

Guide to Judiciary Policy

Vol. 2: Ethics and Judicial Conduct

Pt. E: Judicial Conduct and Disability Act and Related Materials

Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings

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§ 310 Overview

Section 320 of this chapter reproduces the Rules for Judicial-Conduct and Judicial-Disability Proceedings. They were adopted on March 11, 2008, and took effect on April 10, 2008. They were amended on September 17, 2015, ~~and~~ and again on [DATE], published in final form in May 2016.

§ 320 Rules for Judicial-Conduct and Judicial-Disability Proceedings

Preface

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

ARTICLE I. GENERAL PROVISIONS

1. Scope and Covered Judges

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

(b) Covered Judge. A covered judge is defined under the Act and is limited to judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

COMMENTARY ON RULE 1

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

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

Based on the Breyer Committee’s findings, the Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies that must exercise responsibility under the Act. To that end, the Committee on Judicial Conduct and Disability proposed rules ~~that were~~ based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

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

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the Judicial Conference promulgated the present Rules on March 11, 2008. They were amended on September 17, 2015, and again on [DATE].

The definition of a covered judge tracks the Judicial Conduct and Disability Act. See 28 U.S.C. §§ 351(d)(1) (defining the term “judge” as “a circuit judge, district judge, bankruptcy judge, or magistrate judge”).

Rules 8(c) and (d) address the procedures for processing a complaint involving allegations against a person *not* covered by the Act, such as other court personnel, or against both a covered judge and a noncovered person. Court employees seeking to report, or file a claim related to, misconduct or the denial of rights granted under their Employment Dispute Resolution (EDR) plan by other court personnel may wish to consult the Model EDR Plan and the EDR plan for the relevant court, among other resources. See Guide to Judiciary Policy, vol. 12, appx. 2B.

2. ~~Effect and~~ Construction and Effect

(a) Generally. These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) Exception. A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Committee on Judicial Conduct and Disability, or the Judicial Conference expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

COMMENTARY ON RULE 2

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

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

3. General Definitions

The following general definitions apply to these Rules. Cognizable misconduct and disability are defined in Rule 4.

(a) Chief Judge. “Chief judge” means the chief judge of a United States court of appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) Circuit Clerk. “Circuit clerk” means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) Complaint. A “complaint” is:

(1) a document that, in accordance with Rule 6, is filed by, or on behalf of, any person, including a document filed by an in his or her individual capacity or on behalf of a professional organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule ~~4~~ 1(b), has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) Court of Appeals, District Court, and District Judge. “Courts of appeals,” “district court,” and “district judge,” where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

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

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

1 ~~(gf)~~ Judicial Employee. “Judicial Employee” includes judicial assistants,
2 law clerks, and other court employees, including unpaid staff, such
3 as interns, externs, and other volunteer employees.

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

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

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

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

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

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

17 ~~(D)~~ treating litigants, attorneys, Judiciary employees, or
18 others in a demonstrably egregious and hostile manner;

19 ~~(E)~~ engaging in sexual misconduct or misconduct based on
20 sex, including sexual harassment or assault, or sex- or
21 gender- based discrimination;

22 ~~(F)~~ discriminating against or harassing Judiciary
23 employees or others due to race, color, religion, national
24 origin, sex, gender, age, or disability;

25 ~~(FG)~~ engaging in partisan political activity or making
26 inappropriately partisan statements;

27 ~~(FGH)~~ soliciting funds for organizations;

28 ~~(GHI)~~ retaliating against complainants, witnesses, or Judiciary
29 employees, or others for their participation in reporting
30 or disclosing judicial misconduct, otherwise
31 participating in this complaint process, or other
32 impermissible reasons;

~~(H)(J) refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules; or~~

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

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

~~(3) — does not include:~~

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

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

~~(ih)~~ **Subject Judge.** “Subject judge” means any judge a covered judge, as described in Rule 4 1(b), who is the subject of a complaint.

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.

1 Under the Act, a “complaint” may be filed by “any person” or “identified” by a
2 chief judge. See 28 U.S.C. § 351(a), (b). Under Rule 3(c)(1), a complaint may be
3 submitted by, or on behalf of, any person, in his or her individual capacity, or by a
4 professional including a document filed by an organization. Traditional standing
5 requirements do not apply. Individuals or organizations may file a complaint even if
6 they have not been directly injured or aggrieved.

7 Generally, the word “complaint” brings to mind the commencement of an
8 adversary proceeding in which the contending parties are left to present the evidence
9 and legal arguments, and judges play the role of an essentially passive arbiter. The
10 Act, however, establishes an administrative, inquisitorial process. For example, even
11 absent a complaint filed by a complainant under Rule 6, chief judges are expected in
12 some circumstances to trigger the process — “identify a complaint,” see 28 U.S.C.
13 § 351(b) and Rule 5 — and conduct an investigation without becoming a party. See 28
14 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j).
15 ~~Even when a complaint is filed by someone other than the chief judge, the complainant~~
16 ~~lacks many rights that a litigant would have, and the chief judge, instead of being limited~~
17 ~~to the “four corners of the complaint,” must, under Rule 11, proceed as though~~
18 ~~misconduct or disability has been alleged where~~ Where the complainant reveals
19 information of misconduct or disability but does not claim it as such, the chief judge is
20 not limited to the “four corners of the complaint” and should proceed under Rule 5 to
21 determine whether identification of a complaint is appropriate. See Breyer Committee
22 Report, 239 F.R.D. at 183–84.

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

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

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

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

16 Rule 3(h)(1)(E) provides expressly that a judge’s unwanted or abusive sexual or
17 sex-based conduct by a judge, including sexual harassment or assault, or sex- or
18 gender-based discrimination, constitutes cognizable misconduct. The Rule recognizes
19 that anyone can be a victim of sexual or sex-based misconduct, regardless of their sex
20 and of the sex of the judge engaging in the misconduct.

21 Rules 3(h)(1)(D), (E), and (F) The Rule reflects the Judiciary’s commitment to
22 maintaining a work environment in which all people are treated with dignity, fairness,
23 and respect, and are free from discrimination and harassment. See Code of Conduct
24 for U.S. Judges, Canon 3A(3) cmt. (“The duty to be respectful includes the responsibility
25 to avoid comment or behavior that could reasonably be interpreted as harassment,
26 prejudice or bias.”); cf. Guide to Judiciary Policy, vol. 12, ch. 2 § 220(a) (“Discrimination
27 or harassment directed at a judiciary employee due to race, color, religion, national
28 origin, sex, age, or disability is prohibited in accordance with the long-standing national
29 policy of the judiciary to promote equal employment opportunity.”). Judiciary employees
30 include interns, externs, and other volunteer employees. See Code of Conduct for
31 Judicial Employees, Overview (“This Code of Conduct applies to all employees of the
32 judicial branch including interns, externs, and other volunteer court employees”);
33 Guide to Judiciary Policy, vol. 12, ch. 5 § 550.45.10(a)(3) (“A volunteer is to be treated
34 as an employee of the judiciary, albeit an uncompensated one. This is designed to
35 protect both the volunteer and the judiciary.”). Other avenues might be available to a
36 Judiciary employee to address unwanted or abusive conduct by a judge.

