

JUDICIAL CONFERENCE OF THE UNITED STATES

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

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RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

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1 After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the Judicial
2 Conference promulgated the present Rules on March 11, 2008. They were amended on
3 September 17, 2015.
4

5 **2. Effect and Construction**

- 6 **(a) Generally. These Rules are mandatory; they supersede any conflicting**
7 **judicial-council rules. Judicial councils may promulgate additional rules to**
8 **implement the Act as long as those rules do not conflict with these Rules.**
9 **(b) Exception. A Rule will not apply if, when performing duties authorized by the Act, a**
10 **chief judge, a special committee, a judicial council, the Committee on Judicial**
11 **Conduct and Disability, or the Judicial Conference expressly finds that exceptional**
12 **circumstances render application of that Rule in a particular proceeding manifestly**
13 **unjust or contrary to the purposes of the Act or these Rules.**
14

15 **Commentary on Rule 2**

16
17 Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform
18 provisions governing the substantive and procedural aspects of misconduct and disability
19 proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C.
20 §§ 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these
21 Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to
22 Rule 8(b).
23

24 Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a
25 different approach in particular cases.
26

27 **3. Definitions**

- 28 **(a) Chief Judge. “Chief judge” means the chief judge of a United States court of**
29 **appeals, of the United States Court of International Trade, or of the United States**
30 **Court of Federal Claims.**
31 **(b) Circuit Clerk. “Circuit clerk” means a clerk of a United States court of appeals, the**
32 **clerk of the United States Court of International Trade, the clerk of the United**
33 **States Court of Federal Claims, or the circuit executive of the United States Court of**
34 **Appeals for the Federal Circuit.**
35 **(c) Complaint. A complaint is:**
36 **(1) a document that, in accordance with Rule 6, is filed by any person in his or**
37 **her individual capacity or on behalf of a professional organization; or**
38 **(2) information from any source, other than a document described in (c)(1), that**
39 **gives a chief judge probable cause to believe that a covered judge, as defined**
40 **in Rule 4, has engaged in misconduct or may have a disability, whether or**
41 **not the information is framed as or is intended to be an allegation of**
42 **misconduct or disability.**
43 **(d) Court of Appeals, District Court, and District Judge. “Court of appeals,” “district**
44 **court,” and “district judge,” where appropriate, include the United States Court of**
45 **Federal Claims, the United States Court of International Trade, and the judges**
46 **thereof.**
47 **(e) Disability. “Disability” is a temporary or permanent impairment, physical or**
48 **mental, rendering a judge unable to discharge the duties of the particular judicial**
49 **office. Examples of disability include substance abuse, the inability to stay awake**

1 during court proceedings, or impairment of cognitive abilities that renders the judge
2 unable to function effectively.

3 (f) **Judicial Council and Circuit.** “Judicial council” and “circuit,” where appropriate,
4 include any courts designated in 28 U.S.C. § 363.

5 (g) **Magistrate Judge.** “Magistrate judge,” where appropriate, includes a special master
6 appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).

7 (h) **Misconduct.** Cognizable misconduct:

8 (1) is conduct prejudicial to the effective and expeditious administration of the
9 business of the courts. Misconduct includes, but is not limited to:

10 (A) using the judge’s office to obtain special treatment for friends or
11 relatives;

12 (B) accepting bribes, gifts, or other personal favors related to the judicial
13 office;

14 (C) having improper discussions with parties or counsel for one side in a
15 case;

16 (D) treating litigants, attorneys, or others in a demonstrably egregious
17 and hostile manner;

18 (E) engaging in partisan political activity or making inappropriately
19 partisan statements;

20 (F) soliciting funds for organizations;

21 (G) retaliating against complainants, witnesses, or others for their
22 participation in this complaint process;

23 (H) refusing, without good cause shown, to cooperate in the investigation
24 of a complaint under these Rules; or

25 (I) violating other specific, mandatory standards of judicial conduct,
26 such as those pertaining to restrictions on outside income and
27 requirements for financial disclosure.

28 (2) is conduct occurring outside the performance of official duties if the conduct
29 might have a prejudicial effect on the administration of the business of the
30 courts, including a substantial and widespread lowering of public confidence
31 in the courts among reasonable people.

32 (3) does not include:

33 (A) an allegation that is directly related to the merits of a decision or
34 procedural ruling. An allegation that calls into question the
35 correctness of a judge’s ruling, including a failure to recuse, without
36 more, is merits-related. If the decision or ruling is alleged to be the
37 result of an improper motive, *e.g.*, a bribe, *ex parte* contact, racial or
38 ethnic bias, or improper conduct in rendering a decision or ruling,
39 such as personally derogatory remarks irrelevant to the issues, the
40 complaint is not cognizable to the extent that it attacks the merits.

41 (B) an allegation about delay in rendering a decision or ruling, unless the
42 allegation concerns an improper motive in delaying a particular
43 decision or habitual delay in a significant number of unrelated cases.

44 (i) **Subject Judge.** “Subject judge” means any judge described in Rule 4 who is the
45 subject of a complaint.
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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 a complainant 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), (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 subsection (c)(2).

Rule 3(e) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available. A mental disability could involve cognitive impairment or any psychiatric or psychological condition that renders the judge unable to discharge the duties of office. Such duties may include those that are administrative. If, for example, the judge is a chief judge, the judicial council, fulfilling its obligation under 28 U.S.C. § 332(d)(1) to make “necessary and appropriate orders for the effective and expeditious administration of justice,” may find, under 28 U.S.C. § 45(d) or § 136(e), that the judge is “temporarily unable to perform” his or her chief-judge duties. In that event, an appropriate remedy could involve, under Rule 20(b)(1)(D)(vii), temporary reassignment of chief-judge duties to the next judge statutorily eligible to perform them.

The phrase “prejudicial to the effective and expeditious administration of the business of the courts” is not subject to precise definition, and subsection (h)(1) therefore provides some specific examples. Although the Code of Conduct for United States Judges may be informative,

1 its main precepts are highly general; the Code is in many potential applications aspirational rather
2 than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes
3 misconduct under the statute is the province of the judicial council of the circuit, subject to such
4 review and limitations as are ordained by the statute and by these Rules.
5

6 Even where specific, mandatory rules exist—for example, governing the receipt of gifts
7 by judges, outside earned income, and financial disclosure obligations—the distinction between
8 the misconduct statute and these specific, mandatory rules must be borne in mind. For example,
9 an inadvertent, minor violation of any one of these rules, promptly remedied when called to the
10 attention of the judge, might still be a violation but might not rise to the level of misconduct
11 under the statute. By contrast, a pattern of such violations of the Code might well rise to the level
12 of misconduct.
13

14 Under Rule 3(h)(1)(G), a judge’s efforts to retaliate against any person for his or her
15 involvement in the complaint process may constitute cognizable misconduct. The Rule makes
16 this explicit in the interest of public confidence in the complaint process.
17

18 Rule 3(h)(1)(H) provides that a judge’s refusal, without good cause shown, to cooperate
19 in the investigation of a complaint under these Rules may constitute cognizable misconduct.
20 While the exercise of rights under the Fifth Amendment to the Constitution would constitute
21 good cause under Rule 3(h)(1)(H), given the fact-specific nature of the inquiry, it is not possible
22 to otherwise anticipate all circumstances that might also constitute good cause. The Commentary
23 on Rule 13 provides additional discussion regarding Rule 3(h)(1)(H). The Rules contemplate that
24 judicial councils will not consider commencing proceedings under Rule 3(h)(1)(H) except as
25 necessary after other means to acquire the information have been tried or have proven futile.
26

27 Rule 3(h)(2) reflects that an allegation can meet the statutory standard even though the
28 judge’s alleged conduct did not occur in the course of the performance of official duties. And
29 some conduct in the categories listed under subsection (h)(1), or in categories not listed, might,
30 depending on the circumstances, amount to “misconduct” under subsection (h)(2), or under both
31 subsection (h)(1) and subsection (h)(2). Also, the Code of Conduct for United States Judges
32 expressly covers a wide range of extra-official activities, and some of these activities may
33 constitute misconduct. For example, allegations that a judge solicited funds for a charity or
34 participated in a partisan political event are cognizable under the Act.
35

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

42 Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the
43 definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural
44 ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by
45 ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s
46 ruling. Any allegation that calls into question the correctness of an official action of a
47 judge—without more—is merits-related. The phrase “decision or procedural ruling” is not
48 limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint
49 challenging the correctness of a chief judge’s determination to dismiss a prior misconduct

1 complaint would be properly dismissed as merits-related—in other words, as challenging the
2 substance of the judge’s administrative determination to dismiss the complaint—even though it
3 does not concern the judge’s rulings in Article III litigation. Similarly, an allegation that a judge
4 had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this
5 standard.
6

7 Conversely, an allegation—however unsupported—that a judge conspired with a
8 prosecutor to make a particular ruling is not merits-related, even though it “relates” to a ruling in
9 a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and
10 goes beyond a challenge to the correctness—“the merits”—of the ruling itself. An allegation that
11 a judge ruled against the complainant because the complainant is a member of a particular racial
12 or ethnic group, or because the judge dislikes the complainant personally, is also not
13 merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or
14 improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a
15 class of people is not merits-related even if the judge used it on the bench or in an opinion; the
16 correctness of the judge’s rulings is not at stake. An allegation that a judge treated litigants,
17 attorneys, or others in a demonstrably egregious and hostile manner while on the bench is also
18 not merits-related.
19

20 The existence of an appellate remedy is usually irrelevant to whether an allegation is
21 merits-related. The merits-related ground for dismissal exists to protect judges’ independence in
22 making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect
23 ruling is merits-related even though the complainant has no recourse from that ruling. By the
24 same token, an allegation that is otherwise cognizable under the Act should not be dismissed
25 merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted
26 from an improper *ex parte* communication). However, there may be occasions when appellate
27 and misconduct proceedings overlap, and consideration and disposition of a complaint under
28 these Rules may be properly deferred by the chief judge until the appellate proceedings are
29 concluded in order to avoid inconsistent decisions, among other things.
30

31 Because of the special need to protect judges’ independence in deciding what to say in an
32 opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a
33 non-frivolous allegation that a judge’s language in a ruling reflected an improper motive. If the
34 judge’s language was relevant to the case at hand—for example, a statement that a claim is
35 legally or factually “frivolous”—then the judge’s choice of language is presumptively
36 merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper
37 motive. If, on the other hand, the challenged language does not seem relevant on its face, then an
38 additional inquiry under Rule 11 is necessary.
39

40 With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as
41 merits-related. Such an allegation may be said to challenge the correctness of an official action of
42 the judge—in other words, assigning a low priority to deciding the particular case. But, by the
43 same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases,
44 or an allegation of deliberate delay in a single case arising out of an illicit motive, is not
45 merits-related.
46

47 The remaining subsections of Rule 3 provide technical definitions clarifying the
48 application of the Rules to the various kinds of courts covered.
49

1 **4. Covered Judges**

2 **A complaint under these Rules may concern the actions or capacity only of judges of**
3 **United States courts of appeals, judges of United States district courts, judges of United**
4 **States bankruptcy courts, United States magistrate judges, and judges of the courts**
5 **specified in 28 U.S.C. § 363.**

6
7 **Commentary on Rule 4**
8

9 This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of
10 complaints against persons not covered by the Act, such as other court personnel, or against both
11 covered judges and noncovered persons.
12

