



The American Judicature Society appreciates the opportunity to comment on the Draft Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364, promulgated by the Judicial Conference Committee on Judicial Conduct and Disability. The Society believes the draft rules demonstrate the federal judiciary's commitment to effectively and consistently implementing the Judicial Conduct and Disability Act and applauds the Committee's impressive work on this important effort.

The Society does have several proposals for revising the draft rules as indicated in the attached comments. Most of the Society's proposals are designed to clarify or emphasize particular provisions, in several examples, by moving language from the comment to the text of the rule. In addition, the Society proposes two new express exceptions to confidentiality that will allow disclosure when the subject of a complaint has become public through independent sources or when there is evidence of a crime, violation of the code of professional responsibility, or threat to someone's safety, insofar as such an exception would be consistent with the Act. Many state judicial conduct commissions have such exceptions, which can be effective tools for promoting confidence in the fairness and effectiveness of the proceedings. The Society also proposes changing "Judicial researchers" to "authorized researchers" in Rule 23(h), mindful both that the federal judiciary has benefited from the authorized research of independent scholars in the past and that the provision requires the specific approval of the Judicial Conference or its Committee on Judicial Conduct and Disability.

The Society considered whether the draft rules relating to the handling of complaints regarding delay and disqualification might inadvertently fail to promote the purposes of the Act. The Society is concerned that characterizing a complaint of delay in a single case as merits-related (absent allegation of an improper motive) would discourage attorneys and litigants from filing such complaints or lead to the automatic dismissal of such complaints by the chief judge. Delay can have deleterious effects on litigants, and there should be a mechanism for litigants and attorneys to bring significant delay in even a single case to the attention of the chief judge. Moreover, because any single litigant or attorney (except perhaps the U.S. Attorney) would be unlikely to know enough about the judge's docket to allege a pattern of delay, automatic dismissal of allegations of delay would prevent a chief judge from identifying a pattern that could indicate serious administrative failures or a possible disability, preventing the chief judge from taking informal action or the subject judge from taking corrective action. Therefore, the Society proposes additional commentary on Rule 3(b)(1)(A)(ii) that provides: "a chief judge should make a limited inquiry upon receiving a complaint of delay in even a single case

to determine whether to identify a complaint based on a pattern of unreasonable delay, which may evidence serious administrative failings constituting misconduct or a possible disability.”

Similarly, the Society believes that treating all allegations of failure to disqualify as merits-related unless there is an improper motive is too broad. A judge’s failure to disqualify might not represent a decision that disqualification is not necessary but a failure to even consider whether any of the circumstances identified in 28 U.S.C. §455 are present in a case, an abdication of a judge’s statutory duty that cannot fairly be characterized as merits-related and that may constitute misconduct. While the new conflict-identification software will reduce the number of instances in which a judge unknowingly presides in a case when the judge, for example, owns stock in one of the parties, the software is not fool-proof, and allowing complaints for failure to recuse when required will emphasize the importance of diligence and allow for informal or corrective action or even public action where appropriate. Therefore, the Society proposes that the rules use the term “decision not to disqualify” rather than “failure to recuse,” and suggests that the commentary to Rule 3(b)(1)(A)(i) state that allegations that a judge “knew or should have known that one of the circumstances identified by 28 U.S.C. §455(b) requires disqualification are not merits-related.” Finally, the Society notes that the Breyer Committee Report recommended that each Judicial Council consider establishing local bar committees that could serve as conduits between members of the bar and chief judges concerning potential complaints and programs to assist judges who may be disabled or have other problems affecting their work. The Society understands that the rules are not the appropriate mechanism for implementing such programs and looks forwards to the federal courts’ future efforts to implement those recommendations.

The Society’s comments were prepared by a committee comprised of Professor Stephen Burbank (University of Pennsylvania Law School), Judge Avern Cohn (Senior Judge, U.S. District Court, Eastern District of Michigan), Gordon Doerfer (former associate justice of the Massachusetts Appeals Court), and Judge CaraLee Neville (District Court of Minnesota for Hennepin County), Judge John Tunheim (U.S. District Judge for the District of Minnesota), and Cynthia Gray (directors, Center for Judicial Ethics).