37 ——— Under Rule 3(h)(1)(GHI), a judge’s efforts to retaliate against any person for
38 reporting or disclosing misconduct, otherwise participating his or her involvement in the
39 complaint process, or other impermissible reasons may constitute constitutes cognizable
40 misconduct. Other impermissible reasons include, but are not limited to, an individual’s
41 refusal to submit to an unwanted sexual advance. The Rule makes this the prohibition

1 ~~against retaliation~~ explicit in the interest of promoting public confidence in the complaint
2 ~~process.~~

3 ~~—— Rule 3(h)(1)(HJ) provides that a judge's refusal, without good cause shown, to~~
4 ~~cooperate in the investigation of a complaint or enforcement of a decision rendered~~
5 ~~under these Rules may constitute constitutes cognizable misconduct. While the~~
6 ~~exercise of rights under the Fifth Amendment to the Constitution would constitute good~~
7 ~~cause under Rule 3(h)(1)(HJ), given the fact-specific nature of the inquiry, it is not~~
8 ~~possible to otherwise anticipate all circumstances that might also constitute good cause.~~
9 ~~The Commentary on Rule 13 provides additional discussion regarding Rule 3(h)(1)(HJ).~~
10 ~~The Rules contemplate that judicial councils will not consider commencing proceedings~~
11 ~~under Rule 3(h)(1)(HJ) except as necessary after other means to acquire the~~
12 ~~information or enforce a decision have been tried or have proven futile.~~

13 ~~—— Rule 3(h)(2) reflects that an allegation can meet the statutory standard even~~
14 ~~though the judge's alleged conduct did not occur in the course of the performance of~~
15 ~~official duties. And some conduct in the categories listed under subsection (h)(1), or in~~
16 ~~categories not listed, might depending on the circumstances amount to "misconduct"~~
17 ~~under subsection (h)(2), or under both subsection (h)(1) and subsection (h)(2). Also,~~
18 ~~the Code of Conduct for United States Judges expressly covers a wide range of~~
19 ~~extra-official activities, and some of these activities may constitute misconduct. For~~
20 ~~example, allegations that a judge solicited funds for a charity or participated in a~~
21 ~~partisan political event are cognizable under the Act.~~

22 ~~—— On the other hand, judges are entitled to some leeway in extra-official activities.~~
23 ~~For example, misconduct may not include a judge being repeatedly and publicly~~
24 ~~discourteous to a spouse (not including physical abuse) even though this might cause~~
25 ~~some reasonable people to have diminished confidence in the courts. Rule 3(h)(2)~~
26 ~~states that conduct of this sort is covered, for example, when it might lead to a~~
27 ~~"substantial and widespread" lowering of such confidence.~~

28 ~~—— Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the~~
29 ~~definition of misconduct allegations "[d]irectly related to the merits of a decision or~~
30 ~~procedural ruling." This exclusion preserves the independence of judges in the exercise~~
31 ~~of judicial power by ensuring that the complaint procedure is not used to collaterally~~
32 ~~attack the substance of a judge's ruling. Any allegation that calls into question the~~
33 ~~correctness of an official action of a judge——without more——is merits-related. The~~
34 ~~phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article~~
35 ~~III cases or controversies. Thus, a complaint challenging the correctness of a chief~~
36 ~~judge's determination to dismiss a prior misconduct complaint would be properly~~
37 ~~dismissed as merits-related——in other words, as challenging the substance of the~~
38 ~~judge's administrative determination to dismiss the complaint——even though it does not~~
39 ~~concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge~~
40 ~~had incorrectly declined to approve a Criminal Justice Act voucher is merits-related~~
41 ~~under this standard.~~

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

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

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

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

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

ARTICLE II. MISCONDUCT AND DISABILITY

4. Covered Judges

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

Misconduct and Disability Definitions

(a) Misconduct Generally. Cognizable Misconduct: is conduct prejudicial to the effective and expeditious administration of the business of the courts. Cognizable Misconduct misconduct includes, but is not limited to, the following:

(1) Violation of Specific Standards of Judicial Conduct. Cognizable misconduct includes:

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

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

(C) having engaging in improper discussions ex parte communications with parties or counsel for one side in a case;

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

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

(F)(E) soliciting funds for organizations;

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

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

(I)(F) violating other specific, mandatory rules or standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure; or

1 (G) violating requirements for financial disclosure.

2 (2) Abusive or Harassing Behavior. Cognizable misconduct
3 includes:

4 (A) engaging in unwanted, offensive, or abusive sexual
5 conduct, including sexual harassment or assault;

6 (B) treating litigants, attorneys, judicial employees, or
7 others in a demonstrably egregious and hostile manner;
8 or

9 (C) creating a hostile work environment for judicial
10 employees.

11 (3) Discrimination. Cognizable misconduct includes
12 discrimination on the basis of race, sex, gender, gender
13 identity, pregnancy, sexual orientation, religion, national
14 origin, age, or disability;

15 (4) Retaliation. Cognizable misconduct includes retaliation
16 retaliating against complainants, witnesses, judicial
17 employees, or others for their participation participating in this
18 complaint process, or for reporting or disclosing judicial
19 misconduct;

20 (5) Interference or Failure to Comply with the Complaint Process.
21 Cognizable misconduct includes refusing, without good cause
22 shown, to cooperate in the investigation of a complaint or
23 enforcement of a decision rendered under these Rules; or

24 (6) Failure to Report or Disclose. Cognizable misconduct
25 includes failing to call to the attention of the relevant chief
26 district judge and chief circuit judge information reasonably
27 likely to constitute judicial misconduct or disability. A judge
28 who receives such information shall respect a request for
29 confidentiality but shall disclose the information to the chief
30 district judge and chief circuit judge, who shall also treat the
31 information as confidential. Some information will be
32 protected from disclosure by statute or rule. A judge's
33 promise of confidentiality may necessarily yield when there is
34 information of misconduct that is serious or egregious and
35 thus threatens the integrity and proper functioning of the
36 judiciary. This duty to report is included within every judge's
37 obligation to assist in addressing allegations of misconduct or

1 disability and to take appropriate corrective action as
 2 necessary.

3 **(7) Conduct Outside the Performance of Official Duties.**

4 Cognizable misconduct includes conduct occurring outside
 5 the performance of official duties if the conduct might have a
 6 prejudicial effect on the administration of the business of the
 7 courts, including a substantial and widespread lowering of
 8 public confidence in the courts among reasonable people.

9 **(b) Conduct Not Constituting Cognizable Misconduct.**

10 **(1) Allegations related to the merits of a decision or procedural**
 11 **ruling. Cognizable misconduct does not include:** an
 12 allegation that calls into question the correctness of a judge's
 13 ruling, including a failure to recuse, without more, is
 14 merits-related. If the decision or ruling is alleged to be the
 15 result of an improper motive, e.g., a bribe, ex parte contact,
 16 racial or ethnic bias, or improper conduct in rendering a
 17 decision or ruling, such as personally derogatory remarks
 18 irrelevant to the issues, the complaint is not cognizable to the
 19 extent that it attacks calls into question the merits of the
 20 decision.

21 **(2) Allegations about delay. Cognizable misconduct does not**
 22 **include** an allegation about delay in rendering a decision or
 23 ruling, unless the allegation concerns an improper motive in
 24 delaying a particular decision or habitual delay in a significant
 25 number of unrelated cases.

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

32 **COMMENTARY ON RULE 4**

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

36 The phrase "prejudicial to the effective and expeditious administration of the
 37 business of the courts" is not subject to precise definition, and subsection ~~(h)(1)~~ (a)
 38 therefore provides some specific examples. 28 U.S.C. § 351(a). The Code of Conduct

1 for United States Judges sets forth behavioral guidelines for judges. Although the Code
2 of Conduct for United States Judges may be informative, its main precepts are highly
3 general; the Code is in many potential applications aspirational rather than a set of
4 disciplinary rules. Ultimately, While the Code's Canons are informative, ultimately the
5 responsibility for determining what constitutes cognizable misconduct under the statute
6 is the province of the judicial council of the circuit, subject to such review and limitations
7 as are ordained by the statute and by is determined by the Act and these Rules, as
8 interpreted and applied by judicial councils, subject to review and limitations prescribed
9 by the Act and these Rules.

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

17 Rule 4(a)(2)(A) provides expressly that unwanted, offensive, or abusive sexual
18 conduct by a judge, including sexual harassment or assault, constitutes cognizable
19 misconduct. The Rule recognizes that anyone can be a victim of unwanted, offensive,
20 or abusive sexual conduct, regardless of their sex and of the sex of the judge engaging
21 in the misconduct.

22 The prohibition of discrimination contained in Rule 4(a)(3) includes discrimination
23 based on race, sex, gender or gender identity, pregnancy, sexual orientation, religion,
24 national origin, age, or disability. The enumerated grounds for discrimination and
25 harassment contained in Rule 4(a)(3) are not intended to be exhaustive.