13 **ARTICLE II. INITIATION OF COMPLAINT**
14

15 **5. Identification of Complaint**

- 16 (a) **Identification. When a chief judge has information constituting reasonable grounds**
17 **for inquiry into whether a covered judge has engaged in misconduct or has a**
18 **disability, the chief judge may conduct an inquiry, as he or she deems appropriate,**
19 **into the accuracy of the information even if no related complaint has been filed. A**
20 **chief judge who finds probable cause to believe that misconduct has occurred or**
21 **that a disability exists may seek an informal resolution that he or she finds**
22 **satisfactory. If no informal resolution is achieved or is feasible, the chief judge may**
23 **identify a complaint and, by written order stating the reasons, begin the review**
24 **provided in Rule 11. If the evidence of misconduct is clear and convincing and no**
25 **informal resolution is achieved or is feasible, the chief judge must identify a**
26 **complaint. A chief judge must not decline to identify a complaint merely because the**
27 **person making the allegation has not filed a complaint under Rule 6. This Rule is**
28 **subject to Rule 7.**
- 29 (b) **Submission Not Fully Complying with Rule 6. A legible submission in substantial**
30 **but not full compliance with Rule 6 must be considered as possible grounds for the**
31 **identification of a complaint under Rule 5(a).**
32

33 **Commentary on Rule 5**
34

35 This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245–46.
36

37 The Act authorizes a chief judge, by written order stating reasons, to identify a complaint
38 and thereby dispense with the filing of a written complaint. *See* 28 U.S.C. § 351(b). Under Rule
39 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire
40 into possible misconduct or disability on the part of a covered judge, and no formal complaint
41 has been filed, the chief judge has the power in his or her discretion to begin an appropriate
42 inquiry. A chief judge’s decision whether to informally seek a resolution and/or to identify a
43 complaint is guided by the results of that inquiry. If the chief judge concludes that there is
44 probable cause to believe that misconduct has occurred or a disability exists, the chief judge may
45 seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion
46 is accorded largely for the reasons police officers and prosecutors have discretion in making
47 arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence,
48 or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if
49 the inquiry leads the chief judge to conclude that there is clear and convincing evidence of

1 misconduct or a disability, and no satisfactory informal resolution has been achieved or is
2 feasible, the chief judge is required to identify a complaint.
3

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

12 When a chief judge identifies a complaint, a written order stating the reasons for the
13 identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides
14 that once a chief judge has identified a complaint, the chief judge, subject to the disqualification
15 provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the
16 chief judge for the determination of complaints filed by a complainant.
17

18 In high-visibility situations, it may be desirable for a chief judge to identify a complaint
19 without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or
20 conclude the identified complaint without appointment of a special committee) in order to assure
21 the public that the allegations have not been ignored.
22

23 A chief judge’s decision not to identify a complaint under Rule 5 is not appealable and is
24 subject to Rule 3(h)(3)(A), which excludes merits-related complaints from the definition of
25 misconduct.
26

27 A chief judge may not decline to identify a complaint solely on the basis that the unfiled
28 allegations could be raised by one or more persons in a filed complaint, but none of these persons
29 has opted to do so.
30

31 Subsection (a) concludes by stating that this Rule is “subject to Rule 7.” This is intended
32 to establish that only (i) the chief judge of the home circuit of a potential subject judge, or (ii) the
33 chief judge of a circuit in which misconduct is alleged to have occurred in the course of official
34 business while the potential subject judge was sitting by designation, shall have the power or a
35 duty under this Rule to identify a complaint.
36

37 Subsection (b) provides that submissions that do not comply with the requirements of
38 Rule 6(d) must be considered under Rule 5(a). For instance, if a complaint has been filed but the
39 form submitted is unsigned, or the truth of the statements therein are not verified in writing under
40 penalty of perjury, then a chief judge must nevertheless consider the allegations as known
41 information and as a possible basis for the identification of a complaint under the process
42 described in Rule 5(a).
43

44 **6. Filing of Complaint**

45 **(a) Form.** A complainant may use the form reproduced in the appendix to these Rules
46 or a form designated by the rules of the judicial council in the circuit in which the
47 complaint is filed. A complaint form is also available on each court of appeals’
48 website or may be obtained from the circuit clerk or any district court or
49 bankruptcy court within the circuit. A form is not necessary to file a complaint, but

- 1 the complaint must be written and must include the information described in (b).
2 **(b) Brief Statement of Facts.** A complaint must contain a concise statement that details
3 the specific facts on which the claim of misconduct or disability is based. The
4 statement of facts should include a description of:
5 **(1) what happened;**
6 **(2) when and where the relevant events happened;**
7 **(3) any information that would help an investigator check the facts; and**
8 **(4) for an allegation of disability, any additional facts that form the basis of that**
9 **allegation.**
- 10 **(c) Legibility.** A complaint should be typewritten if possible. If not typewritten, it must
11 be legible. An illegible complaint will be returned to the complainant with a request
12 to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not
13 be accepted for filing.
- 14 **(d) Complainant’s Address and Signature; Verification.** The complainant must provide
15 a contact address and sign the complaint. The truth of the statements made in the
16 complaint must be verified in writing under penalty of perjury. If any of these
17 requirements are not met, the submission will be accepted, but it will be reviewed
18 under only Rule 5(b).
- 19 **(e) Number of Copies; Envelope Marking.** The complainant shall provide the number
20 of copies of the complaint required by local rule. Each copy should be in an
21 envelope marked “Complaint of Misconduct” or “Complaint of Disability.” The
22 envelope must not show the name of any subject judge.

23
24 **Commentary on Rule 6**

25
26 The Rule is adapted from the Illustrative Rules and is self-explanatory.
27

28 **7. Where to Initiate Complaint**

- 29 **(a) Where to File.** Except as provided in (b),
30 **(1) a complaint against a judge of a United States court of appeals, a United**
31 **States district court, a United States bankruptcy court, or a United States**
32 **magistrate judge must be filed with the circuit clerk in the jurisdiction in**
33 **which the subject judge holds office.**
34 **(2) a complaint against a judge of the United States Court of International Trade**
35 **or the United States Court of Federal Claims must be filed with the**
36 **respective clerk of that court.**
37 **(3) a complaint against a judge of the United States Court of Appeals for the**
38 **Federal Circuit must be filed with the circuit executive of that court.**
- 39 **(b) Misconduct in Another Circuit; Transfer.** If a complaint alleges misconduct in the
40 course of official business while the subject judge was sitting on a court by
41 designation under 28 U.S.C. §§ 291–293 and 294(d), the complaint may be filed or
42 identified with the circuit clerk of that circuit or of the subject judge’s home circuit.
43 The proceeding will continue in the circuit of the first-filed or first-identified
44 complaint. The judicial council of the circuit where the complaint was first filed or
45 first identified may transfer the complaint to the subject judge’s home circuit or to
46 the circuit where the alleged misconduct occurred, as the case may be.
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Commentary on Rule 7

Title 28 U.S.C. § 351 states that complaints are to be filed with “the clerk of the court of appeals for the circuit.” However, in many circuits, this role is filled by circuit executives. Accordingly, the term “circuit clerk,” as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

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

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

8. Action by Circuit Clerk

- (a) **Receipt of Complaint.** Upon receiving a complaint against a judge filed under Rule 6 or identified under Rule 5, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability, and acknowledge the complaint’s receipt.
- (b) **Distribution of Copies.** The circuit clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 6 or identified under Rule 5 to each subject judge. The circuit clerk must retain the original complaint. Any further distribution should be as provided by local rule.
- (c) **Complaint Against Noncovered Person.** If the circuit clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint under these Rules.
- (d) **Complaint Against Judge and Another Noncovered Person.** If the circuit clerk receives a complaint about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint under these Rules only with regard to the judge and must so inform the complainant.

Commentary on Rule 8

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

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help

1 avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some,
2 but not all of the named judges.

3
4 Complaints against noncovered persons are not to be accepted for processing under these
5 Rules but may, of course, be accepted under other circuit rules or procedures for grievances.
6

7 **9. Time for Filing or Identifying Complaint**

8 **A complaint may be filed or identified at any time. If the passage of time has made an**
9 **accurate and fair investigation of a complaint impracticable, the complaint must be**
10 **dismissed under Rule 11(c)(1)(E).**

11 **Commentary on Rule 9**

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14 This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the
15 Illustrative Rules.
16

17 **10. Abuse of Complaint Procedure**

- 18 **(a) Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous**
19 **complaints, or has otherwise abused the complaint procedure, may be restricted**
20 **from filing further complaints. After giving the complainant an opportunity to show**
21 **cause in writing why his or her right to file further complaints should not be limited,**
22 **the judicial council may prohibit, restrict, or impose conditions on the**
23 **complainant’s use of the complaint procedure. Upon written request of the**
24 **complainant, the judicial council may revise or withdraw any prohibition,**
25 **restriction, or condition previously imposed.**
- 26 **(b) Orchestrated Complaints. When many essentially identical complaints from**
27 **different complainants are received and appear to be part of an orchestrated**
28 **campaign, the chief judge may recommend that the judicial council issue a written**
29 **order instructing the circuit clerk to accept only a certain number of such**
30 **complaints for filing and to refuse to accept additional complaints. The circuit clerk**
31 **must send a copy of any such order to anyone whose complaint was not accepted.**

32 **Commentary on Rule 10**

33
34
35 This Rule is adapted from the Illustrative Rules.
36

37 Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further
38 complaints by a single complainant who has abused the complaint procedure. In some instances,
39 however, the complaint procedure may be abused in a manner for which the remedy provided in
40 Rule 10(a) may not be appropriate. For example, some circuits have been inundated with
41 submissions of dozens or hundreds of essentially identical complaints against the same judge or
42 judges, all submitted by different complainants. In many of these instances, persons with
43 grievances against a particular judge or judges used the Internet or other technology to
44 orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of
45 such a campaign were accepted for filing and processed according to these Rules, there would be
46 a serious drain on court resources without any benefit to the adjudication of the underlying
47 merits.
48
49

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

9 **ARTICLE III. REVIEW OF COMPLAINT BY CHIEF JUDGE**

10 **11. Chief Judge's Review**

- 11
- 12 (a) **Purpose of Chief Judge's Review.** When a complaint is identified by the chief judge
13 or is filed, the chief judge must review it unless the chief judge is disqualified under
14 Rule 25. If a complaint contains information constituting evidence of misconduct or
15 disability, but the complainant does not claim it as such, the chief judge must treat
16 the complaint as if it did allege misconduct or disability and give notice to the
17 subject judge. After reviewing a complaint, the chief judge must determine whether
18 it should be:
- 19 (1) dismissed;
 - 20 (2) concluded on the ground that voluntary corrective action has been taken;
 - 21 (3) concluded because intervening events have made action on the complaint no
22 longer necessary; or
 - 23 (4) referred to a special committee.
- 24 (b) **Chief Judge's Inquiry.** In determining what action to take under Rule 11(a), the
25 chief judge may conduct a limited inquiry. The chief judge, or a designee, may
26 communicate orally or in writing with the complainant, the subject judge, and any
27 others who may have knowledge of the matter, and may obtain and review
28 transcripts and other relevant documents. In conducting the inquiry, the chief judge
29 must not determine any reasonably disputed issue. Any such determination must be
30 left to a special committee appointed under Rule 11(f) and to the judicial council
31 that considers the special committee's report.
- 32 (c) **Dismissal.**
- 33 (1) **Permissible grounds.** A complaint must be dismissed in whole or in part to
34 the extent that the chief judge concludes that the complaint:
 - 35 (A) alleges conduct that, even if true, is not prejudicial to the effective and
36 expeditious administration of the business of the courts and does not
37 indicate a mental or physical disability resulting in the inability to
38 discharge the duties of judicial office;
 - 39 (B) is directly related to the merits of a decision or procedural ruling;
 - 40 (C) is frivolous;
 - 41 (D) is based on allegations lacking sufficient evidence to raise an inference
42 that misconduct has occurred or that a disability exists;
 - 43 (E) is based on allegations that are incapable of being established through
44 investigation;
 - 45 (F) has been filed in the wrong circuit under Rule 7; or
 - 46 (G) is otherwise not appropriate for consideration under the Act.
 - 47 (2) **Impermissible grounds.** A complaint must not be dismissed solely because it
48 repeats allegations of a previously dismissed complaint if it also contains
49

1 material information not previously considered and does not constitute
2 harassment of the subject judge.