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American Judicature Society Comments on Draft Rules Governing Complaints of Judicial Conduct and Disability

Preface

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

ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope.

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

Commentary to Rule 1

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the “Breyer Committee,” presented a report, known as the “Breyer Report,” 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980 (hereinafter “the 16 Act”) 28 U.S.C. §§ 351-364. The Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act’s implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

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

Misconduct and Disability,” discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. *Id.* at 238.

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

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

After being submitted for public comment, the present Rules were promulgated by the Judicial Conference on .

Rule 2. Effect and Construction.

Notwithstanding any rule of a circuit to the contrary, these Rules are to be deemed mandatory, and the accompanying Commentaries are to be deemed authoritative interpretations of the Rules, unless a chief circuit judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or Judicial Conference of the United States, in the performance of acts authorized by 28 U.S.C. §§ 351-364 and these Rules, deems and expressly finds that exceptional circumstances render the application of a Rule in a particular proceeding manifestly unjust or manifestly contrary to the purposes of 28 U.S.C. §§ 351-364 or these Rules.

Commentary to 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. However, the final sentence of Rule 2 recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

Rule 3. Definitions.

(a) Complaint.

A complaint is:

- (1) a document filed by any person pursuant to Rule 6; or
- (2) information from any source, including a document described in (a)(1), known to a chief circuit judge, constituting reasonable grounds to inquire into possible misconduct or

disability on the part of a covered judge whether or not the information is framed as, or intended to be, an allegation of misconduct or disability.

(b) Misconduct.

(1) Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to, use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, gifts, or other personal favors related to the judicial office, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, treating litigants or attorneys in an unnecessarily hostile manner, engaging in partisan political activity or statements, participating in organizational fundraising, and other violations of the standards of judicial conduct, regulation of gifts, restrictions on outside income, financial disclosure obligations, or abuses of judicial office. The Code of Conduct for United States Judges provides standards of conduct applicable to proceedings under the Act, although disciplinary action is not appropriate for every violation of the Code.

Conduct occurring outside the performance of official duties is not excluded if it might have a prejudicial effect on the administration of the business of the courts, including, but not limited to, a lowering of public confidence in the courts among reasonable persons.

(A) Exclusions.

(i) Allegations that are directly related to the merits of a decision or procedural ruling are excluded from the definition of misconduct. Any allegation that calls into question the correctness of a ruling of a judge, including a decision not to disqualify from a case, a failure to recuse, without more, is merits related. However, a complaint that involves both the merits and 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, is excluded only to the extent it attacks the merits.

(ii) A complaint about delay in rendering a decision or ruling is excluded does not constitute misconduct absent evidence of a pattern of delay. However, a complaint involving habitual delay in a number of unrelated cases or an improper motive, or a particular instance of delay that so lacks legitimate justification that it is willful.

(c) Disability.

Disability is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include, but are not limited to, substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(d) Subject Judge.

The term "subject judge" means any judge described in Rule 4 who is the subject of a complaint.

(e) Chief Circuit Judge.

The term "chief circuit judge" includes the chief judges of the United States Court of Appeals for the Federal Circuit, United States Court of International Trade, and United States Court of Federal Claims.

(f) Judicial Council and Circuit.

The terms “judicial council” and “circuit,” where appropriate, includes the courts mentioned in 28 U.S.C. § 363.

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 circuit judge under Rule 5 and to complaints filed by complainants under Rule 6.

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

An allegation of misconduct or disability filed under Rule 6 is most assuredly a “complaint,” and the Rule so provides in (a)(1). But both the nature of the process and the use of the term “identify” suggest that the word “complaint” covers more than a document formally triggering the process. The process relies on chief circuit judges considering known information and triggering the process when appropriate.