26 Under Rule ~~3(h)(1)(G)~~ 4(a)(4), a judge's efforts to retaliate against any person for
27 reporting or disclosing misconduct, or otherwise participating in the his or her
28 involvement in the complaint process may constitute cognizable misconduct. The Rule
29 makes this the prohibition against retaliation explicit in the interest of promoting public
30 confidence in the complaint process.

31 Rules 4(a)(2), (3), and (4) reflect the judiciary's commitment to maintaining a
32 work environment in which all judicial employees are treated with dignity, fairness, and
33 respect, and are free from harassment, discrimination, and retaliation. See Code of
34 Conduct for U.S. Judges, Canon 3A(3) cmt. ("The duty to be respectful includes the
35 responsibility to avoid comment or behavior that could reasonably be interpreted as
36 harassment, prejudice or bias."); Guide to Judiciary Policy, vol. 12, ch. 2 § 220(a)
37 ("Discrimination or harassment directed at a judiciary employee due to race, color,
38 religion, national origin, sex, age, or disability is prohibited in accordance with the long-
39 standing national policy of the judiciary to promote equal employment opportunity.").

Rule 3(h)(1)(H) 4(a)(5) provides that a judge's refusal, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules may constitute cognizable misconduct. While the exercise of rights under the Fifth Amendment to the Constitution would constitute good cause under 3(h)(1)(H) 4(a)(5), given the fact-specific nature of the inquiry, it is not possible to otherwise anticipate all circumstances that might also constitute good cause. The Commentary on Rule 13 provides additional discussion regarding Rule 3(h)(1)(H) 4(a)(5). The Rules contemplate that judicial councils will not consider commencing proceedings under Rule 3(h)(1)(H) 4(a)(5) except as necessary after other means to acquire the information or enforce a decision have been tried or have proven futile.

All judges have a duty to bring to the attention of the relevant chief district judge and chief circuit judge information reasonably likely to constitute judicial misconduct or disability. See Rule 4(a)(6). This duty is included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate corrective action as necessary. Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable evidence of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence. These Rules incorporate those principles while allowing for appropriate, expeditious, fair, and effective resolutions of all such complaints.

The formal procedures outlined in these Rules are intended to address serious issues of judicial misconduct and disability. By statute and rule, the chief circuit judge administers the misconduct and disability complaint process, including the authority to investigate an allegation and, if warranted, to identify a formal complaint. See Rule 5.

In practice, however, not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action. In such cases, allegations may initially be addressed to the chief district judge or the chief circuit judge to determine whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.

"A judge, in deciding what action is appropriate, may take into account any request for confidentiality made by a person complaining of or reporting misconduct." Code of Conduct for United States Judges, Canon 3B(6) cmt.

Rule 3(h)(2) 4(a)(7) reflects that an allegation can meet the statutory standard for misconduct even though the judge's alleged conduct did not occur in the course of the performance of official duties. And some conduct in the categories listed under subsection (h)(1), or in categories not listed, might depending on the circumstances amount to "misconduct" under subsection (h)(2), or under both subsection (h)(1) and subsection (h)(2)). Also, the Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may

1 constitute misconduct under the Act and these Rules. For example, allegations that a
2 judge solicited funds for a charity or other organization or participated in a partisan
3 political event are cognizable under the Act even though they did not occur in the
4 course of the performance of the judge's official duties.

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

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

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

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

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

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

17 With regard to Rule **3(h)(3)(B) 4(b)(2)**, a complaint of delay in a single case is
18 excluded as merits-related. Such an allegation may be said to challenge the
19 correctness of an official action of the judge — **in other words, i.e.**, assigning a low
20 priority to deciding the particular case. But, **by the same token**, an allegation of a
21 habitual pattern of delay in a significant number of unrelated cases, or an allegation of
22 deliberate delay in a single case arising out of an **illicit improper** motive, is not merits-
23 related.

24 Rule **3(e) 4(c)** relates to disability and provides only the most general definition,
25 recognizing that a fact-specific approach is the only one available. A mental disability
26 could involve cognitive impairment or any psychiatric or psychological condition that
27 renders the judge unable to discharge the duties of office. Such duties may include
28 those that are administrative. If, for example, the judge is a chief judge, the judicial
29 council, fulfilling its obligation under 28 U.S.C. § 332(d)(1) to make "necessary and
30 appropriate orders for the effective and expeditious administration of justice," may find,
31 under 28 U.S.C. § 45(d) or § 136(e), that the judge is "temporarily unable to perform" his
32 or her chief-judge duties. In that event, an appropriate remedy could involve, under
33 Rule 20(b)(1)(D)(vii), temporary reassignment of chief-judge duties to the next judge
34 statutorily eligible to perform them.

35 **Confidentiality as referenced elsewhere in these Rules is directed toward**
36 **protecting the fairness and thoroughness of the process by which a complaint is filed or**
37 **initiated, investigated (in specific circumstances), and ultimately resolved, as specified**
38 **under these Rules. Nothing in these Rules concerning the confidentiality of the**
39 **complaint process or the Code of Conduct for Judicial Employees concerning use or**
40 **disclosure of confidential information received in the course of official duties prevents**
41 **judicial employees from reporting or disclosing misconduct. See Rule 23(c).**

ARTICLE III. INITIATION OF COMPLAINT**5. Identification of Complaint**

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

COMMENTARY ON RULE 5

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

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

1 resolution has been achieved or is feasible, the chief judge is required to identify a
2 complaint.

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

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

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

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

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

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

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

6. Filing of Complaint

- (a) **Form.** A complainant may use the [form reproduced in the appendix to these Rules](#) or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).
- (b) **Brief Statement of Facts.** A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:
- (1) what happened;
 - (2) when and where the relevant events happened;
 - (3) any information that would help an investigator check the facts; and
 - (4) for an allegation of disability, any additional facts that form the basis of that allegation.
- (c) **Legibility.** A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.
- (d) **Complainant's Address and Signature; Verification.** The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the submission will be accepted, but it will be reviewed under only Rule 5(b).
- (e) **Number of Copies; Envelope Marking.** The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

The Rule is adapted from the Illustrative Rules and is largely self-explanatory. As discussed in the Commentary to Rule 4 and in Rule 23(c), confidentiality as referenced elsewhere in these Rules does not prevent judicial employees from reporting or disclosing misconduct. See Rule 23(c).

7. Where to Initiate Complaint

(a) Where to File. Except as provided in (b),

(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) **Misconduct in Another Circuit; Transfer.** If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291–293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge’s home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge’s home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

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, where the chief judge is disqualified from considering a complaint, to 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.

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

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

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

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

10 COMMENTARY ON RULE 9

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

13 **10. Abuse of Complaint Procedure**

14 (a) **Abusive Complaints.** A complainant who has filed repetitive,
15 harassing, or frivolous complaints, or has otherwise abused the
16 complaint procedure, may be restricted from filing further
17 complaints. After giving the complainant an opportunity to show
18 cause in writing why his or her right to file further complaints should
19 not be limited, the judicial council may prohibit, restrict, or impose
20 conditions on the complainant's use of the complaint procedure.
21 Upon written request of the complainant, the judicial council may
22 revise or withdraw any prohibition, restriction, or condition
23 previously imposed.

24 (b) **Orchestrated Complaints.** When many essentially identical
25 complaints from different complainants are received and appear to
26 be part of an orchestrated campaign, the chief judge may
27 recommend that the judicial council issue a written order instructing
28 the circuit clerk to accept only a certain number of such complaints
29 for filing and to refuse to accept additional complaints. The circuit
30 clerk must send a copy of any such order to anyone whose
31 complaint was not accepted.

32 COMMENTARY ON RULE 10

33 This Rule is adapted from the Illustrative Rules.

34 Rule 10(a) provides a mechanism for a judicial council to restrict the filing of
35 further complaints by a single complainant who has abused the complaint procedure. In
36 some instances, however, the complaint procedure may be abused in a manner for

which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

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

ARTICLE ~~III~~IV. REVIEW OF COMPLAINT BY CHIEF JUDGE

11. Chief Judge's Review

- (a) Purpose of Chief Judge's Review.** When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25, in which case the most-senior active circuit judge not disqualified will review the complaint.