3 (d) **Corrective Action.** The chief judge may conclude a complaint proceeding in whole
4 or in part if:

- 5 (1) an informal resolution under Rule 5 satisfactory to the chief judge was
6 reached before the complaint was filed under Rule 6; or
7 (2) the chief judge determines that the subject judge has taken appropriate
8 voluntary corrective action that acknowledges and remedies the problems
9 raised by the complaint.

10 (e) **Intervening Events.** The chief judge may conclude a complaint proceeding in whole
11 or in part upon determining that intervening events render some or all of the
12 allegations moot or make remedial action impossible.

13 (f) **Appointment of Special Committee.** If some or all of a complaint is not dismissed or
14 concluded, the chief judge must promptly appoint a special committee to investigate
15 the complaint or any relevant portion of it and to make recommendations to the
16 judicial council. Before appointing a special committee, the chief judge must invite
17 the subject judge to respond to the complaint either orally or in writing if the judge
18 was not given an opportunity during the limited inquiry. In the chief judge's
19 discretion, separate complaints may be joined and assigned to a single special
20 committee. Similarly, a single complaint about more than one judge may be severed
21 and more than one special committee appointed.

22 (g) **Notice of Chief Judge's Action; Petition for Review.**

- 23 (1) When chief judge appoints special committee. If the chief judge appoints a
24 special committee, the chief judge must notify the complainant and the
25 subject judge that the matter has been referred to a committee, notify the
26 complainant of a complainant's rights under Rule 16, and identify the
27 members of the committee. A copy of the order appointing the special
28 committee must be sent to the Committee on Judicial Conduct and
29 Disability.
- 30 (2) When chief judge disposes of complaint without appointing special
31 committee. If the chief judge disposes of a complaint under Rule 11(c), (d), or
32 (e), the chief judge must prepare a supporting memorandum that sets forth
33 the reasons for the disposition. If the complaint was initiated by
34 identification under Rule 5, the memorandum must so indicate. Except as
35 authorized by 28 U.S.C. § 360, the memorandum must not include the name
36 of the complainant or of the subject judge. The order and memoranda
37 incorporated by reference in the order must be promptly sent to the
38 complainant, the subject judge, and the Committee on Judicial Conduct and
39 Disability.
- 40 (3) **Right to petition for review.** If the chief judge disposes of a complaint under
41 Rule 11(c), (d), or (e), the complainant and the subject judge must be notified
42 of the right to petition the judicial council for review of the disposition, as
43 provided in Rule 18. If the chief judge so disposes of a complaint that was
44 identified under Rule 5 or filed by its subject judge, the chief judge must
45 transmit the order and memoranda incorporated by reference in the order to
46 the judicial council for review in accordance with Rule 19. In the event of
47 such a transmission, the subject judge may make a written submission to the
48 judicial council but will have no further right of review except as allowed
49 under Rule 21(b)(1)(B). When a disposition is to be reviewed by the judicial
50 council, the chief judge must promptly transmit all materials obtained in

1 **connection with the inquiry under Rule 11(b) to the circuit clerk for**
2 **transmittal to the council.**

3 **(h) Public Availability of Chief Judge’s Decision. The chief judge’s decision must be**
4 **made public to the extent, at the time, and in the manner provided in Rule 24.**

5
6 **Commentary on Rule 11**
7

8 This Rule describes complaint-review actions available either to a chief judge or, where
9 that judge is the subject judge or is otherwise disqualified under Rule 25, to the judge designated
10 under Rule 25(f) to perform the chief judge’s duties under these Rules. Subsection (a) of this
11 Rule provides that where a complaint has been filed under Rule 6, the ordinary doctrines of
12 waiver do not apply. The chief judge must identify as a complaint any misconduct or disability
13 issues raised by the factual allegations of the complaint even if the complainant makes no such
14 claim with regard to those issues. For example, an allegation limited to misconduct in
15 fact-finding that mentions periods during a trial when the judge was asleep must be treated as a
16 complaint regarding disability. Some formal order giving notice of the expanded scope of the
17 proceeding must be given to the subject judge.
18

19 Subsection (b) describes the nature of the chief judge’s inquiry. It is based largely on the
20 Breyer Committee Report, 239 F.R.D. at 243–45. The Act states that dismissal is appropriate
21 “when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual
22 foundation or are conclusively refuted by objective evidence.” 28 U.S.C. § 352(b)(1)(B). At the
23 same time, however, Section 352(a) states that “[t]he chief judge shall not undertake to make
24 findings of fact about any matter that is reasonably in dispute.” These two statutory standards
25 should be read together, so that a matter is not “reasonably” in dispute if a limited inquiry shows
26 that the allegations do not constitute misconduct or disability, that they lack any reliable factual
27 foundation, or that they are conclusively refuted by objective evidence.
28

29 In conducting a limited inquiry under subsection (b), the chief judge must avoid
30 determinations of reasonably disputed issues, including reasonably disputed issues as to whether
31 the facts alleged constitute misconduct or disability, which are ordinarily left to the judicial
32 council and its special committee. An allegation of fact is ordinarily not “refuted” simply because
33 the subject judge denies it. The limited inquiry must reveal something more in the way of
34 refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the
35 complainant’s word against the subject judge’s—in other words, there is simply no other
36 significant evidence of what happened or of the complainant’s unreliability—then there must be
37 a special-committee investigation. Such a credibility issue is a matter “reasonably in dispute”
38 within the meaning of the Act.
39

40 However, dismissal following a limited inquiry may occur when a complaint refers to
41 transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all
42 support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a
43 complaint alleging that the subject judge said X, and the complaint mentions, or it is
44 independently clear, that five people may have heard what the judge said. *Id.* The chief judge is
45 told by the subject judge and one witness that the judge did not say X, and the chief judge
46 dismisses the complaint without questioning the other four possible witnesses. *Id.* In this
47 example, the matter remains reasonably in dispute. If all five witnesses say the subject judge did
48 not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have
49 not been questioned, then the matter remains reasonably in dispute. *Id.*
50

1 Similarly, under subsection (c)(1)(A), if it is clear that the conduct or disability alleged,
2 even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue
3 is reasonably in dispute, however, dismissal under subsection (c)(1)(A) is inappropriate.
4

5 Essentially, the standard articulated in subsection (b) is that used to decide motions for
6 summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not
7 resolved at the summary judgment stage. A material fact is one that “might affect the outcome of
8 the suit under the governing law,” and a dispute is “genuine” if “the evidence is such that a
9 reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby*, 477
10 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a
11 material fact or the existence of misconduct or a disability when conducting a limited inquiry
12 pursuant to subsection (b).
13

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

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

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

32 A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following
33 example. Consider a complainant who alleges an impropriety and asserts that he knows of it
34 because it was observed and reported to him by a person who is identified. The subject judge
35 denies that the event occurred. When contacted, the source also denies it. In such a case, the chief
36 judge’s proper course of action may turn on whether the source had any role in the allegedly
37 improper conduct. If the complaint was based on a lawyer’s statement that he or she had an
38 improper *ex parte* contact with a judge, the lawyer’s denial of the impropriety might not be taken
39 as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised.
40 On the other hand, if the complaint quoted a disinterested third party and that disinterested party
41 denied that the statement had been made, there would be no value in opening a formal
42 investigation. In such a case, it would be appropriate to dismiss the complaint under Rule
43 11(c)(1)(D).
44

45 Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is
46 offered or identified, or when the only identified source is unavailable. Breyer Committee
47 Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the
48 complainant that the subject judge did X. *Id.* The subject judge denies it. The chief judge requests
49 that the complainant (who does not purport to have observed the subject judge do X) identify the
50 unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the

1 unnamed witness’s account. *Id.* The complainant responds that he has spoken with the unnamed
2 witness, that the unnamed witness is an attorney who practices in federal court, and that the
3 unnamed witness is unwilling to be identified or to come forward. *Id.* at 243–44. The allegation
4 is then properly dismissed as containing allegations that are incapable of being established
5 through investigation. *Id.*
6

7 If, however, the situation involves a reasonable dispute over credibility, the matter should
8 proceed. For example, the complainant alleges an impropriety and alleges that he or she observed
9 it and that there were no other witnesses; the subject judge denies that the event occurred. Unless
10 the complainant’s allegations are facially incredible or so lacking indicia of reliability as to
11 warrant dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there
12 is a material factual question that is reasonably in dispute.
13

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

17 Subsection (c)(2) indicates that the investigative nature of the process prevents the
18 application of claim preclusion principles where new and material evidence becomes available.
19 However, it also recognizes that at some point a renewed investigation may constitute
20 harassment of the subject judge and should not be undertaken, depending of course on the
21 seriousness of the issues and the weight of the new evidence.
22

23 Rule 11(d) implements the Act’s provision for dismissal if voluntary appropriate
24 corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239
25 F.R.D. at 244–45. The Act authorizes the chief judge to conclude the complaint proceedings if
26 “appropriate corrective action has been taken.” 28 U.S.C. § 352(b)(2). Under the Rule, action
27 taken after a complaint is filed is “appropriate” when it acknowledges and remedies the problem
28 raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals
29 with the conduct of judges, the emphasis is on correction of the judicial conduct that was the
30 subject of the complaint. *Id.* Terminating a complaint based on corrective action is premised on
31 the implicit understanding that voluntary self-correction or redress of misconduct or a disability
32 is preferable to sanctions. *Id.* The chief judge may facilitate this process by giving the subject
33 judge an objective view of the appearance of the judicial conduct in question and by suggesting
34 appropriate corrective measures. *Id.* Moreover, when corrective action is taken under Rule 5
35 satisfactory to the chief judge before a complaint is filed, that informal resolution will be
36 sufficient to conclude a subsequent complaint based on identical conduct.
37

38 “Corrective action” must be voluntary action taken by the subject judge. Breyer
39 Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an
40 appellate court without the participation of the subject judge in formulating the directive or
41 without the subject judge’s subsequent agreement to such action does not constitute the requisite
42 voluntary corrective action. *Id.* Neither the chief judge nor an appellate court has authority under
43 the Act to impose a formal remedy or sanction; only the judicial council can impose a formal
44 remedy or sanction under 28 U.S.C. § 354(a)(2). *Id.* Compliance with a previous judicial-council
45 order may serve as corrective action allowing conclusion of a later complaint about the same
46 behavior. *Id.*
47