“Identifying” a “complaint,” therefore, is best understood as concluding -- “identifying” - - that information known to a chief circuit judge constitutes reasonable grounds for an inquiry into possible misconduct or disability – a “complaint” -- whether or not the information is framed as, or intended to be an accusation. This definition is codified in (a)(2).

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

“Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.”

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

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

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

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

the complainant was a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive.

The same standard applies to allegations concerning a judge's decision not to disqualify. ~~failure to recuse~~. An allegation that a judge should have granted a motion to disqualify ~~recused~~ is merits-related. The very different allegations that the judge failed to disqualify ~~recuse~~ for improper reasons or knew or should have known that one of the circumstances identified by 28 U.S.C. §455(b) required disqualification are ~~is~~ not merits-related.

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 was rude to counsel or others while on the bench is also not merits-related.

The existence of an appellate remedy is 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 (e.g., vacating a ruling that resulted from an improper ex parte communication).

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(b)(1)(A)(ii), 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, i.e., assigning a low priority to deciding the particular case. ~~But, by the same token, However,~~ an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of intentional delay in a single case arising out of an illicit motive, or an allegation of a particular instance of delay that so lacks legitimate justification that it is willful is not merits-related. A chief circuit judge should make a limited inquiry upon receiving a complaint of delay in even a single case to determine whether to identify a complaint based on a pattern of unreasonable delay, which may evidence serious administrative failings constituting misconduct or a possible disability.

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

Rule 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.

Commentary on Rule 4

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

ARTICLE II. INITIATION OF A COMPLAINT

Rule 5. Identification of a Complaint.

(a) Identifying a Complaint.

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

(2) A chief circuit judge:

(A) may not decline to identify a complaint:

- (i) because the chief circuit judge deems otherwise cognizable allegations not to be credible, unless the sole source of information has been unreliable in the past; or
- (ii) because the person or persons making such allegations have not filed a complaint under Rule 6.

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

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

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

Commentary to Rule 5

This Rule is adapted from the Breyer Report. See Breyer Report, 239 F.R.D. at 245-46. The phrase “Subject to Rule 7” in (a)(1) is intended to establish that only: (i) the chief circuit judge of the home circuit of a potential subject judge, or (ii) the chief circuit judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have power or a duty under this Rule to identify a complaint.

The Act authorizes the chief circuit judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. A chief circuit judge who has identified a complaint will not be considered a complainant and need not automatically recuse from further proceedings on the complaint. The identification of a complaint merely begins the process described in Rule 11, leaving the chief circuit judge with the same options available in the case of a complaint filed under Rule 6. Where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply, and a chief circuit judge must identify as a complaint any misconduct or disability issues implicitly presented even if the complainant makes no claim with regard to those issues.

For example, a claim limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be identified as a complaint regarding disability. The identification may occur as a new complaint under Rule 5 or as a formal expansion by written order of an inquiry under Rule 11, but some formal order giving notice of the expanded scope of the proceeding to the subject judge and reviewing tribunal is necessary.

The chief circuit judge’s decision whether to identify a complaint under Rule 5 is fundamentally different from the decision whether to appoint a special committee under Rule 11.

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

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

A chief circuit judge may properly treat identifying a complaint as a resort to be considered after informal approaches at a resolution, if feasible, have failed. However, in high-visibility situations, it may be particularly desirable for the chief circuit judge to identify a complaint (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

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

Rule 6. Filing a Complaint.

(a) Brief Statement of Facts.

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

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

(b) Form.

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

(c) Legibility; Number of Copies.

Complaints should be typewritten if possible. If not typewritten, they must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form, failing which the complaint will not be considered. If the complaint is about a single judge of the court of appeals, the complainant must provide three copies of the complaint, the statement of facts, and any documents submitted. If it is about a single district judge or magistrate judge, four copies must be provided; if about a single bankruptcy judge, five copies. If the complaint is about more than one judge, copies must be provided for the clerk of the court, the chief judge of the circuit, each subject judge,

and each judge to whom the clerk must send a copy under Rule 8(b). Complaints under this Rule should be in an envelope marked “Complaint of Misconduct” or “Complaint of Disability.” The name of the subject judge should not appear on the envelope.