If a complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing a complaint, the chief judge must determine whether it should be:

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

- (b) Chief Judge's Inquiry.** In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the

complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report.

(c) Dismissal.

(1) Permissible grounds. A complaint ~~may must~~ be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

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

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

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

- (1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6; or
 - (2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.
- (e) Intervening Events. The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge.
- (f) Appointment of Special Committee. If some or all of a complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.
- (g) Notice of Chief Judge's Action; Petition for Review.
 - (1) When chief judge appoints special committee. If the chief judge appoints a special committee, the chief judge must notify the complainant and the subject judge that the matter has been referred to a committee, notify the complainant of a complainant's rights under Rule 16, and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Committee on Judicial Conduct and Disability.
 - (2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and memoranda incorporated by reference in the

order must be promptly sent to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.

(3) **Right to petition for review.** If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and the subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If the chief judge so disposes of a complaint that was identified under Rule 5 or filed by its subject judge, the chief judge must transmit the order and memoranda incorporated by reference in the order to the judicial council for review in accordance with Rule 19. In the event of such a transmission, the subject judge may make a written submission to the judicial council but will have no further right of review except as allowed under Rule 21(b)(1)(B). When a disposition is to be reviewed by the judicial council, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the council.

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

COMMENTARY ON RULE 11

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

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

1 that a matter is not “reasonably” in dispute if a limited inquiry shows that the allegations
2 do not constitute misconduct or disability, that they lack any reliable factual foundation,
3 or that they are conclusively refuted by objective evidence.

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

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

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

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

38 Subsection (c) describes the grounds on which a complaint may be dismissed.
39 These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report,
40 239 F.R.D. at 239–45. Subsection (c)(1)(A) permits dismissal of an allegation that,
41 even if true, does not constitute misconduct or disability under the statutory standard.

1 The proper standards are set out in Rule 3 and discussed in the Commentary on that
2 Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a
3 decision by a subject judge; this standard is also governed by Rule 3 and its
4 accompanying Commentary.

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

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

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

26 Rule 11(c)(1)(E) is intended, among other things, to cover situations when no
27 evidence is offered or identified, or when the only identified source is unavailable.
28 Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an
29 unnamed attorney told the complainant that the subject judge did X. *Id.* The subject
30 judge denies it. The chief judge requests that the complainant (who does not purport to
31 have observed the subject judge do X) identify the unnamed witness, or that the
32 unnamed witness come forward so that the chief judge can learn the unnamed
33 witness’s account. *Id.* The complainant responds that he has spoken with the
34 unnamed witness, that the unnamed witness is an attorney who practices in federal
35 court, and that the unnamed witness is unwilling to be identified or to come forward. *Id.*
36 at 243–44. The allegation is then properly dismissed as containing allegations that are
37 incapable of being established through investigation. *Id.*

38 If, however, the situation involves a reasonable dispute over credibility, the
39 matter should proceed. For example, the complainant alleges an impropriety and
40 alleges that he or she observed it and that there were no other witnesses; the subject
41 judge denies that the event occurred. Unless the complainant’s allegations are facially

1 incredible or so lacking indicia of reliability as to warrant dismissal under Rule
2 11(c)(1)(C), a special committee must be appointed because there is a material factual
3 question that is reasonably in dispute.

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

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

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

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

38 Where a subject judge’s conduct has resulted in identifiable, particularized harm
39 to the complainant or another individual, appropriate corrective action should include
40 steps taken by that judge to acknowledge and redress the harm, if possible, such as by
41 an apology, recusal from a case, or a pledge to refrain from similar conduct in the

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

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

13 Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief
14 judge to “conclude the proceeding,” if “action on the complaint is no longer necessary
15 because of intervening events,” such as a resignation from judicial office. Ordinarily,
16 ~~however,~~ stepping down from an administrative post such as chief judge, judicial-council
17 member, or court-committee chair does not constitute an event rendering unnecessary
18 any further action on a complaint alleging judicial misconduct. Breyer Committee
19 Report, 239 F.R.D. at 245. As long as the subject of a complaint ~~performs judicial~~
20 ~~duties, retains the judicial office,~~ a complaint alleging judicial misconduct must be
21 addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a).

22 While concluding a complaint proceeding precludes remedial action under the
23 Act and these Rules as to the subject judge, the Judicial Conference and the judicial
24 councils have ample authority to assess potential institutional issues related to the
25 complaint as part of their respective responsibilities to promote “the expeditious conduct
26 of court business,” 28 U.S.C. § 331, and to “make all necessary and appropriate orders
27 for the effective administration of justice within [each] circuit.” *Id.* at § 332(d)(1). Such
28 an assessment might include an analysis of what conditions may have enabled
29 misconduct or prevented its discovery, and what precautionary or curative steps could
30 be undertaken to prevent its recurrence.

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

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

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

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

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

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

12. Special Committee’s Composition

(a) **Membership.** Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. For the courts named in [28 U.S.C. § 363](#), the special committee must be selected from the judges serving on the subject judge’s court.

(b) **Presiding Officer.** When appointing the special committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the special committee’s appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser

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

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

10 (e) **Continuing Qualification of Special-Committee Member.** A member
11 of a special committee may continue to serve on the committee even
12 though the member relinquishes the position of chief judge, active
13 circuit judge, or active district judge, as the case may be, but only if
14 the member continues to hold office under Article III, Section 1, of
15 the Constitution of the United States, or under [28 U.S.C. § 171](#).

16 (f) **Inability of Special-Committee Member to Complete Service.** If a
17 member of a special committee can no longer serve because of
18 death, disability, disqualification, resignation, retirement from office,
19 or other reason, the chief judge must decide whether to appoint a
20 replacement member, either a circuit or district judge as needed
21 under (a). No special committee appointed under these Rules may
22 function with only a single member, and the votes of a two-member
23 committee must be unanimous.

24 (g) **Voting.** All actions by a special committee must be by vote of a
25 majority of all members of the committee.

26 COMMENTARY ON RULE 12

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

28 Rule 12 leaves the size of a special committee flexible, to be determined on a
29 case-by-case basis. The question the size of a special committee is one that should be
30 weighed with care in view of the potential for consuming the members' time; a large
31 committee should be appointed only if there is a special reason to do so. Rule 12(a)
32 acknowledges the common practice of including senior judges in the membership of a
33 special committee.

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

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

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

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

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

31 13. Conduct of Special-Committee Investigation

32 (a) **Extent and Methods of Special-Committee Investigation.** A special
33 committee should determine the appropriate extent and methods of
34 its investigation in light of the allegations ~~of-in~~ the complaint and ~~its~~
35 the committee's preliminary inquiry. In investigating the alleged
36 misconduct or disability, the special committee should take steps to
37 determine the full scope of the potential misconduct or disability,
38 including whether a pattern of misconduct or a broader disability
39 exists. The investigation may include use of appropriate experts or
40 other professionals. If, in the course of the investigation, the special
41 committee has cause to believe that the subject judge may have

engaged in misconduct or has a disability that is beyond the ~~scope of the complaint~~specific pending complaint, the committee must refer the new matter to the chief judge for a determination of whether action under Rule 5 or Rule 11 is necessary before the committee's investigation is expanded to include the new matter.

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

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

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

COMMENTARY ON RULE 13

This Rule is adapted from the Illustrative Rules.

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

Rule 13(a) includes a provision making clear that the special committee may choose to consult appropriate experts or other professionals if it determines that such a consultation is warranted. If, for example, the special committee has cause to believe that the subject judge may be unable to discharge all of the duties of office by reason of mental or physical disability, the committee could ask the subject judge to respond to inquiries and, if necessary, request the judge to undergo a medical or psychological examination. In advance of any such examination, the special committee may enter

1 into an agreement with the subject judge as to the scope and use that may be made of
2 the examination results. In addition or in the alternative, the special committee may ask
3 to review existing records, including medical records.