48 Where a subject judge’s conduct has resulted in identifiable, particularized harm to the
49 complainant or another individual, appropriate corrective action should include steps taken by
50 that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from

1 a case, or a pledge to refrain from similar conduct in the future. *Id.* While the Act is generally
2 forward-looking, any corrective action should, to the extent possible, serve to correct a specific
3 harm to an individual, if such harm can reasonably be remedied. *Id.* In some cases, corrective
4 action may not be “appropriate” to justify conclusion of a complaint unless the complainant or
5 other individual harmed is meaningfully apprised of the nature of the corrective action in the
6 chief judge’s order, in a direct communication from the subject judge, or otherwise. *Id.*

7
8 Voluntary corrective action should be proportionate to any plausible allegations of
9 misconduct in a complaint. The form of corrective action should also be proportionate to any
10 sanctions that the judicial council might impose under Rule 20(b), such as a private or public
11 reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244–45. In
12 other words, minor corrective action will not suffice to dispose of a serious matter. *Id.*

13
14 Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to
15 “conclude the proceeding” if “action on the complaint is no longer necessary because of
16 intervening events,” such as a resignation from judicial office. Ordinarily, however, stepping
17 down from an administrative post such as chief judge, judicial-council member, or
18 court-committee chair does not constitute an event rendering unnecessary any further action on a
19 complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as
20 the subject of a complaint performs judicial duties, a complaint alleging judicial misconduct
21 must be addressed. *Id.*

22
23 If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee
24 must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the
25 complaint before a special committee is appointed, if no earlier response was invited.

26
27 Subject judges, of course, receive copies of complaints at the same time that they are
28 referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b),
29 the chief judge may request a response if it is thought necessary. However, many complaints are
30 clear candidates for dismissal even if their allegations are accepted as true, and there is no need
31 for the subject judge to devote time to a defense.

32
33 The Act requires that the order dismissing a complaint or concluding a proceeding
34 contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C.
35 § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the
36 order will be made public, usually without disclosing the names of the complainant or the subject
37 judge. If desired for administrative purposes, more identifying information can be included in a
38 non-public version of the order.

39
40 When a complaint is disposed of by the chief judge, the statutory purposes are best served
41 by providing the complainant with a full, particularized, but concise explanation, giving reasons
42 for the conclusions reached. *See also* Commentary on Rule 24 (dealing with public availability).

43
44 Rule 11(g) provides that the complainant and the subject judge must be notified, in the
45 case of a disposition by the chief judge, of the right to petition the judicial council for review.
46 Because an identified complaint has no “complainant” to petition for review, the chief judge’s
47 dispositive order on such a complaint will be transmitted to the judicial council for review. The
48 same will apply where a complaint was filed by its subject judge. A copy of the chief judge’s
49 order, and memoranda incorporated by reference in the order, disposing of a complaint must be
50 sent by the circuit clerk to the Committee on Judicial Conduct and Disability.

1 **ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL**
2 **COMMITTEE**

3
4 **12. Special Committee’s Composition**

- 5 (a) **Membership.** Except as provided in (e), a special committee appointed under Rule
6 **11(f)** must consist of the chief judge and equal numbers of circuit and district
7 **judges.** These judges may include senior judges. If the complaint is about a district
8 **judge, bankruptcy judge, or magistrate judge, then, when possible, the**
9 **district-judge members of the special committee must be from districts other than**
10 **the district of the subject judge. For the courts named in 28 U.S.C. § 363, the special**
11 **committee must be selected from the judges serving on the subject judge’s court.**
- 12 (b) **Presiding Officer.** When appointing the special committee, the chief judge may serve
13 **as the presiding officer or else must designate a committee member as the presiding**
14 **officer.**
- 15 (c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the subject judge is a
16 **bankruptcy judge or magistrate judge, he or she may, within 14 days after being**
17 **notified of the special committee’s appointment, ask the chief judge to designate as a**
18 **committee adviser another bankruptcy judge or magistrate judge, as the case may**
19 **be. The chief judge must grant such a request but may otherwise use discretion in**
20 **naming the adviser. Unless the adviser is a Court of Federal Claims special master**
21 **appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other**
22 **than the district of the subject bankruptcy judge or subject magistrate judge. The**
23 **adviser cannot vote but has the other privileges of a special-committee member.**
- 24 (d) **Provision of Documents.** The chief judge must certify to each other member of the
25 **special committee and to any adviser copies of the complaint and statement of facts,**
26 **in whole or relevant part, and any other relevant documents on file.**
- 27 (e) **Continuing Qualification of Special-Committee Member.** A member of a special
28 **committee may continue to serve on the committee even though the member**
29 **relinquishes the position of chief judge, active circuit judge, or active district judge,**
30 **as the case may be, but only if the member continues to hold office under Article III,**
31 **Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.**
- 32 (f) **Inability of Special-Committee Member to Complete Service.** If a member of a
33 **special committee can no longer serve because of death, disability, disqualification,**
34 **resignation, retirement from office, or other reason, the chief judge must decide**
35 **whether to appoint a replacement member, either a circuit or district judge as**
36 **needed under (a). No special committee appointed under these Rules may function**
37 **with only a single member, and the votes of a two-member committee must be**
38 **unanimous.**
- 39 (g) **Voting.** All actions by a special committee must be by vote of a majority of all
40 **members of the committee.**

41
42 **Commentary on Rule 12**

43
44 This Rule is adapted from the Act and the Illustrative Rules.

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

1 practice of including senior judges in the membership of a special committee.
2

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

8 Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate
9 judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject
10 judge. Subsection (c) also provides that the adviser will have all the privileges of a member of
11 the special committee except a vote. The adviser, therefore, may participate in all deliberations of
12 the special committee, question witnesses at hearings, and write a separate statement to
13 accompany the committee's report to the judicial council.
14

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

22 Stability of membership is also the principal concern animating Rule 12(f), which deals
23 with the case in which a special committee loses a member before its work is complete. The Rule
24 permits the chief judge to determine whether a replacement member should be appointed.
25 Generally, appointment of a replacement member is desirable in these situations unless the
26 special committee has conducted evidentiary hearings before the vacancy occurs. However, cases
27 may arise in which a special committee is in the late stages of its work, and in which it would be
28 difficult for a new member to play a meaningful role. The Rule also preserves the collegial
29 character of the special-committee process by prohibiting a single surviving member from
30 serving as a committee and by providing that a committee of two surviving members will, in
31 essence, operate under a unanimity rule.
32

33 Rule 12(g) provides that actions of a special committee must be by vote of a majority of
34 all the members. All the members of a special committee should participate in committee
35 decisions. In that circumstance, it seems reasonable to require that special-committee decisions
36 be made by a majority of the membership, rather than a majority of some smaller quorum.
37

38 **13. Conduct of Special-Committee Investigation**

- 39 **(a) Extent and Methods of Special-Committee Investigation.** A special committee
40 **should determine the appropriate extent and methods of its investigation in light of**
41 **the allegations of the complaint and its preliminary inquiry. The investigation may**
42 **include use of appropriate experts or other professionals. If, in the course of the**
43 **investigation, the special committee has cause to believe that the subject judge may**
44 **have engaged in misconduct or has a disability that is beyond the scope of the**
45 **complaint, the committee must refer the new matter to the chief judge for a**
46 **determination of whether action under Rule 5 or Rule 11 is necessary before the**
47 **committee's investigation is expanded to include the new matter.**
- 48 **(b) Criminal Conduct.** If the special committee's investigation concerns conduct that
49 **may be a crime, the committee must consult with the appropriate prosecutorial**

1 **authorities to the extent permitted by the Act to avoid compromising any criminal**
2 **investigation. The special committee has final authority over the timing and extent**
3 **of its investigation and the formulation of its recommendations.**

4 (c) **Staff. The special committee may arrange for staff assistance to conduct the**
5 **investigation. It may use existing staff of the Judiciary or may hire special staff**
6 **through the Director of the Administrative Office of the United States Courts.**

7 (d) **Delegation of Subpoena Power; Contempt. The chief judge may delegate the**
8 **authority to exercise the subpoena powers of the special committee. The judicial**
9 **council or special committee may institute a contempt proceeding under 28 U.S.C.**
10 **§ 332(d) against anyone who fails to comply with a subpoena.**

11
12 **Commentary on Rule 13**
13

14 This Rule is adapted from the Illustrative Rules.
15

16 Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which the special
17 committee carries out its mission. They reflect the view that the special committee has two roles
18 that are separated in ordinary litigation. First, the special committee has an investigative role of
19 the kind that is characteristically left to executive branch agencies or discovery by civil litigants.
20 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition
21 role that is characteristically left to juries, judges, or arbitrators. *Id.* Rule 13 generally governs the
22 investigative stage. Even though the same body has responsibility for both roles under the Act, it
23 is important to distinguish between them in order to ensure that appropriate rights are afforded at
24 appropriate times to the subject judge.
25

26 Rule 13(a) includes a provision making clear that a special committee may choose to
27 consult appropriate experts or other professionals if it determines that such a consultation is
28 warranted. If, for example, the special committee has cause to believe that the subject judge may
29 be unable to discharge all of the duties of office by reason of mental or physical disability, the
30 committee could ask the subject judge to respond to inquiries and, if necessary, request the judge
31 to undergo a medical or psychological examination. In advance of any such examination, the
32 special committee may enter into an agreement with the subject judge as to the scope and use that
33 may be made of the examination results. In addition or in the alternative, the special committee
34 may ask to review existing records, including medical records.
35

36 The extent of the subject judge's cooperation in the investigation may be taken into
37 account in the consideration of the underlying complaint. If, for example, the subject judge
38 impedes reasonable efforts to confirm or disconfirm the presence of a disability, the special
39 committee may still consider whether the conduct alleged in the complaint and confirmed in the
40 investigation constitutes disability. The same would be true of a complaint alleging misconduct.
41

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

1
2 One of the difficult questions that can arise is the relationship between proceedings under
3 the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the
4 special committee in cases in which criminal conduct is suspected, but gives the committee the
5 authority to determine the appropriate pace of its activity in light of any criminal investigation.
6

7 Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena
8 powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be
9 issued on behalf of a judicial council by the circuit clerk “at the direction of the chief judge of the
10 circuit or his designee.” Rule 13(d) contemplates that, where the chief judge designates someone
11 else as presiding officer of the special committee, the presiding officer also be delegated the
12 authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is
13 not intended to imply, however, that the decision to use the subpoena power is exercisable by the
14 presiding officer alone. *See* Rule 12(g).
15

16 **14. Conduct of Special-Committee Hearings**

- 17 **(a) Purpose of Hearings. The special committee may hold hearings to take testimony**
18 **and receive other evidence, to hear argument, or both. If the special committee is**
19 **investigating allegations against more than one judge, it may hold joint or separate**
20 **hearings.**
- 21 **(b) Special-Committee Evidence. Subject to Rule 15, the special committee must obtain**
22 **material, nonredundant evidence in the form it considers appropriate. In the special**
23 **committee’s discretion, evidence may be obtained by committee members, staff, or**
24 **both. Witnesses offering testimonial evidence may include the complainant and the**
25 **subject judge.**
- 26 **(c) Counsel for Witnesses. The subject judge has the right to counsel. The special**
27 **committee has discretion to decide whether other witnesses may have counsel**
28 **present when they testify.**
- 29 **(d) Witness Fees. Witness fees must be paid as provided in 28 U.S.C. § 1821.**
- 30 **(e) Oath. All testimony taken at a hearing must be given under oath or affirmation.**
- 31 **(f) Rules of Evidence. The Federal Rules of Evidence do not apply to special-committee**
32 **hearings.**
- 33 **(g) Record and Transcript. A record and transcript must be made of all hearings.**
34