(d) Signature.

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

Commentary to Rule 6

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

Rule 7. Where to Initiate Complaints.

(a) Where to File.

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

(b) Transfer; Misconduct in Another Circuit.

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. §§ 291-93 and 294(d), the complaint may be filed or identified with the clerk of the court of appeals of that circuit or the subject judge’s home circuit. The proceeding will continue in the circuit of the first filed or identified complaint. However, the judicial council of the circuit in which the complaint was first filed or identified may transfer the complaint to the subject judge’s home circuit or circuit where the alleged misconduct occurred, as the case may be.

Commentary to Rule 7

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 identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act’s emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge’s future 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.

Rule 8. Action by Clerk.

(a) Receipt of Complaint.

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

(b) Distribution of Copies.

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

(c) Complaints Against Non-Covered Persons.

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

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

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

Commentary to Rule 8

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

Complaints against non-covered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

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

Rule 9. Time for Filing or Identifying a Complaint.

(a) No Time Limitations.

A complaint may be filed or identified at any time. However, where the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(3).

Commentary to Rule 9

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

Rule 10. Abuse of the Complaint Procedure.

(a) Abusive Complaints.

A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. On written request of the complainant, the judicial council may revise or withdraw any prohibitions, restrictions or conditions imposed.

(b) Orchestrated Complaints.

Where large numbers of essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the judicial council may, on the recommendation of the chief circuit judge, issue a written order instructing the clerk of the court of appeals to accept only one or more of such complaints for filing and to refuse to accept subsequent complaints. A copy of the order shall be sent to the complainants whose complaints were not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a different manner, for which the remedy provided in Rule 10(a) may not be appropriate. 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 circuit may 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. Where the first complaint or complaints have been dismissed on the merits, when further, essentially identical, submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the clerk not to accept these complaints or any further such complaints for filing, and directing the clerk or the circuit executive to send each putative complainant copies of both orders.

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

Rule 11. Review by the Chief Circuit Judge.

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

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

- (1) dismissed;
- (2) concluded on the ground that corrective action has been taken;
- (3) concluded because intervening events, such as the judge's resignation, have made action on the complaint no longer necessary; or
- (4) referred to a special committee.

(b) Inquiry by Chief Circuit Judge.

In determining what action to take under Rule 11(a), the chief circuit judge may conduct a limited inquiry. In conducting such an inquiry, the chief circuit judge may not make findings of fact about any matter that is reasonably in dispute or determinations concerning the credibility of the complainant or putative witnesses. The chief circuit 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 review transcripts or other relevant documents. The chief circuit judge may make findings of fact to the extent that the limited inquiry shows that the factual allegations are frivolous under (c)(3) of this Rule.

(c) Dismissal.

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

- (1) when the chief circuit judge concludes that the complaint
 - (1A) 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 inability to discharge the duties of judicial office;
 - (2B) is directly related to the merits of a decision or procedural ruling;
 - (3C) is frivolous because it lacks sufficient evidence to raise an inference that misconduct has occurred or it is based on allegations that are wholly unsupported, inherently incredible ~~plainly untrue, refuted by objective evidence~~, or incapable of being established through investigation.
 - (4D) has been filed in the wrong circuit under Rule 7; or
 - (5E) is otherwise not appropriate for consideration under the Act.

(2) when following a limited inquiry the chief circuit judge concludes, without making findings of fact about any matter reasonably in dispute or the credibility of the complainant or witnesses, that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence.

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

(d) Corrective Action.

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

(e) Intervening Events.

The chief circuit judge may conclude the complaint proceeding in whole or in part if the chief circuit judge determines that intervening events, such as the judge's resignation, render some or all allegations of the complaint moot or remedial action impossible. However, as long as the judge who is subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed regardless of intervening events.

(f) Appointment of Special Committee.