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

10 The special committee may also consider whether such a judge might be in
11 violation of his or her duty to cooperate in an investigation under these Rules, a duty
12 rooted not only in the Act's definition of misconduct but also in the Code of Conduct for
13 United States Judges, which emphasizes the need to maintain public confidence in the
14 judiciary, see Canon 2(A) and Canon 1 cmt., and requires judges to "facilitate the
15 performance of the administrative responsibilities of other judges and court personnel,"
16 Canon 3(B)(1). If the special committee finds a breach of the duty to cooperate and
17 believes that the breach may amount to misconduct under Rule ~~3(h)(1)(H)~~4(a)(3), it
18 should determine, under the final sentence of Rule 13(a), whether that possibility should
19 be referred to the chief judge for consideration of action under Rule 5 or Rule 11. See
20 also Commentary on Rule ~~34~~.

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

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

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

- 36 **(a) Purpose of Hearings.** The special committee may hold hearings to
37 take testimony and receive other evidence, to hear argument, or
38 both. If the special committee is investigating allegations against
39 more than one judge, it may hold joint or separate hearings.

- 1 **(b) Special-Committee Evidence.** Subject to Rule 15, the special
2 committee must obtain material, nonredundant evidence in the form
3 it considers appropriate. In the special committee's discretion,
4 evidence may be obtained by committee members, staff, or both.
5 Witnesses offering testimonial evidence may include the
6 complainant and the subject judge.
- 7 **(c) Counsel for Witnesses.** The subject judge has the right to counsel.
8 The special committee has discretion to decide whether other
9 witnesses may have counsel present when they testify.
- 10 **(d) Witness Fees.** Witness fees must be paid as provided in [28 U.S.C.](#)
11 [§ 1821](#).
- 12 **(e) Oath.** All testimony taken at a hearing must be given under oath or
13 affirmation.
- 14 **(f) Rules of Evidence.** The Federal Rules of Evidence do not apply to
15 special-committee hearings.
- 16 **(g) Record and Transcript.** A record and transcript must be made of all
17 hearings.

18 COMMENTARY ON RULE 14

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

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

31 Rule 14(b) contemplates that material evidence will be obtained by the special
32 committee and presented in the form of affidavits, live testimony, etc. Staff or others
33 who are organizing the hearings should regard it as their role to present evidence
34 representing the entire picture. With respect to testimonial evidence, the subject judge
35 should normally be called as a special-committee witness. Cases may arise in which
36 the subject judge will not testify voluntarily. In such cases, subpoena powers are
37 available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes

the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

15. Subject Judge's Rights

(a) Notice.

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

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

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

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

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

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

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

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

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

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

5 COMMENTARY ON RULE 15

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

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

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

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

- 23 **(a) Notice.** The complainant must receive written notice of the
24 **investigation as provided in Rule 11(g)(1). When the special**
25 **committee’s report to the judicial council is filed, the complainant**
26 **must be notified of the filing. The judicial council may, in its**
27 **discretion, provide a copy of the report of a special committee to the**
28 **complainant.**
- 29 **(b) Opportunity to Provide Evidence.** If the complainant knows of
30 **relevant evidence not already before the special committee, the**
31 **complainant may briefly explain in writing the basis of that**
32 **knowledge and the nature of that evidence. If the special committee**
33 **determines that the complainant has information not already known**
34 **to the committee that would assist in the committee’s investigation,**
35 **a representative of the committee must interview the complainant.**
- 36 **(c) Presentation of Argument.** The complainant may submit written
37 **argument to the special committee. In its discretion, the special**
38 **committee may permit the complainant to offer oral argument.**

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

~~**(e) Cooperation.** In exercising its discretion under this Rule, the special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.~~

COMMENTARY ON RULE 16

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

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

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

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

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

17. Special-Committee Report

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

COMMENTARY ON RULE 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statements and documents to the Committee on Judicial Conduct and Disability was new at the time the Judicial Conference promulgated the Rules for Judicial-Conduct and Judicial-Disability Proceedings in 2008.

ARTICLE VI. REVIEW BY JUDICIAL COUNCIL**18. Petition for Review of Chief-Judge Disposition Under Rule 11(c), (d), or (e)**

(a) **Petition for Review.** After the chief judge issues an order under Rule 11(c), (d), or (e), the complainant or the subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under [28 U.S.C. § 358](#), the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) **When to File; Form; Where to File.** A petition for review must be filed in the office of the circuit clerk within 42 days after the date of the chief judge's order. The petition for review should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The petition for review should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . ." and state the reasons why the petition should be granted. It must be signed.

(c) **Receipt and Distribution of Petition.** A circuit clerk who receives a petition for review filed in accordance with this Rule must:

(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;

(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

(A) copies of the complaint;

(B) all materials obtained by the chief judge in connection with the inquiry;

(C) the chief judge's order disposing of the complaint;

(D) any memorandum in support of the chief judge's order;

(E) the petition for review; and

(F) an appropriate ballot; and

(3) send the petition for review to the Committee on Judicial Conduct and Disability. Unless the Committee on Judicial Conduct and Disability requests them, the circuit clerk will not send copies of the materials obtained by the chief judge.

(d) Untimely Petition. The circuit clerk must refuse to accept a petition that is received after the time allowed in (b).

(e) Timely Petition Not in Proper Form. When the circuit clerk receives a petition for review filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the circuit clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within the original time allowed for filing the petition or within 21 days after the date on which a notice of the deficiencies was sent to the complainant, whichever is later. If the deficiencies are corrected within the time allowed, the circuit clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the circuit clerk must reject the petition.

COMMENTARY ON RULE 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits the subject judge, as well as the complainant, to petition for review of the chief judge's order dismissing a complaint under Rule 11(c), or

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

9 Subsection (b) contains a time limit of 42 days to file a petition for review. It is
10 important to establish a time limit on petitions for review of chief judges' dispositions in
11 order to provide finality to the process. If the complaint requires an investigation, the
12 investigation should proceed; if it does not, the subject judge should know that the
13 matter is closed.

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

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

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

20 **(a) Rights of Subject Judge.** At any time after a complainant files a
21 petition for review, the subject judge may file a written response with
22 the circuit clerk. The circuit clerk must promptly distribute copies of
23 the response to each member of the judicial council or of the
24 relevant panel, unless that member is disqualified under Rule 25.
25 Copies must also be distributed to the chief judge, to the
26 complainant, and to the Committee on Judicial Conduct and
27 Disability. The subject judge must not otherwise communicate with
28 individual judicial-council members about the matter. The subject
29 judge must be given copies of any communications to the judicial
30 council from the complainant.

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

- 33 **(1)** affirm the chief judge's disposition by denying the petition;
- 34 **(2)** return the matter to the chief judge with directions to conduct
35 a further inquiry under Rule 11(b) or to identify a complaint
36 under Rule 5;
- 37 **(3)** return the matter to the chief judge with directions to appoint a
38 special committee under Rule 11(f); or

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

(c) Notice of Judicial-Council Decision. Copies of the judicial council's order, together with memoranda incorporated by reference in the order and separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.

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

(e) Review of Judicial-Council Decision. If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented, the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b).

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

COMMENTARY ON RULE 19

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

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

Under Rule 19(b), after considering a petition for review and the materials before it, a judicial council may return a matter to the chief judge to take various actions, including conducting further inquiry under Rule 11(b), identifying a complaint under Rule 5, or appointing a special committee under Rule 11(f).

A petition for review of a judicial council's decision under this Rule may be filed in any matter in which one or more members of the council dissented from the order. See Rule 21(b).

20. Judicial-Council Action Following Appointment of Special Committee

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

(b) Judicial-Council Action.

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

(A) dismiss the complaint because:

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

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

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

(iv) the complaint is otherwise not appropriate for consideration under [28 U.S.C. §§ 351–364](#).

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

(C) refer the complaint to the Judicial Conference with the judicial council's recommendations for action.