35 **Commentary on Rule 14**

36
37 This Rule is adapted from the Act, 28 U.S.C. § 353, and the Illustrative Rules.
38

39 Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee
40 hearings will normally be held only after the investigative work has been completed and the
41 committee has concluded that there is sufficient evidence to warrant a formal fact-finding
42 proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial.
43 Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing
44 will have something of an adversary character. Nevertheless, that tendency should be moderated
45 to the extent possible. Even though a proceeding will commonly have investigative and hearing
46 stages, special-committee members should not regard themselves as prosecutors one day and
47 judges the next. Their duty—and that of their staff—is at all times to be impartial seekers of the
48 truth.
49
50

1 Rule 14(b) contemplates that material evidence will be obtained by the special committee
2 and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the
3 hearings should regard it as their role to present evidence representing the entire picture. With
4 respect to testimonial evidence, the subject judge should normally be called as a
5 special-committee witness. Cases may arise in which the subject judge will not testify
6 voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial
7 privileges. Although Rule 15(c) recognizes the subject judge’s statutory right to call witnesses on
8 his or her own behalf, exercise of this right should not usually be necessary.
9

10 **15. Subject Judge’s Rights**

11 **(a) Notice.**

12 **(1) Generally. The subject judge must receive written notice of:**

- 13 **(A) the appointment of a special committee under Rule 11(f);**
- 14 **(B) the expansion of the scope of an investigation under Rule 13(a);**
- 15 **(C) any hearing under Rule 14, including its purposes, the names of any**
16 **witnesses the special committee intends to call, and the text of any**
17 **statements that have been taken from those witnesses.**

18 **(2) Suggestion of additional witnesses. The subject judge may suggest additional** 19 **witnesses to the special committee.**

20 **(b) Special-Committee Report. The subject judge must be sent a copy of the special** 21 **committee’s report when it is filed with the judicial council.**

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

28 **(d) Presentation of Argument. The subject judge may submit written argument to the** 29 **special committee and must be given a reasonable opportunity to present oral** 30 **argument at an appropriate stage of the investigation.**

31 **(e) Attendance at Hearings. The subject judge has the right to attend any hearing held** 32 **under Rule 14 and to receive copies of the transcript, of any documents introduced,** 33 **and of any written arguments submitted by the complainant to the special** 34 **committee.**

35 **(f) Representation by Counsel. The subject judge may choose to be represented by** 36 **counsel in the exercise of any right enumerated in this Rule. As provided in Rule** 37 **20(e), the United States may bear the costs of the representation.**

38 39 **Commentary on Rule 15**

40
41 This Rule is adapted from the Act and the Illustrative Rules.

42
43 The Act states that these Rules must contain provisions requiring that “the judge whose
44 conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by
45 counsel) at proceedings conducted by the investigating panel, to present oral and documentary
46 evidence, to compel the attendance of witnesses or the production of documents, to
47 cross-examine witnesses, and to present argument orally or in writing.” 28 U.S.C. § 358(b)(2).
48 To implement this provision, Rule 15(e) gives the subject judge the right to attend any hearing
49 held for the purpose of receiving evidence of record or hearing argument under Rule 14.
50

1 The Act does not require that the subject judge be permitted to attend all proceedings of
2 the special committee. Accordingly, the Rules do not give a right to attend other
3 proceedings—for example, meetings at which the special committee is engaged in investigative
4 activity, such as interviewing persons to learn whether they ought to be called as witnesses or
5 examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or
6 meetings in which the committee is deliberating on the evidence or its recommendations.
7

8 **16. Complainant’s Rights in Investigation**

- 9 **(a) Notice.** The complainant must receive written notice of the investigation as provided
10 in Rule 11(g)(1). When the special committee’s report to the judicial council is filed,
11 the complainant must be notified of the filing. The judicial council may, in its
12 discretion, provide a copy of the report of a special committee to the complainant.
- 13 **(b) Opportunity to Provide Evidence.** If the complainant knows of relevant evidence not
14 already before the special committee, the complainant may briefly explain in writing
15 the basis of that knowledge and the nature of that evidence. If the special committee
16 determines that the complainant has information not already known to the
17 committee that would assist in the committee’s investigation, a representative of the
18 committee must interview the complainant.
- 19 **(c) Presentation of Argument.** The complainant may submit written argument to the
20 special committee. In its discretion, the special committee may permit the
21 complainant to offer oral argument.
- 22 **(d) Representation by Counsel.** A complainant may submit written argument through
23 counsel and, if permitted to offer oral argument, may do so through counsel.
- 24 **(e) Cooperation.** In exercising its discretion under this Rule, the special committee may
25 take into account the degree of the complainant’s cooperation in preserving the
26 confidentiality of the proceedings, including the identity of the subject judge.
27

28 **Commentary on Rule 16**

29
30 This Rule is adapted from the Act and the Illustrative Rules.
31

32 In accordance with the view of the process as fundamentally administrative and
33 inquisitorial, these Rules do not give the complainant the rights of a party to litigation and leave
34 the complainant’s role largely to the discretion of the special committee. However, Rule 16(b)
35 gives the complainant the prerogative to make a brief written submission showing that he or she
36 is aware of relevant evidence not already known to the special committee. (Such a submission
37 may precede any written or oral argument the complainant provides under Rule 16(c), or it may
38 accompany that argument.) If the special committee determines, independently or from the
39 complainant’s submission, that the complainant has information that would assist the committee
40 in its investigation, the complainant must be interviewed by a representative of the committee.
41 Such an interview may be in person or by telephone, and the representative of the special
42 committee may be either a member or staff.
43

44 Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend
45 proceedings of the special committee except when testifying or presenting oral argument. A
46 special committee may exercise its discretion to permit the complainant to be present at its
47 proceedings, or to permit the complainant, individually or through counsel, to participate in the
48 examination or cross-examination of witnesses.
49
50

1 The Act authorizes an exception to the normal confidentiality provisions where the
2 judicial council in its discretion provides a copy of the report of the special committee to the
3 complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle
4 the complainant to a copy of the special committee’s report.
5

6 In exercising their discretion regarding the role of the complainant, the special committee
7 and the judicial council should protect the confidentiality of the complaint process. As a
8 consequence, subsection (e) provides that the special committee may consider the degree to
9 which a complainant has cooperated in preserving the confidentiality of the proceedings in
10 determining what role beyond the minimum required by these Rules should be given to that
11 complainant.
12

13 **17. Special-Committee Report**

14 **The special committee must file with the judicial council a comprehensive report of its**
15 **investigation, including findings and recommendations for council action. The report must**
16 **be accompanied by a statement of the vote by which it was adopted, any separate or**
17 **dissenting statements of special-committee members, and the record of any hearings held**
18 **under Rule 14. In addition to being sent to the subject judge under Rule 15(b), a copy of**
19 **the report and any accompanying statements and documents must be sent to the**
20 **Committee on Judicial Conduct and Disability.**
21

22 **Commentary on Rule 17**

23
24 This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for
25 sending a copy of the special-committee report and accompanying statements and documents to
26 the Committee on Judicial Conduct and Disability is new.
27

28 **ARTICLE V. REVIEW BY JUDICIAL COUNCIL**

29 30 **18. Petition for Review of Chief Judge Disposition Under** 31 **Rule 11(c), (d), or (e)**

- 32 (a) **Petition for Review.** After the chief judge issues an order under Rule 11(c), (d), or
33 (e), the complainant or the subject judge may petition the judicial council of the
34 circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial
35 council may refer a petition for review filed under this Rule to a panel of no fewer
36 than five members of the council, at least two of whom must be district judges.
- 37 (b) **When to File; Form; Where to File.** A petition for review must be filed in the office
38 of the circuit clerk within 42 days after the date of the chief judge’s order. The
39 petition for review should be in letter form, addressed to the circuit clerk, and in an
40 envelope marked “Misconduct Petition” or “Disability Petition.” The name of the
41 subject judge must not be shown on the envelope. The petition for review should be
42 typewritten or otherwise legible. It should begin with “I hereby petition the judicial
43 council for review of . . .” and state the reasons why the petition should be granted.
44 It must be signed.
- 45 (c) **Receipt and Distribution of Petition.** A circuit clerk who receives a petition for
46 review filed in accordance with this Rule must:
- 47 (1) **acknowledge its receipt and send a copy to the complainant or subject judge,**
48 **as the case may be;**
49
50

1 Rule 18(e) provides for an automatic extension of the time limit imposed under
2 subsection (b) if a person files a petition that is rejected for failure to comply with formal
3 requirements.
4

5 **19. Judicial-Council Disposition of Petition for Review**

- 6 **(a) Rights of Subject Judge.** At any time after a complainant files a petition for review,
7 the subject judge may file a written response with the circuit clerk. The circuit clerk
8 must promptly distribute copies of the response to each member of the judicial
9 council or of the relevant panel, unless that member is disqualified under Rule 25.
10 Copies must also be distributed to the chief judge, to the complainant, and to the
11 Committee on Judicial Conduct and Disability. The subject judge must not
12 otherwise communicate with individual judicial-council members about the matter.
13 The subject judge must be given copies of any communications to the judicial
14 council from the complainant.
- 15 **(b) Judicial-Council Action.** After considering a petition for review and the materials
16 before it, the judicial council may:
- 17 (1) affirm the chief judge's disposition by denying the petition;
 - 18 (2) return the matter to the chief judge with directions to conduct a further
19 inquiry under Rule 11(b) or to identify a complaint under Rule 5;
 - 20 (3) return the matter to the chief judge with directions to appoint a special
21 committee under Rule 11(f); or
 - 22 (4) in exceptional circumstances, take other appropriate action.
- 23 **(c) Notice of Judicial-Council Decision.** Copies of the judicial council's order, together
24 with memoranda incorporated by reference in the order and separate concurring or
25 dissenting statements, must be given to the complainant, the subject judge, and the
26 Committee on Judicial Conduct and Disability.
- 27 **(d) Memorandum of Judicial-Council Decision.** If the judicial council's order affirms
28 the chief judge's disposition, a supporting memorandum must be prepared only if
29 the council concludes that there is a need to supplement the chief judge's
30 explanation. A memorandum supporting a judicial-council order must not include
31 the name of the complainant or the subject judge.
- 32 **(e) Review of Judicial-Council Decision.** If the judicial council's decision is adverse to
33 the petitioner, and if no member of the council dissented, the complainant must be
34 notified that he or she has no right to seek review of the decision. If there was a
35 dissent, the petitioner must be informed that he or she can file a petition for review
36 under Rule 21(b).
- 37 **(f) Public Availability of Judicial-Council Decision.** Materials related to the judicial
38 council's decision must be made public to the extent, at the time, and in the manner
39 set forth in Rule 24.
40

41 **Commentary on Rule 19**

42
43 This Rule is adapted largely from the Act and is self-explanatory.
44

45 The judicial council should ordinarily review the decision of the chief judge on the
46 merits, treating the petition for review for all practical purposes as an appeal. The judicial council
47 may respond to a petition for review by affirming the chief judge's order, remanding the matter,
48 or, in exceptional cases, taking other appropriate action. A petition for review of a judicial
49 council's decision may be filed under Rule 21(b) in any matter in which one or more members of
50 the council dissented from the order.