If some or all of the complaint is not dismissed or concluded, the chief circuit judge must promptly appoint a special committee to investigate the complaint or relevant portion thereof and to make recommendations to the judicial council. Before appointing a special committee, the chief circuit judge must invite the subject judge to respond to the complaint either orally or in writing if such an opportunity was not given during the limited inquiry.

In the discretion of the chief circuit judge, 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 Circuit Judge's Action; Petitions for Review.

(1) If the complaint is disposed of under Rule 11(c), (d), or (e), the chief circuit judge must prepare a supporting memorandum that sets forth the reasons for the disposition. The memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum must be provided to the complainant, the subject judge, any judge entitled to receive a copy of the complaint pursuant to Rule 8(b), and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and subject judge must be notified of the right to petition the judicial council for review of the decision under (g)(2) of this Rule. If a petition for review is filed as provided in Rule 18(a), the chief circuit judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the clerk of the court of appeals for transmittal to the judicial council.

(2) If the chief circuit judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant or subject judge may petition the judicial council of the circuit for review of that disposition, as provided in Rule 18.

(3) If a special committee is appointed, the chief circuit judge must notify the complainant, the subject judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 8(b) that the matter has been referred to a special committee, and must inform them of the membership of the committee.

(h) Public Availability of Chief Circuit Judge's Decision.

The chief circuit judge's decision must be made public at the time and in the manner provided in Rule 24.

(i) Report to the Judicial Council.

The chief circuit judge must report to the judicial council of the circuit on all actions taken under this Rule.

Commentary to Rule 11

Subsection (a) lists the actions available to a chief circuit judge in reviewing a complaint. Subsection (b) describes the nature of the chief circuit judge's inquiry. It is based largely on the Breyer Committee Report. See Breyer 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."

Section 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 that a matter is not "reasonably" in dispute if a limited inquiry shows the allegations to lack any factual foundation or to be conclusively refuted by objective evidence.

In conducting a limited inquiry, the chief circuit judge must avoid credibility determinations, which are ordinarily left to a special committee and the judicial council. An allegation is not "conclusively refuted by objective evidence" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is not inherently incredible. If it is literally the complainant's word against the subject judge's -- there is simply no other significant evidence -- then there must be a special committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur where the complaint refers to transcripts or to witnesses and when the chief circuit judge determines that the transcripts and witnesses all support the subject judge. For example, consider a complaint alleging that the subject judge said X, where the complaint mentions, or it is independently clear, that five people may have heard what the judge said. The chief circuit judge is told by the judge complained against and one witness that the judge did not say X, and the chief

circuit judge dismisses the complaint without questioning the other four possible witnesses. In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is called for. But if potential witnesses, reasonably accessible, have not been questioned, then the matter remains reasonably in dispute.

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

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

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

Another example would be a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief circuit judge’s proper course of action may well turn on whether the source had any role in the allegedly improper conduct. If the complaint were based on a lawyer’s statement that he or she had had an improper ex parte contact with a judge, the lawyer’s denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and the disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In

such a case, it would be appropriate to dismiss the complaint as frivolous because there is no support for the allegation of misconduct.

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

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

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

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

"Corrective action" means voluntary action taken by the subject judge. A remedial action directed by the chief circuit judge or by an appellate court without the participation of the subject judge in formulating the directive or by the subject judge's subsequent agreeing to such action does not constitute the requisite voluntary corrective action. Neither the chief circuit judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2).

Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior.

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an

apology, recusal from a case, and a pledge to refrain from similar conduct in the future. While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. Ordinarily, corrective action will not be “appropriate” to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief circuit judge’s order, in a direct communication from the judge complained against, or otherwise.

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

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

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

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

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 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 judge involved. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief circuit judges, 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 the Commentary to Rule 24, dealing with public availability.

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

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

Rule 12. Composition of Special Committees.

(a) Membership.

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

(b) Presiding Officer.

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

(c) Bankruptcy Judge or Magistrate Judge as Adviser.

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

(d) Provision of Documents.