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

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

- (ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;
- (iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under [28 U.S.C. § 631\(i\)](#) or [42 U.S.C. § 300aa-12\(c\)\(2\)](#);
- (iv) in the case of a bankruptcy judge, removing the judge from office under [28 U.S.C. § 152\(e\)](#);
- (v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived;
- (vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under [28 U.S.C. § 372\(b\)](#) so that an additional judge may be appointed; and
- (vii) in the case of a circuit chief judge or district chief judge, finding that the judge is temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge in accordance with [28 U.S.C. § 45\(d\)](#) or [§ 136\(e\)](#).

(E) take any combination of actions described in (b)(1)(A)–(D) of this Rule that is within its power.

(2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

- (A) might constitute ground for impeachment; or
- (B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) **Inadequate Basis for Decision.** If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general

scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) **Judicial-Council Vote.** Judicial-council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the judicial council.

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

(f) **Judicial-Council Order.** Judicial-council action must be by written order. Unless the judicial council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. Such a memorandum may incorporate all or part of any underlying special-committee report. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. The order and memoranda incorporated by reference in the order must be provided to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b). If the complaint was identified under Rule 5 or filed by its subject judge, the judicial council must transmit the order and memoranda incorporated by reference in the order to the Committee on Judicial Conduct and Disability for review in accordance with Rule 21. In the event of such a transmission, the subject judge may make a written submission to the Committee on Judicial Conduct and Disability but will have no further right of review.

COMMENTARY ON RULE 20

This Rule is largely adapted from the Illustrative Rules.

1 Rule 20(a) provides that within 21 days after the filing of the report of a special
2 committee, the subject judge may address a written response to all of the members of
3 the judicial council. The subject judge must also be given an opportunity to present
4 argument to the judicial council, personally or through counsel, or both, at the direction
5 of the council. Whether that argument is written or oral would be for the judicial council
6 to determine. The subject judge may not otherwise communicate with judicial-council
7 members about the matter.

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

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

24 Under 28 U.S.C. §§ 45(d) and 136(e), which provide for succession where “a
25 chief judge is temporarily unable to perform his duties as such,” the determination
26 whether such an inability exists is not expressly reserved to the chief judge. Nor,
27 indeed, is it assigned to any particular judge or court-governance body. Clearly,
28 however, a chief judge’s inability to function as chief could implicate “the effective and
29 expeditious administration of justice,” which the judicial council of the circuit must, under
30 28 U.S.C. § 332(d)(1), “make all necessary and appropriate orders” to secure. For this
31 reason, such reassignment is among a judicial council’s remedial options, as subsection
32 (b)(1)(D)(vii) makes clear. Consistent with 28 U.S.C. §§ 45(d) and 136(e), however, any
33 reassignment of chief-judge duties must not outlast the subject judge’s inability to
34 perform them. Nor can such reassignment result in any extension of the subject judge’s
35 term as chief judge.

36 Rule 20(c) provides that a judicial council may return a matter to a special
37 committee to augment its findings and report of its investigation to include additional
38 areas of inquiry and investigation to allow the judicial council to reach a complete and
39 fully informed judgment. Rule 20(c) also provides that if the judicial council decides to
40 conduct an additional investigation, the subject judge must be given adequate prior
41 notice in writing of that decision and of the general scope and purpose of the additional
42 investigation. The conduct of the investigation will be generally in accordance with the

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

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

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

Rule 20(f) requires that judicial-council action be by order and, normally, that it be supported with a memorandum of factual determinations and reasons. Notice of the action must be given to the complainant and the subject judge, and must include notice of any right to petition for review of the judicial council's decision under Rule 21(b). Because an identified complaint has no "complainant" to petition for review, a judicial council's dispositive order on an identified complaint on which a special committee has been appointed must be transmitted to the Committee on Judicial Conduct and Disability for review. The same will apply where a complaint was filed by its subject judge.

ARTICLE VII. REVIEW BY COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

21. Committee on Judicial Conduct and Disability

- (a) Committee Review.** The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its review of judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion. Its disposition of petitions for review is ordinarily final. The Judicial Conference may, in its sole discretion, review any such Committee

1 decision, but a complainant or subject judge does not have a right to
2 this review.

3 **(b) Reviewable Matters.**

4 **(1) Upon petition.** A complainant or subject judge may petition
5 the Committee for review of a judicial-council order entered in
6 accordance with:

7 **(A)** Rule 20(b)(1)(A), (B), (D), or (E); or

8 **(B)** Rule 19(b)(1) or (4) if one or more members of the
9 judicial council dissented from the order.

10 **(2) Upon Committee's initiative.** At its initiative and in its sole
11 discretion, the Committee may review any judicial-council
12 order entered under Rule 19(b)(1) or (4), but only to determine
13 whether a special committee should be appointed. Before
14 undertaking the review, the Committee must invite that judicial
15 council to explain why it believes the appointment of a special
16 committee is unnecessary, unless the reasons are clearly
17 stated in the council's order denying the petition for review. If
18 the Committee believes that it would benefit from a
19 submission by the subject judge, it may issue an appropriate
20 request. If the Committee determines that a special committee
21 should be appointed, the Committee must issue a written
22 decision giving its reasons.

23 **(c) Committee Vote.** Any member of the Committee from the same
24 circuit as the subject judge is disqualified from considering or voting
25 on a petition for review related to that subject judge. Committee
26 decisions under (b) of this Rule must be by majority vote of the
27 qualified Committee members. Those members hearing the petition
28 for review should serve in that capacity until final disposition of the
29 petition, whether or not their term of committee membership has
30 ended. If only six members are qualified to consider a petition for
31 review, the Chief Justice shall select an additional judge to join the
32 qualified members to consider the petition. If four or fewer members
33 are qualified to consider a petition for review, the Chief Justice shall
34 select a panel of five judges, including the qualified Committee
35 members, to consider it.

36 **(d) Additional Investigation.** Except in extraordinary circumstances, the
37 Committee will not conduct an additional investigation. The
38 Committee may return the matter to the judicial council with
39 directions to undertake an additional investigation. If the Committee

1 conducts an additional investigation, it will exercise the powers of
2 the Judicial Conference under [28 U.S.C. § 331](#).

3 (e) Oral Argument; Personal Appearance. There is ordinarily no oral
4 argument or personal appearance before the Committee. In its
5 discretion, the Committee may permit written submissions.

6 (f) Committee Decision. A Committee decision under this Rule must be
7 transmitted promptly to the Judicial Conference. Other distribution
8 will be by the Administrative Office at the direction of the Committee
9 chair.

10 (g) Finality. All orders of the Judicial Conference or of the Committee
11 (when the Conference does not exercise its power of review) are
12 final.

13 COMMENTARY ON RULE 21

14 This Rule is largely self-explanatory.

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

19 Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of
20 a dismissal or a conclusion of a complaint under Rule 19(b)(1) or (4). Where one or
21 more members of a judicial council reviewing a petition have dissented, the complainant
22 or the subject judge has the right to petition for review by the Committee. Under Rule
23 21(b)(2), the Committee may review such a dismissal or conclusion in its sole
24 discretion, whether or not a dissent occurred, and only as to the appointment of a
25 special committee. Any review under Rule 21(b)(2) will be conducted as soon as
26 practicable after the dismissal or conclusion at issue. No party has a right to such
27 review, and such review will be rare.

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

36 Under this Rule, all Committee decisions are final in that they are unreviewable
37 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 reviewable matter, as defined in Rule 21(b)(1), 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 the 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 for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition for review should not normally exceed 20 pages plus necessary attachments. A petition for review must be signed by the petitioner or his or her attorney.

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

(d) **Action on Receipt of Petition.** When a petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), is submitted in accordance with this Rule, the Administrative Office shall acknowledge its receipt, notify the chair of the Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

COMMENTARY ON RULE 22

Rule 22 is self-explanatory.

ARTICLE VII. MISCELLANEOUS RULES**23. Confidentiality**

(a) Confidentiality Generally. Confidentiality as referenced in these Rules is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules.

(b) Confidentiality in the Complaint Process.

(a1) General Rule. The consideration of a complaint by a chief judge, a special committee, a judicial council, or the Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be **publicly** disclosed by any judge or **judicial** employee, ~~of the judiciary~~ or by any person who records or transcribes testimony except as allowed by these Rules. A chief judge, **a judicial council, or the Committee on Judicial Conduct and Disability** may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability.