1 **20. Judicial-Council Action Following Appointment of Special Committee**

2 (a) **Subject Judge’s Rights.** Within 21 days after the filing of the report of a special
3 committee, the subject judge may send a written response to the members of the
4 judicial council. The subject judge must also be given an opportunity to present
5 argument, personally or through counsel, written or oral, as determined by the
6 judicial council. The subject judge must not otherwise communicate with
7 judicial-council members about the matter.

8 (b) **Judicial-Council Action.**

9 (1) **Discretionary actions.** Subject to the subject judge’s rights set forth in
10 subsection (a), the judicial council may:

11 (A) **dismiss the complaint because:**

- 12 (i) **even if the claim is true, the claimed conduct is not conduct**
13 **prejudicial to the effective and expeditious administration of the**
14 **business of the courts and does not indicate a mental or physical**
15 **disability resulting in inability to discharge the duties of office;**
- 16 (ii) **the complaint is directly related to the merits of a decision or**
17 **procedural ruling;**
- 18 (iii) **the facts on which the complaint is based have not been**
19 **established; or**
- 20 (iv) **the complaint is otherwise not appropriate for consideration**
21 **under 28 U.S.C. §§ 351–364.**

22 (B) **conclude the proceeding because appropriate corrective action has**
23 **been taken or intervening events have made the proceeding**
24 **unnecessary.**

25 (C) **refer the complaint to the Judicial Conference with the judicial**
26 **council’s recommendations for action.**

27 (D) **take remedial action to ensure the effective and expeditious**
28 **administration of the business of the courts, including:**

- 29 (i) **censuring or reprimanding the subject judge, either by private**
30 **communication or by public announcement;**
- 31 (ii) **ordering that no new cases be assigned to the subject judge for**
32 **a limited, fixed period;**
- 33 (iii) **in the case of a magistrate judge, ordering the chief judge of the**
34 **district court to take action specified by the council, including**
35 **the initiation of removal proceedings under 28 U.S.C. § 631(i) or**
36 **42 U.S.C. § 300aa-12(c)(2);**
- 37 (iv) **in the case of a bankruptcy judge, removing the judge from**
38 **office under 28 U.S.C. § 152(e);**
- 39 (v) **in the case of a circuit or district judge, requesting the judge to**
40 **retire voluntarily with the provision (if necessary) that ordinary**
41 **length-of-service requirements be waived;**
- 42 (vi) **in the case of a circuit or district judge who is eligible to retire**
43 **but does not do so, certifying the disability of the judge under**
44 **28 U.S.C. § 372(b) so that an additional judge may be**
45 **appointed; and**
- 46 (vii) **in the case of a circuit chief judge or district chief judge, finding**
47 **that the judge is temporarily unable to perform chief-judge**
48 **duties, with the result that those duties devolve to the next**
49 **eligible judge in accordance with 28 U.S.C. § 45(d) or § 136(e).**

- 1 (E) take any combination of actions described in (b)(1)(A)–(D) of this Rule
2 that is within its power.
- 3 (2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial
4 Conference if the council determines that a circuit judge or district judge may
5 have engaged in conduct that:
- 6 (A) might constitute ground for impeachment; or
7 (B) in the interest of justice, is not amenable to resolution by the judicial
8 council.
- 9 (c) **Inadequate Basis for Decision.** If the judicial council finds that a special committee’s
10 report, recommendations, and record provide an inadequate basis for decision, it
11 may return the matter to the committee for further investigation and a new report,
12 or it may conduct further investigation. If the judicial council decides to conduct
13 further investigation, the subject judge must be given adequate prior notice in
14 writing of that decision and of the general scope and purpose of the additional
15 investigation. The judicial council’s conduct of the additional investigation must
16 generally accord with the procedures and powers set forth in Rules 13 through 16 for
17 the conduct of an investigation by a special committee.
- 18 (d) **Judicial-Council Vote.** Judicial-council action must be taken by a majority of those
19 members of the council who are not disqualified. A decision to remove a bankruptcy
20 judge from office requires a majority vote of all the members of the judicial council.
- 21 (e) **Recommendation for Fee Reimbursement.** If the complaint has been finally
22 dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so
23 requests, the judicial council may recommend that the Director of the Administrative
24 Office use funds appropriated to the Judiciary to reimburse the judge for reasonable
25 expenses incurred during the investigation, when those expenses would not have been
26 incurred but for the requirements of the Act and these Rules. Reasonable expenses
27 include attorneys’ fees and expenses related to a successful defense or prosecution of
28 a proceeding under Rule 21(a) or (b).
- 29 (f) **Judicial-Council Order.** Judicial-council action must be by written order. Unless the
30 judicial council finds that extraordinary reasons would make it contrary to the
31 interests of justice, the order must be accompanied by a memorandum setting forth
32 the factual determinations on which it is based and the reasons for the council action.
33 Such a memorandum may incorporate all or part of any underlying
34 special-committee report. If the complaint was initiated by identification under Rule
35 5, the memorandum must so indicate. The order and memoranda incorporated by
36 reference in the order must be provided to the complainant, the subject judge, and
37 the Committee on Judicial Conduct and Disability. The complainant and the subject
38 judge must be notified of any right to review of the judicial council’s decision as
39 provided in Rule 21(b). If the complaint was identified under Rule 5 or filed by its
40 subject judge, the judicial council must transmit the order and memoranda
41 incorporated by reference in the order to the Committee on Judicial Conduct and
42 Disability for review in accordance with Rule 21. In the event of such a transmission,
43 the subject judge may make a written submission to the Committee on Judicial
44 Conduct and Disability but will have no further right of review.

45
46 **Commentary on Rule 20**

47
48 This Rule is largely adapted from the Illustrative Rules.

49
50 Rule 20(a) provides that within 21 days after the filing of the report of a special
51 committee, the subject judge may address a written response to all of the members of the judicial

1 council. The subject judge must also be given an opportunity to present argument to the judicial
2 council, personally or through counsel, or both, at the direction of the council. Whether that
3 argument is written or oral would be for the judicial council to determine. The subject judge may
4 not otherwise communicate with judicial-council members about the matter.
5

6 Rule 20(b)(1)(D) recites the remedial actions enumerated in 28 U.S.C. § 354(a)(2) while
7 making clear that this list is not exhaustive. A judicial council may consider lesser remedies.
8 Some remedies may be unique to senior judges, whose caseloads can be modified by agreement or
9 through statutory designation and certification processes.
10

11 Under 28 U.S.C. §§ 45(d) and 136(e), which provide for succession where “a chief judge
12 is temporarily unable to perform his duties as such,” the determination whether such an inability
13 exists is not expressly reserved to the chief judge. Nor, indeed, is it assigned to any particular
14 judge or court-governance body. Clearly, however, a chief judge’s inability to function as chief
15 could implicate “the effective and expeditious administration of justice,” which the judicial
16 council of the circuit must, under 28 U.S.C. § 332(d)(1), “make all necessary and appropriate
17 orders” to secure. For this reason, such reassignment is among a judicial council’s remedial
18 options, as subsection (b)(1)(D)(vii) makes clear. Consistent with 28 U.S.C. §§ 45(d) and 136(e),
19 however, any reassignment of chief-judge duties must not outlast the subject judge’s inability to
20 perform them. Nor can such reassignment result in any extension of the subject judge’s term as
21 chief judge.
22

23 Rule 20(c) provides that if the judicial council decides to conduct an additional
24 investigation, the subject judge must be given adequate prior notice in writing of that decision and
25 of the general scope and purpose of the additional investigation. The conduct of the investigation
26 will be generally in accordance with the procedures set forth in Rules 13 through 16 for the
27 conduct of an investigation by a special committee. However, if hearings are held, the judicial
28 council may limit testimony or the presentation of evidence to avoid unnecessary repetition of
29 testimony and evidence before the special committee.
30

31 Rule 20(d) provides that judicial-council action must be taken by a majority of those
32 members of the council who are not disqualified, except that a decision to remove a bankruptcy
33 judge from office requires a majority of all the members of the council as required by 28 U.S.C. §
34 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial
35 council may take under the Act. If some members of the judicial council are disqualified in the
36 matter, their disqualification should not be given the effect of a vote against council action.
37

38 With regard to Rule 20(e), the judicial council, on the request of the subject judge, may
39 recommend to the Director of the Administrative Office that the subject judge be reimbursed for
40 reasonable expenses incurred, including attorneys’ fees. The judicial council has the authority to
41 recommend such reimbursement where, after investigation by a special committee, the complaint
42 has been finally dismissed or concluded under subsection (b)(1)(A) or (B) of this Rule. It is
43 contemplated that such reimbursement may be provided for the successful prosecution or defense
44 of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or
45 (B) dismissal or conclusion.
46

47 Rule 20(f) requires that judicial-council action be by order and, normally, that it be
48 supported with a memorandum of factual determinations and reasons. Notice of the action must
49 be given to the complainant and the subject judge, and must include notice of any right to petition
50 for review of the judicial council’s decision under Rule 21(b). Because an identified complaint
51 has no “complainant” to petition for review, a judicial council’s dispositive order on an identified

1 complaint on which a special committee has been appointed must be transmitted to the Committee
2 on Judicial Conduct and Disability for review. The same will apply where a complaint was filed
3 by its subject judge.
4

5 **ARTICLE VI. REVIEW BY COMMITTEE ON JUDICIAL CONDUCT** 6 **AND DISABILITY** 7

8 **21. Committee on Judicial Conduct and Disability**

- 9 (a) **Committee Review.** The Committee on Judicial Conduct and Disability, consisting of
10 seven members, considers and disposes of all petitions for review under (b) of this
11 Rule, in conformity with the Committee's jurisdictional statement. Its review of
12 judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion.
13 Its disposition of petitions for review is ordinarily final. The Judicial Conference
14 may, in its sole discretion, review any such Committee decision, but a complainant or
15 subject judge does not have a right to this review.
- 16 (b) **Reviewable Matters.**
- 17 (1) **Upon petition.** A complainant or subject judge may petition the Committee
18 for review of a judicial-council order entered in accordance with:
19 (A) Rule 20(b)(1)(A), (B), (D), or (E); or
20 (B) Rule 19(b)(1) or (4) if one or more members of the judicial council
21 dissented from the order.
- 22 (2) **Upon Committee's initiative.** At its initiative and in its sole discretion, the
23 Committee may review any judicial-council order entered under Rule 19(b)(1)
24 or (4), but only to determine whether a special committee should be
25 appointed. Before undertaking the review, the Committee must invite that
26 judicial council to explain why it believes the appointment of a special
27 committee is unnecessary, unless the reasons are clearly stated in the council's
28 order denying the petition for review. If the Committee believes that it would
29 benefit from a submission by the subject judge, it may issue an appropriate
30 request. If the Committee determines that a special committee should be
31 appointed, the Committee must issue a written decision giving its reasons.
- 32 (c) **Committee Vote.** Any member of the Committee from the same circuit as the subject
33 judge is disqualified from considering or voting on a petition for review related to
34 that subject judge. Committee decisions under (b) of this Rule must be by majority
35 vote of the qualified Committee members. Those members hearing the petition for
36 review should serve in that capacity until final disposition of the petition, whether or
37 not their term of Committee membership has ended. If only six members are
38 qualified to consider a petition for review, the Chief Justice shall select an additional
39 judge to join the qualified members to consider the petition. If four or fewer
40 members are qualified to consider a petition for review, the Chief Justice shall select
41 a panel of five judges, including the qualified Committee members, to consider it.
- 42 (d) **Additional Investigation.** Except in extraordinary circumstances, the Committee will
43 not conduct an additional investigation. The Committee may return the matter to the
44 judicial council with directions to undertake an additional investigation. If the
45 Committee conducts an additional investigation, it will exercise the powers of the
46 Judicial Conference under 28 U.S.C. § 331.
- 47 (e) **Oral Argument; Personal Appearance.** There is ordinarily no oral argument or
48 personal appearance before the Committee. In its discretion, the Committee may
49 permit written submissions.
50