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

(e) Continuing Qualification of Committee Members.

A member of a special committee who was qualified to serve at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief circuit judge, active circuit judge, or active district judge, as the case

may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States.

(f) Inability of Committee Member to Complete Service.

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

(g) Voting.

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

Commentary on Rule 12

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

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

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

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

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

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

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally consisted of the chief circuit judge and an equal number of circuit and district judges, as required by the law, may continue

to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

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

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

Rule 13. Conduct of an Investigation.

(a) Extent and Methods of Special Committee Investigation.

Each special committee must determine the extent and methods of the investigation as it deems appropriate in light of the allegations of the complaint. If, in the course of the investigation, the 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, the committee must, with written notice to the subject judge, expand the scope of the investigation or refer the new matter to the chief circuit judge for action under Rule 5 or Rule 11.

(b) Criminal Conduct.

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

(c) Staff.

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

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

(d) Delegation.

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

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

Rule 13 and the three rules that follow are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. 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.

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

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

Rule 14. Conduct of Hearings by Special Committee.

(a) Purpose of Hearings.

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

(b) Committee Witnesses.

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

(c) Counsel for Witnesses.

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

(d) Witness Fees.

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

(e) Oath.

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

(f) Rules of Evidence.

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

(g) Record and Transcript.

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

Commentary on Rule 14

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

Rule 14 is concerned with the conduct of fact-finding hearings. Special committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special committee proceedings are primarily inquisitorial rather than adversarial.

Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges the next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.

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

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

Rule 15. Rights of Subject Judge.

(a) Notice.

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

(b) Presentation of Evidence.

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

(c) 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.

(d) Attendance at Hearings.

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

(e) Representation by Counsel.

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

Commentary on Rule 15

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

The Act states that these rules must contain provisions requiring that “the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.” 28

U.S.C. § 358(b)(2). To implement this provision, Rule 15(d) gives the judge the right to attend any hearing for the purpose of receiving evidence of record or hearing argument under Rule 14.

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

Rule 16. Rights of Complainant in Investigation.

(a) Notice.

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

(b) Opportunity to Provide Evidence.

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

(c) Presentation of Argument.

The complainant may submit written argument to the special committee. In the discretion of the special committee, the complainant may be permitted 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 the exercise of discretion under this Rule, a 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) provides that, where a special committee has been appointed, the complainant will be interviewed by a representative of the committee. Such an interview may, of

course, be in person or by telephone, and the representative of the 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. The rules do not accord the complainant the rights of a litigant and do not entitle the complainant to a copy of the report of the special committee.

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

Rule 17. Special Committee Report.

(a) Report.

The 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 committee members, and the record of any hearings held pursuant to Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

Commentary to Rule 17

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

ARTICLE V. JUDICIAL COUNCIL REVIEW

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

(a) Petitions for Review.

A complainant or subject judge aggrieved by an order of the chief circuit judge under Rule 11(c), (d), or (e) may petition the judicial council of the circuit for review of the

order. A judicial council may, by rules promulgated under 28 U.S.C. § 358, refer a petition for review filed under this Rule to a panel of no less than 5 members of the council, at least 2 of whom must be district judges.

(b) Time; Form; Where to File.

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

(c) Receipt and Distribution of Petition.

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

(d) Receipt of Untimely Petition.

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

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

On receipt of a petition 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, including a document that is ambiguous about whether a petition for review is intended, the clerk must acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

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

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

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

Rule 19. Judicial Council Disposition of Petitions for Review.

(a) Rights of Subject Judge.

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

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

(b) Judicial Council Action.

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

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

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

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

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

(c) Notice of Council Decision.

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

(d) Memorandum of Council Decision.

If the order of the council affirms the chief circuit judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief circuit judge's explanation. A memorandum supporting a 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 no member of the council dissented on the ground that a special committee should be appointed pursuant to Rule 11(f), the complainant must be notified that there is no right of review of the decision. If there was such a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely of the issue of whether a special committee should be appointed.