(b2) Files. All files related to a complaint must be separately maintained with appropriate security precautions to ensure confidentiality.

(e3) Disclosure in Decisions. Except as otherwise provided in Rule 24, written decisions of a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of a council or the Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(d4) Availability to Judicial Conference. On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee on Judicial Conduct and Disability to records of proceedings under the Act at the site where the records are kept.

(e5) Availability to District Court. If the judicial council directs the initiation of proceedings for removal of a magistrate judge

under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f6) Impeachment Proceedings Communications with the House of Representatives. If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives. The Secretary of the Judicial Conference may authorize disclosure of the existence of a complaint or proceeding to the appropriate officials in the House of Representatives.

(g7) Subject Judge's Consent. If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted under these Rules, not be revealed.

(h8) Disclosure in Special Circumstances. The Judicial Conference, its Committee on Judicial Conduct and Disability, ~~or~~ a judicial council, or a chief judge may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. For example, D~~d~~ disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i9) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(j10) Assistance and Consultation. Nothing in this Rule prohibits a chief judge, a special committee, a judicial council, or the Judicial Conference or its Committee on Judicial Conduct and Disability, in the performance of any function authorized under the Act or these Rules, from seeking the help of qualified staff or experts or from consulting other judges who may be helpful regarding the performance of that function.

k(c) Disclosure of Misconduct and Disability. Nothing in these Rules and Commentary concerning the confidentiality of the complaint process, or in the Code of Conduct for Judicial Employees concerning the use or disclosure of confidential information received in the course of official duties, prevents a judicial employee from reporting or disclosing misconduct.

COMMENTARY ON RULE 23

Rule 23 was adapted from the Illustrative Rules.

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

With regard to the first question, Rule 23(ab)(1) provides that judges, employees of the judiciary, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(ab)(1) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, a judicial council, the Judicial Conference, and the Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(eb)(5) so provides.

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not

1 prevent the chief judge from “communicat[ing] orally or in writing with . . . [persons] who
2 may have knowledge of the matter,” as part of a limited inquiry conducted by the chief
3 judge under Rule 11(b).

4 Rule 23 recognizes that there must be some exceptions to the Act’s
5 confidentiality requirement. For example, the Act requires that certain orders and the
6 reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(eb)(3) makes it
7 explicit that written decisions, as well as dissenting opinions and separate statements,
8 may contain references to information that would otherwise be confidential and that
9 such information may be made public. However, subsection (eb)(3) is subject to Rule
10 24(a), which provides the general rule regarding the public availability of decisions. For
11 example, the name of a subject judge cannot be made public in a decision if disclosure
12 of the name is prohibited by that Rule.

13 The Act makes clear that there is a barrier of confidentiality between the judicial
14 branch and the legislative branch. It provides that material may be disclosed to
15 Congress only if it is believed necessary to an impeachment investigation or trial of a
16 judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the
17 Judicial Conference to transmit the record of a proceeding to the House of
18 Representatives if the Conference believes that impeachment of a subject judge may be
19 appropriate. Rule 23(fb)(6) implements this requirement.

20 The Act provides that confidential materials may be disclosed if authorized in
21 writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule
22 23(bg)(7) implements this requirement. Once the subject judge has consented to the
23 disclosure of confidential materials related to a complaint, the chief judge ordinarily will
24 refuse consent only to the extent necessary to protect the confidentiality interests of the
25 complainant or of witnesses who have testified in investigatory proceedings or who
26 have provided information in response to a limited inquiry undertaken pursuant to Rule
27 11. It will generally be necessary, therefore, for the chief judge to require that the
28 identities of the complainant or of such witnesses, as well as any identifying information,
29 be shielded in any materials disclosed, except insofar as the chief judge has secured
30 the consent of the complainant or of a particular witness to disclosure, or there is a
31 demonstrated need for disclosure of the information that, in the judgment of the chief
32 judge, outweighs the confidentiality interest of the complainant or of a particular witness
33 (as may be the case where the complainant is delusional or where the complainant or a
34 particular witness has already demonstrated a lack of concern about maintaining the
35 confidentiality of the proceedings).

36 Rule 23(bh)(8) permits disclosure of additional information in circumstances not
37 enumerated. For example, disclosure may be appropriate to permit a prosecution for
38 perjury based on testimony given before a special committee. ~~Another example might,~~
39 where a special committee discovers involve evidence of a judge’s criminal conduct
40 conduct by a judge discovered by a special committee, to permit disciplinary action by a
41 bar association or other licensing body, or in other appropriate circumstances.

1 Under subsection (b)(8), where a complainant or other person has publicly
2 released information regarding the existence of a complaint proceeding, the Judicial
3 Conference, the Committee on Judicial Conduct and Disability, a judicial council, or a
4 chief judge may authorize the disclosure of information about the consideration of the
5 complaint, including orders and other materials related to the complaint proceeding, in
6 the interest of assuring the public that the judiciary is acting effectively and expeditiously
7 in addressing the relevant complaint proceeding.

8 Subsection (~~h~~**b**)(8) also permits the authorization of disclosure of information
9 about the consideration of a complaint, including the papers, documents, and transcripts
10 relating to the investigation, to judicial researchers engaged in the study or evaluation of
11 experience under the Act and related modes of judicial discipline. The Rule envisions
12 disclosure of information from the official record of a complaint proceeding to a limited
13 category of persons for appropriately authorized research purposes only, and with
14 appropriate safeguards to protect individual identities in any published research results.
15 In authorizing disclosure, a judicial council may refuse to release particular materials
16 when such release would be contrary to the interests of justice, or when those materials
17 constitute purely internal communications. The Rule does not envision disclosure of
18 purely internal communications between judges and their colleagues and staff.

19 Under Rule 23(~~h~~**b**)(10), any of the specified judges or entities performing a
20 function authorized under these Rules may seek expert or staff assistance or may
21 consult with other judges who may be helpful regarding performance of that function;
22 the confidentiality requirement does not preclude this. A chief judge, for example, may
23 properly seek the advice and assistance of another judge who the chief judge deems to
24 be in the best position to communicate with the subject judge in an attempt to bring
25 about corrective action. As another example, a new chief judge may wish to confer with
26 a predecessor to learn how similar complaints have been handled. In consulting with
27 other judges, of course, a chief judge should disclose information regarding the
28 complaint only to the extent the chief judge deems necessary under the circumstances.

29 Rule 23(c) provides that confidentiality as referenced in these Rules and
30 Commentary is directed toward protecting the fairness and thoroughness of the process
31 by which a complaint is filed or initiated, investigated (in specific circumstances), and
32 ultimately resolved, as specified under these Rules. Nothing in these Rules concerning
33 the confidentiality of the complaint process or the Code of Conduct for Judicial
34 Employees concerning use or disclosure of confidential information received in the
35 course of official duties prevents judicial employees from reporting or disclosing
36 misconduct. Judges should bring such matters to the attention of an appropriate judge
37 or other official. See Rule 4(a)(6). Judges should be mindful of Canon 3(B)(6) of the
38 Code of Conduct for United States Judges, which provides in part that a judge “should
39 take appropriate action upon learning of reliable evidence indicating the likelihood that a
40 judge’s conduct contravened this Code.”

24. Public Availability of Decisions

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

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

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

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

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

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

(b) Manner of Making Public. The orders described in (a) must be made public by placing the orders on the court's public website and by placing them in a publicly accessible file in the office of the circuit clerk ~~and by placing the orders on the court's public website~~. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Committee on Judicial Conduct and Disability will make available on the judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional

information to the public on how complaints are addressed under the Act.