- 1 (f) **Committee Decision.** A Committee decision under this Rule must be transmitted
2 promptly to the Judicial Conference. Other distribution will be by the
3 Administrative Office at the direction of the Committee chair.
4 (g) **Finality.** All orders of the Judicial Conference or of the Committee (when the
5 Conference does not exercise 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 Committee on Judicial Conduct and Disability to dispose of petitions for review does not preclude review of such dispositions by the Judicial 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 a dismissal or a conclusion of a complaint under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented, the complainant or the subject judge has the right to petition for review by the Committee. Under Rule 21(b)(2), the Committee may review such a dismissal or conclusion in its sole discretion, whether or not a dissent occurred, and only as to the appointment of a special committee. Any review under Rule 21(b)(2) will be conducted as soon as practicable after the dismissal or conclusion at issue. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. The Rule provides that every petition for review must be considered and voted on by at least five, and if possible by seven, qualified Committee members to avoid the possibility of tie votes. If six, or four or fewer, members are qualified, the Chief Justice shall appoint other judges to join the qualified members to consider the petition for review. To the extent possible, the judges whom the Chief Justice selects to join the qualified members should be drawn from among former members of the Committee.

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

22. Procedures for Review

- (a) **Filing Petition for Review.** A petition for review of a judicial-council decision on a complaint referred to a special committee may be filed by sending a brief written statement to the Committee on Judicial Conduct and Disability at JCD_PetitionforReview@ao.uscourts.gov or to:

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

The Administrative Office will send a copy of the petition for review to the complainant or subject judge, as the case may be.

- (b) **Form and Contents of Petition.** No particular form is required. The petition for review must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the council's decision, and the grounds on which the petitioner seeks review. The petition

1 for review must specify the date and docket number of the judicial council order for
2 which review is sought. The petitioner may attach any documents or correspondence
3 arising in the course of the proceeding before the judicial council or its special
4 committee. A petition for review should not normally exceed 20 pages plus necessary
5 attachments. A petition for review must be signed by the petitioner or his or her
6 attorney.

7 (c) **Time.** A petition for review must be submitted within 42 days after the date of the
8 order for which review is sought.

9 (d) **Action on Receipt of Petition.** When a petition for review of a judicial-council
10 decision on a complaint referred to a special committee is submitted in accordance
11 with this Rule, the Administrative Office shall acknowledge its receipt, notify the
12 chair of the Committee on Judicial Conduct and Disability, and distribute the
13 petition to the members of the Committee for their deliberation.

14
15 **Commentary on Rule 22**

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17 Rule 22 is self-explanatory.

18
19 **ARTICLE VII. MISCELLANEOUS RULES**

20
21 **23. Confidentiality**

22 (a) **General Rule.** The consideration of a complaint by a chief judge, a special committee,
23 a judicial council, or the Committee on Judicial Conduct and Disability is
24 confidential. Information about this consideration must not be disclosed by any
25 judge or employee of the Judiciary or by any person who records or transcribes
26 testimony except as allowed by these Rules. A chief judge may disclose the existence
27 of a proceeding under these Rules when necessary or appropriate to maintain public
28 confidence in the Judiciary's ability to redress misconduct or disability.

29 (b) **Files.** All files related to a complaint must be separately maintained with appropriate
30 security precautions to ensure confidentiality.

31 (c) **Disclosure in Decisions.** Except as otherwise provided in Rule 24, written decisions of
32 a chief judge, a judicial council, or the Committee on Judicial Conduct and
33 Disability, and dissenting opinions or separate statements of members of a council or
34 the Committee may contain information and exhibits that the authors consider
35 appropriate for inclusion, and the information and exhibits may be made public.

36 (d) **Availability to Judicial Conference.** On request of the Judicial Conference or its
37 Committee on Judicial Conduct and Disability, the circuit clerk must furnish any
38 requested records related to a complaint. For auditing purposes, the circuit clerk
39 must provide access to the Committee on Judicial Conduct and Disability to records
40 of proceedings under the Act at the site where the records are kept.

41 (e) **Availability to District Court.** If the judicial council directs the initiation of
42 proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit
43 clerk must provide to the chief judge of the district court copies of the report of the
44 special committee and any other documents and records that were before the council
45 at the time of its decision. On request of the chief judge of the district court, the
46 judicial council may authorize release to that chief judge of any other records
47 relating to the investigation.

48 (f) **Impeachment Proceedings.** If the Judicial Conference determines that consideration
49 of impeachment may be warranted, it must transmit the record of all relevant
50 proceedings to the Speaker of the House of Representatives.
51

- 1 (g) **Subject Judge’s Consent.** If both the subject judge and the chief judge consent in
2 writing, any materials from the files may be disclosed to any person. In any such
3 disclosure, the chief judge may require that the identity of the complainant, or of
4 witnesses in an investigation conducted under these Rules, not be revealed.
- 5 (h) **Disclosure in Special Circumstances.** The Judicial Conference, its Committee on
6 Judicial Conduct and Disability, or a judicial council may authorize disclosure of
7 information about the consideration of a complaint, including the papers, documents,
8 and transcripts relating to the investigation, to the extent that disclosure is justified
9 by special circumstances and is not prohibited by the Act. Disclosure may be made to
10 judicial researchers engaged in the study or evaluation of experience under the Act
11 and related modes of judicial discipline, but only where the study or evaluation has
12 been specifically approved by the Judicial Conference or by the Committee on
13 Judicial Conduct and Disability. Appropriate steps must be taken to protect the
14 identities of the subject judge, the complainant, and witnesses from public disclosure.
15 Other appropriate safeguards to protect against the dissemination of confidential
16 information may be imposed.
- 17 (i) **Disclosure of Identity by Subject Judge.** Nothing in this Rule precludes the subject
18 judge from acknowledging that he or she is the judge referred to in documents made
19 public under Rule 24.
- 20 (j) **Assistance and Consultation.** Nothing in this Rule prohibits a chief judge, a special
21 committee, a judicial council, or the Judicial Conference or its Committee on Judicial
22 Conduct and Disability, in the performance of any function authorized under the Act
23 or these Rules, from seeking the help of qualified staff or experts or from consulting
24 other judges who may be helpful regarding the performance of that function.

25
26 **Commentary on Rule 23**

27
28 Rule 23 was adapted from the Illustrative Rules.

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

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

41
42 With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly
43 to consideration of a complaint at any stage.

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

1 In extraordinary circumstances, a chief judge may disclose the existence of a proceeding
2 under these Rules. The disclosure of such information in high-visibility or controversial cases is to
3 reassure the public that the Judiciary is capable of redressing judicial misconduct or disability.
4 Moreover, the confidentiality requirement does not prevent the chief judge from
5 “communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter”
6 as part of a limited inquiry conducted by the chief judge under Rule 11(b).
7

8 Rule 23 recognizes that there must be some exceptions to the Act’s confidentiality
9 requirement. For example, the Act requires that certain orders and the reasons for them must be
10 made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that written decisions, as well as
11 dissenting opinions and separate statements, may contain references to information that would
12 otherwise be confidential and that such information may be made public. However, subsection (c)
13 is subject to Rule 24(a), which provides the general rule regarding the public availability of
14 decisions. For example, the name of a subject judge cannot be made public in a decision if
15 disclosure of the name is prohibited by that Rule.
16

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

24 The Act provides that confidential materials may be disclosed if authorized in writing by
25 the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this
26 requirement. Once the subject judge has consented to the disclosure of confidential materials
27 related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to
28 protect the confidentiality interests of the complainant or of witnesses who have testified in
29 investigatory proceedings or who have provided information in response to a limited inquiry
30 undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to
31 require that the identities of the complainant or of such witnesses, as well as any identifying
32 information, be shielded in any materials disclosed, except insofar as the chief judge has secured
33 the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated
34 need for disclosure of the information that, in the judgment of the chief judge, outweighs the
35 confidentiality interest of the complainant or of a particular witness (as may be the case where the
36 complainant is delusional or where the complainant or a particular witness has already
37 demonstrated a lack of concern about maintaining the confidentiality of the proceedings).
38

39 Rule 23(h) permits disclosure of additional information in circumstances not enumerated.
40 For example, disclosure may be appropriate to permit a prosecution for perjury based on
41 testimony given before a special committee. Another example might involve evidence of criminal
42 conduct by a judge discovered by a special committee.
43

44 Subsection (h) also permits the authorization of disclosure of information about the
45 consideration of a complaint, including the papers, documents, and transcripts relating to the
46 investigation, to judicial researchers engaged in the study or evaluation of experience under the
47 Act and related modes of judicial discipline. The Rule envisions disclosure of information from
48 the official record of a complaint proceeding to a limited category of persons for appropriately
49 authorized research purposes only, and with appropriate safeguards to protect individual identities
50 in any published research results. In authorizing disclosure, a judicial council may refuse to
51 release particular materials when such release would be contrary to the interests of justice, or

1 when those materials constitute purely internal communications. The Rule does not envision
2 disclosure of purely internal communications between judges and their colleagues and staff.
3

4 Under Rule 23(j), any of the specified judges or entities performing a function authorized
5 under these Rules may seek expert or staff assistance or may consult with other judges who may
6 be helpful regarding performance of that function; the confidentiality requirement does not
7 preclude this. A chief judge, for example, may properly seek the advice and assistance of another
8 judge who the chief judge deems to be in the best position to communicate with the subject judge
9 in an attempt to bring about corrective action. As another example, a new chief judge may wish to
10 confer with a predecessor to learn how similar complaints have been handled. In consulting with
11 other judges, of course, a chief judge should disclose information regarding the complaint only to
12 the extent the chief judge deems necessary under the circumstances.
13

14 **24. Public Availability of Decisions**

15 **(a) General Rule; Specific Cases. When final action has been taken on a complaint and it**
16 **is no longer subject to review, all orders entered by the chief judge and judicial**
17 **council, including memoranda incorporated by reference in those orders and any**
18 **dissenting opinions or separate statements by members of the judicial council, but**
19 **excluding any orders under Rule 5 or 11(f), must be made public, with the following**
20 **exceptions:**

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

25 **(2) if the complaint is concluded because of intervening events, or dismissed at**
26 **any time after a special committee is appointed, the judicial council must**
27 **determine whether the name of the subject judge should be disclosed.**

28 **(3) if the complaint is finally disposed of by a privately communicated censure or**
29 **reprimand, the publicly available materials must not disclose either the name**
30 **of the subject judge or the text of the reprimand.**

31 **(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action**
32 **other than private censure or reprimand, the text of the dispositive order**
33 **must be included in the materials made public, and the name of the subject**
34 **judge must be disclosed.**

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

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

45 **(c) Orders of Committee on Judicial Conduct and Disability. Orders of the Committee**
46 **on Judicial Conduct and Disability constituting final action in a complaint**
47 **proceeding arising from a particular circuit will be made available to the public in**
48 **the office of the circuit clerk of the relevant court of appeals. The Committee on**
49 **Judicial Conduct and Disability will also make such orders available on the**
50 **Judiciary's website, www.uscourts.gov. When authorized by the Committee on**

1 judicial officer resigns in the course of an investigation—to make the identity of the subject judge
2 known.