(f) Public Availability of Judicial Council Decision.

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

Commentary to Rule 19

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

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

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

(a) Rights of Subject Judge.

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

(b) Judicial Council Actions.

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

(1) dismiss the complaint because:

(A) the claimed conduct, even if the claim is true, 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;

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

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

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

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

(3) in its discretion, refer the complaint to the Judicial Conference of the United States with the council's recommendations for action. 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:

(A) that might constitute ground for impeachment; or

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

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

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

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

(C) 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 pursuant to 28 U.S.C. § 631(i);

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

(E) 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 will be waived; and

(F) 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.

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

(c) Inadequate Basis for Decision.

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

(d) Council Vote.

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.

(e) Recommendation for Fee Reimbursement.

On the request of a subject judge, the judicial council may, if the complaint has been finally dismissed or concluded under (b)(1) or (2) of this Rule, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, including a successful defense or prosecution of a proceeding under Rule 21(a) or (b), which would not have been incurred but for the requirements of the Act and these Rules.

(f) Council Action.

Council action must be by written order. Unless the council finds that, for extraordinary reasons, it would be 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. The memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum must be provided to the complainant, the subject judge, any judge entitled to receive a copy of the complaint pursuant to Rule 8(b), and the Judicial Conference Committee on Judicial Conduct and Disability. However, if the complaint has been referred to the Judicial Conference of the United States under (b)(3) of this Rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

(g) Public Availability of Council Action.

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

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not communicate with individual council members about the matter, either orally or in writing.

If the judicial council decides to conduct an additional 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 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 council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

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 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 of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. 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) or (2) 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), i.e., one that results in a Rule 20(b)(1) or (2) dismissal or conclusion.

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

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

Rule 21. Committee on Judicial Conduct and Disability.

(a) Review by Committee.

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

(b) Reviewable Matters.

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

(A) pursuant to Rule 20(b)(1), (2), (4) or (5); or

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

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

(c) Committee Vote.

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

(d) Additional Investigation.

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

(e) Oral Argument; Personal Appearance.

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

(f) Committee Decisions.

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

(g) Finality.

All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final and conclusive.

Commentary on Rule 21

This Rule is largely self-explanatory.

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

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

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

Rule 22. Procedures for Review.

(a) Filing a Petition for Review.

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

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

(b) Form and Contents of Petition for Review.

No particular form is required. The petition 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 decision of the judicial council, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the order of the judicial council 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 that the petitioner deems essential or useful to the prompt disposition of the review petition. A petition should not normally exceed 20 pages, plus necessary attachments.

(c) Time.

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

(d) Copies.

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

(e) Action on Receipt of Petition for Review.

The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, and must notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability. The Administrative Office must 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

Rule 23. Confidentiality.

(a) General Rule.

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

(b) Files.

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

(c) Disclosure in Decisions.

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

(d) Availability to Judicial Conference.

On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the clerk of a court of appeals must furnish any records related to a complaint that are requested.

(e) Availability to District Court.

In the event that the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(4)(C), the clerk of the court of appeals 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 judicial council at the time of its determination. 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.

(f) Impeachment Proceedings.

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.

(g) Consent of Subject Judge.

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

(h) Disclosure in Special Circumstances.

The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council 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 such disclosure is justified by special circumstances and is not prohibited by the Act. Such disclosure may be made to Judiciary authorized researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where such study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability.

Appropriate steps must be taken to protect the identities of the judge complained against, the complainant, and witnesses from public disclosure, and other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

To prevent substantial unfairness to the judge or a threat to confidence in the administration of justice due to lack of information or misunderstanding, when the subject of a complaint or inquiry has become public through independent sources, nothing in this rule precludes a chief circuit judge or judicial council from issuing, with the consent of the subject judge, one or more short announcements confirming or denying the existence of a complaint or investigation, clarifying procedural aspects, or defending the right of a judge to a fair hearing.