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

(d) **Complaints Referred to Judicial Conference.** If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

COMMENTARY ON RULE 24

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

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of a chief judge, a judicial council, and the Committee on Judicial Conduct and Disability, as well as the texts of memoranda incorporated by reference in those orders, together with any dissenting

1 opinions or separate statements by members of the judicial council. No memoranda
2 other than those incorporated by reference in those orders shall be disclosed.
3 However, these orders and memoranda are to be made public only when final action on
4 the complaint has been taken and any right of review has been exhausted. The
5 provision that decisions will be made public only after final action has been taken is
6 designed in part to avoid public disclosure of the existence of pending proceedings.
7 Whether the name of the subject judge is disclosed will then depend on the nature of
8 the final action. If the final action is an order predicated on a finding of misconduct or
9 disability (other than a privately communicated censure or reprimand) the name of the
10 subject judge must be made public. If the final action is dismissal of the complaint, the
11 name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a
12 proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary
13 corrective action, the name of the subject judge must generally should not be disclosed,
14 except where the complainant or another person has disclosed the existence of a
15 complaint proceeding to the public. Shielding the name of the subject judge in this
16 circumstance should encourage informal disposition.

17 If a complaint is dismissed as moot, or because intervening events have made
18 action on the complaint unnecessary, after appointment of a special committee, Rule
19 24(a)(2) allows the judicial council to determine whether the subject judge will be
20 identified. In such a case, no final decision has been rendered on the merits, but it may
21 be in the public interest — particularly if a judicial officer resigns in the course of an
22 investigation — to make the identity of the subject judge known.

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

26 Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if
27 the chief judge so orders. Identifying the complainant when the subject judge is not
28 identified would increase the likelihood that the identity of the subject judge would
29 become publicly known, thus circumventing the policy of nondisclosure. It may not
30 always be practicable to shield the complainant's identity while making public disclosure
31 of the judicial council's order and supporting memoranda; in some circumstances,
32 moreover, the complainant may consent to public identification.

33 Rule 24(b) makes clear that circuits must post on their external websites all
34 orders required to be made public under Rule 24(a). Individual circuits should seek
35 ways to make decisions on complaints filed in their courts more readily accessible to the
36 public through searchable electronic indices.

37 Matters involving orders issued following a special-committee investigation often
38 involve highly sensitive situations, and it is important that judicial councils have every
39 opportunity to reach a correct and just outcome. This would include the ability to reach
40 informal resolution before a subject judge's identity must be released. But there must
41 also come a point of procedural finality. The date of finality — and thus the time at

1 which other safeguards and rules such as the publication requirement are triggered —
2 is the date on which the judicial council issues a Final Order. See *In re Complaint of*
3 *Judicial Misconduct*, 751 F.3d 611, 617 (2014) (requiring publication of a judicial council
4 order “[e]ven though the period for review had not yet elapsed” and concluding that “the
5 order was a final decision because the Council had adjudicated the matter on the merits
6 after having received a report from a special investigating committee”). As determined
7 in the cited case, modifications of this kind to a final order are subject to review by the
8 Committee on Judicial Conduct and Disability.

9 25. Disqualification

- 10 (a) **General Rule.** Any judge is disqualified from participating in any
11 proceeding under these Rules if the judge, ~~in his or her discretion,~~
12 concludes that circumstances warrant disqualification. If a
13 complaint is filed by a judge, that judge is disqualified from
14 participating in any consideration of the complaint except to the
15 extent that these Rules provide for a complainant’s participation. A
16 chief judge who has identified a complaint under Rule 5 is not
17 automatically disqualified from considering the complaint.
- 18 (b) **Subject Judge.** A subject judge, including a chief judge, is
19 disqualified from considering a complaint except to the extent that
20 these Rules provide for participation by a subject judge.
- 21 (c) **Chief Judge Disqualified from Considering Petition for Review of**
22 **Chief Judge’s Order.** If a petition for review of the chief judge’s order
23 entered under Rule 11(c), (d), or (e) is filed with the judicial council in
24 accordance with Rule 18, the chief judge is disqualified from
25 participating in the council’s consideration of the petition.
- 26 (d) **Member of Special Committee Not Disqualified.** A member of the
27 judicial council who serves on a special committee, including the
28 chief judge, is not disqualified from participating in council
29 consideration of the committee’s report.
- 30 (e) **Subject Judge’s Disqualification After Appointment of Special**
31 **Committee.** Upon appointment of a special committee, the subject
32 judge is disqualified from participating in the identification or
33 consideration of any complaint, related or unrelated to the pending
34 matter, under the Act or these Rules. The disqualification continues
35 until all proceedings on the complaint against the subject judge are
36 finally terminated with no further right of review.
- 37 (f) **Substitute for Disqualified Chief Judge.** If the chief judge is
38 disqualified from performing duties that the Act and these Rules
39 assign to a chief judge (including where a complaint is filed against a

chief judge), those duties must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council.

(g) Judicial-Council Action When Multiple Judges Disqualified. Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or those judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) Disqualification of Members of Committee on Judicial Conduct and Disability. No member of the Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

COMMENTARY ON RULE 25

Rule 25 is adapted from the Illustrative Rules.

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

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

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

30 Under the Act, a complaint against the chief judge is to be handled by "that circuit
31 judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c).
32 Rule 25(f) provides that seniority among judges other than the chief judge is to be
33 determined by date of commission, with the result that complaints against the chief
34 judge may be routed to a former chief judge or other judge who was appointed earlier
35 than the chief judge. The Rules do not purport to prescribe who is to preside over
36 meetings of the judicial council. Consequently, where the presiding member of the
37 judicial council is disqualified from participating under these Rules, the order of
38 precedence prescribed by Rule 25(f) for performing "duties that the Act and these Rules
39 assign to a chief judge" does not apply to determine the acting presiding member of the
40 council. That is a matter left to the internal rules or operating practices of each judicial
41 council. In most cases the most senior active circuit judge who is a member of the
42 judicial council and who is not disqualified will preside.

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

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

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

28 Applying a rule of necessity in these situations is consistent with the appearance
29 of justice. See, e.g., *In re Complaint of Doe*, 2 F.3d 308 (8th Cir. Jud. Council 1993)
30 (invoking the rule of necessity); *In re Complaint of Judicial Misconduct*, No. 91-80464
31 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge
32 to dispose of a patently insubstantial complaint that names all active circuit judges in the
33 circuit.

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

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

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

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

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

18 **COMMENTARY ON RULE 26**

19 Rule 26 implements the Breyer Committee's recommended use of transfers.
20 Breyer Committee Report, 239 F.R.D. at 214–15.

21 Rule 26 authorizes the transfer of a complaint proceeding to another judicial
22 council selected by the Chief Justice. Such transfers may be appropriate, for example,
23 in the case of a serious complaint where there are multiple disqualifications among the
24 original judicial council, where the issues are highly visible and a local disposition may
25 weaken public confidence in the process, where internal tensions arising in the council
26 as a result of the complaint render disposition by a less involved council appropriate, or
27 where a complaint calls into question policies or governance of the home court of
28 appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes
29 in a judicial council over where to transfer a sensitive matter and to ensure that the
30 transferee council accepts the matter.

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

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

- 36 **(a) Complaint Pending Before Chief Judge. With the chief judge's**
37 **consent, the complainant may withdraw a complaint that is before**
38 **the chief judge for a decision under Rule 11. The withdrawal of a**

1 **complaint will not prevent the chief judge from identifying or having**
2 **to identify a complaint under Rule 5 based on the withdrawn**
3 **complaint.**

4 **(b) Complaint Pending Before Special Committee or Judicial Council.**
5 **After a complaint has been referred to the special committee for**
6 **investigation and before the committee files its report, the**
7 **complainant may withdraw the complaint only with the consent of**
8 **both the subject judge and either the special committee or the**
9 **judicial council.**

10 **(c) Petition for Review. A petition for review addressed to the judicial**
11 **council under Rule 18, or the Committee on Judicial Conduct and**
12 **Disability under Rule 22, may be withdrawn if no action on the**
13 **petition has been taken.**

14 COMMENTARY ON RULE 27

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

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

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

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

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

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

9 **29. Effective Date**

10 These Rules will become effective 30 days after promulgation by the Judicial
11 Conference of the United States. Any amendments to these Rules will become
12 effective upon promulgation by the Judicial Conference.

13 Appendix to the Rules: [Form AO 310 \(Complaint of Judicial Misconduct or](#)
14 [Disability\)](#)