3
4 Once a special committee has been appointed, and a proceeding is concluded by the full
5 judicial council on the basis of a remedial order of the council, Rule 24(a)(4) provides for
6 disclosure of the name of the subject judge.

7
8 Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the
9 chief judge so orders. Identifying the complainant when the subject judge is not identified would
10 increase the likelihood that the identity of the subject judge would become publicly known, thus
11 circumventing the policy of nondisclosure. It may not always be practicable to shield the
12 complainant’s identity while making public disclosure of the judicial council’s order and
13 supporting memoranda; in some circumstances, moreover, the complainant may consent to public
14 identification.

15
16 Rule 24(b) makes clear that circuits must post on their external websites all orders
17 required to be made public under Rule 24(a).

18
19 Matters involving orders issued following a special-committee investigation often involve
20 highly sensitive situations, and it is important that judicial councils have every opportunity to
21 reach a correct and just outcome. This would include the ability to reach informal resolution
22 before a subject judge’s identity must be released. But there must also come a point of procedural
23 finality. The date of finality—and thus the time at which other safeguards and rules such as the
24 publication requirement are triggered—is the date on which the judicial council issues a Final
25 Order. *See In re Complaint of Judicial Misconduct*, 751 F.3d 611, 617 (2014) (requiring
26 publication of a judicial-council order “[e]ven though the period for review had not yet elapsed”
27 and concluding that “the order was a final decision because the Council had adjudicated the
28 matter on the merits after having received a report from a special investigating committee”). As
29 determined in the cited case, modifications of this kind to a final order are subject to review by the
30 Committee on Judicial Conduct and Disability.

31 32 **25. Disqualification**

- 33 **(a) General Rule. Any judge is disqualified from participating in any proceeding under**
34 **these Rules if the judge, in his or her discretion, concludes that circumstances**
35 **warrant disqualification. If a complaint is filed by a judge, that judge is disqualified**
36 **from participating in any consideration of the complaint except to the extent that**
37 **these Rules provide for a complainant’s participation. A chief judge who has**
38 **identified a complaint under Rule 5 is not automatically disqualified from**
39 **considering the complaint.**
- 40 **(b) Subject Judge. A subject judge is disqualified from considering a complaint except to**
41 **the extent that these Rules provide for participation by a subject judge.**
- 42 **(c) Chief Judge Disqualified from Considering Petition for Review of Chief Judge’s**
43 **Order. If a petition for review of the chief judge’s order entered under Rule**
44 **11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief**
45 **judge is disqualified from participating in the council’s consideration of the petition.**
- 46 **(d) Member of Special Committee Not Disqualified. A member of the judicial council**
47 **who serves on a special committee, including the chief judge, is not disqualified from**
48 **participating in council consideration of the committee’s report.**
- 49

- 1 (e) **Subject Judge’s Disqualification After Appointment of Special Committee.** Upon
2 **appointment of a special committee, the subject judge is disqualified from**
3 **participating in the identification or consideration of any complaint, related or**
4 **unrelated to the pending matter, under the Act or these Rules. The disqualification**
5 **continues until all proceedings on the complaint against the subject judge are finally**
6 **terminated with no further right of review.**
- 7 (f) **Substitute for Disqualified Chief Judge.** If the chief judge is disqualified from
8 **performing duties that the Act and these Rules assign to a chief judge, those duties**
9 **must be assigned to the most-senior active circuit judge not disqualified. If all circuit**
10 **judges in regular active service are disqualified, the judicial council may determine**
11 **whether to request a transfer under Rule 26, or, in the interest of sound judicial**
12 **administration, to permit the chief judge to dispose of the complaint on the merits.**
13 **Members of the judicial council who are named in the complaint may participate in**
14 **this determination if necessary to obtain a quorum of the council.**
- 15 (g) **Judicial-Council Action When Multiple Judges Disqualified.** Notwithstanding any
16 **other provision in these Rules to the contrary,**
- 17 (1) **a member of the judicial council who is a subject judge may participate in its**
18 **disposition if:**
- 19 (A) **participation by one or more subject judges is necessary to obtain a**
20 **quorum of the judicial council;**
- 21 (B) **the judicial council finds that the lack of a quorum is due to the**
22 **naming of one or more judges in the complaint for the purpose of**
23 **disqualifying that judge or those judges, or to the naming of one or**
24 **more judges based on their participation in a decision excluded from**
25 **the definition of misconduct under Rule 3(h)(3); and**
- 26 (C) **the judicial council votes that it is necessary, appropriate, and in the**
27 **interest of sound judicial administration that one or more subject**
28 **judges be eligible to act.**
- 29 (2) **otherwise disqualified members may participate in votes taken under**
30 **(g)(1)(B) and (g)(1)(C).**
- 31 (h) **Disqualification of Members of Committee on Judicial Conduct and Disability.** No
32 **member of the Committee on Judicial Conduct and Disability is disqualified from**
33 **participating in any proceeding under the Act or these Rules because of**
34 **consultations with a chief judge, a member of a special committee, or a member of a**
35 **judicial council about the interpretation or application of the Act or these Rules,**
36 **unless the member believes that the consultation would prevent fair-minded**
37 **participation.**

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Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

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

1 Subsection (e) makes it clear that the disqualification of the subject judge relates only to
2 the subject judge's participation in any proceeding arising under the Act or these Rules. For
3 example, the subject judge cannot initiate complaints by identification, conduct limited inquiries,
4 or choose between dismissal and special-committee investigation as the threshold disposition of
5 a complaint. Likewise, the subject judge cannot participate in any proceeding arising under the
6 Act or these Rules as a member of any special committee, the judicial council of the circuit, the
7 Judicial Conference, or the Committee on Judicial Conduct and Disability. The Illustrative Rule,
8 based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge
9 from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of
10 the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge
11 to continue to decide cases and to continue to exercise the powers of chief circuit or district
12 judge. It would also create a substantial deterrence to the appointment of special committees,
13 particularly where a special committee is needed solely because the chief judge may not decide
14 matters of credibility in his or her review under Rule 11.

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

21
22 Under the Act, a complaint against the chief judge is to be handled by "that circuit judge
23 in regular active service next senior in date of commission." 28 U.S.C. § 351(c). The Rules do
24 not purport to prescribe who is to preside over meetings of the judicial council. Consequently,
25 where the presiding member of the judicial council is disqualified from participating under these
26 Rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and
27 responsibilities of the chief circuit judge under these Rules" does not apply to determine the
28 acting presiding member of the council. That is a matter left to the internal rules or operating
29 practices of each judicial council. In most cases the most senior active circuit judge who is a
30 member of the judicial council and who is not disqualified will preside.

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

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

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

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

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

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

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

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

30 31 **26. Transfer to Another Judicial Council**

32 **In exceptional circumstances, the chief judge or the judicial council may ask the Chief**
33 **Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under**
34 **Rule 6 to the judicial council of another circuit. The request for a transfer may be made at**
35 **any stage of the proceeding before a reference to the Judicial Conference under Rule**
36 **20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a**
37 **request, the Chief Justice may refuse the request or select the transferee judicial council,**
38 **which may then exercise the powers of a judicial council under these Rules.**

39 40 **Commentary on Rule 26**

41
42 Rule 26 is new; it implements the Breyer Committee's recommended use of transfers.
43 Breyer Committee Report, 239 F.R.D. at 214–15.

44
45 Rule 26 authorizes the transfer of a complaint proceeding to another judicial council
46 selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a
47 serious complaint where there are multiple disqualifications among the original judicial council,
48 where the issues are highly visible and a local disposition may weaken public confidence in the
49 process, where internal tensions arising in the council as a result of the complaint render
50 disposition by a less involved council appropriate, or where a complaint calls into question

1 policies or governance of the home court of appeals. The power to effect a transfer is lodged in
2 the Chief Justice to avoid disputes in a judicial council over where to transfer a sensitive matter
3 and to ensure that the transferee council accepts the matter.
4

5 Upon receipt of a transferred proceeding, the transferee judicial council shall determine
6 the proper stage at which to begin consideration of the complaint—for example, reference to the
7 transferee chief judge, appointment of a special committee, etc.
8

9 **27. Withdrawal of Complaint or Petition for Review**

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

24 **Commentary on Rule 27**

25
26 Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once
27 begun, as a matter of public business rather than as the property of the complainant. Accordingly,
28 the chief judge or the judicial council remains responsible for addressing any complaint under the
29 Act, even a complaint that has been formally withdrawn by the complainant.
30

31 Under subsection (a), a complaint pending before the chief judge may be withdrawn if the
32 chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly
33 be saved the burden of preparing a formal order and supporting memorandum. However, the
34 chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a
35 withdrawn complaint.
36

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

45 With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted
46 authority to withdraw the petition. It is thought that the public’s interest in the proceeding is
47 adequately protected, because there will necessarily have been a decision by the chief judge and
48 often by the judicial council as well in such a case.
49
50

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

2 **These Rules and copies of the complaint form as provided in Rule 6(a) must be available**
3 **without charge in the office of the circuit clerk of each court of appeals, district court,**
4 **bankruptcy court, or other federal court whose judges are subject to the Act. Each court**
5 **must also make these Rules, the complaint form, and complaint-filing instructions available**
6 **on the court’s website, or provide an Internet link to these items on the appropriate court**
7 **of appeals website or on www.uscourts.gov.**

8
9 **29. Effective Date**

10 **These Rules will become effective 30 days after promulgation by the Judicial Conference of**
11 **the United States.**

Please use the misconduct complaint form designated by Ninth Circuit Judicial Council:

http://www.ce9.uscourts.gov/misconduct/complaint_form.pdf

A P P E N D I X

COMPLAINT FORM

A two-page complaint form follows.

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 4 (below). The Rules for Judicial-Conduct and Judicial-Disability Proceedings, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The Rules are available in federal court clerks' offices, on individual federal courts' websites, and on www.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. For the number of copies to file, consult the local rules or clerk's office of the court in which your complaint is required to be filed. Enclose each copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: _____
Contact Address: _____

Daytime telephone: (___) _____

2. Name(s) of Judge(s): _____
Court: _____

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?
 Yes No

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

Court: _____

Case Number: _____

Docket number of any appeal to the _____ Circuit: _____

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

Party Lawyer Neither

If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

4. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

5. **Declaration and signature:**

I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature)_____

(Date)_____