If, during the course of or after an investigation or hearing, a chief circuit judge, special committee, or judicial council reasonably believes that there may have been a violation of criminal law or a violation of the code of professional responsibility for lawyers or receives information concerning a threat to the safety of any person or persons, information may be disclosed to the relevant authorities.

(i) 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 pursuant to Rule 24.

(j) Assistance and Consultation.

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

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. 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(a) provides that judges, employees of the judicial branch, 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(a) 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 circuit judge, judicial council, the Judicial Conference, and the Judicial Conference 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. It is clear that 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(e) so provides.

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

In addition, chief circuit judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition. Rule 23(j) provides that the confidentiality requirement does not preclude this. The chief circuit judge, for example, may properly seek the advice and assistance of another judge who the chief circuit judge deems to be in the best position to communicate with the subject judge

in an attempt to bring about corrective action. As another example, a new chief circuit judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief circuit judge should disclose information regarding the complaint only to the extent the chief circuit judge deems necessary under the circumstances.

On the other hand, the Act makes it clear that there is a barrier of confidentiality between the judicial branch and the legislative branch. It provides that material may be disclosed to Congress only if the Judicial Conference determines it is believed necessary to an impeachment ~~may be warranted investigation or trial of a judge~~ but, following such a determination, the Judicial Conference must transmit the determination and the record of proceedings to the House of Representatives.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief circuit judge.

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

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

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

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

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

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

Rule 24. Public Availability of Decisions.

(a) General Rule; Specific Cases.

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

- (1) If the complaint is finally dismissed under Rule 11(c) without appointment of a special committee, or if it is concluded because of voluntary corrective action, the publicly available materials must 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 the appointment of a special committee, the judicial council must determine whether the name of the subject judge is to 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 by any action other than private censure or reprimand taken pursuant to Rule 20(b)(4), 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 circuit judge orders such disclosure.

(b) Manner of Making Public.

The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals or by placing such orders on the court's public website. In cases in which such orders appear to have precedential value, the chief circuit judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability must make available on the judiciary 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 Judicial Conference Committee.

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

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

If a complaint is referred to the Judicial Conference pursuant to Rule 20(b)(3), materials relating to the complaint will be made public only as may be 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. 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 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 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 the chief circuit judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made

public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings.

Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, or a conclusion of the proceeding by the chief circuit judge on the basis of corrective action taken, the name of the subject judge must not be disclosed.

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

Rule 24(a)(1) provides that where a proceeding is concluded by the chief circuit judge on the basis of voluntary corrective action, the name of the subject judge must not be disclosed.

Shielding the name of the subject judge in this circumstance should encourage informal disposition. Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

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

Rule 25. Disqualification.

(a) Complainant.

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

(b) Subject Judge.

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

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

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

(d) Member of Special Committee not Disqualified.

A member of the judicial council who serves on a special committee, including the chief circuit judge, will not be disqualified from participating in council consideration of the committee's report.

(e) Subject Judge Following Appointment of a Special Committee. Clarified in note?

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

(f) Substitute for Disqualified Chief Circuit Judge.

If the chief circuit judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief circuit judge under these rules must be assigned to the circuit judge in regular active service who is the most senior in date of commission of those who are 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 whether, in the interest of sound judicial administration, to permit the chief circuit 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 judicial council.

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

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

- (1) participation by subject judge(s) is necessary to obtain a quorum of the judicial council;
- (2) 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 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(b)(1)(A); and
(3) the judicial council votes that it is necessary, appropriate and in the interest of sound judicial administration that such subject judges be eligible to act.

Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Rule 25(e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference committee. The Illustrative Rule, based on Section 359(a), was ambiguous and could have been read to disqualify a subject judge from any service of any kind on each of the bodies mentioned.

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

Under the Act, a complaint against the chief circuit judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief is to be determined by date of commission, with the result that complaints against the chief circuit judge may be routed to a former chief circuit judge or other judge who was appointed earlier than the chief circuit judge.

The rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as

acting chief circuit judge of the circuit, and the judicial council will be without appellate members.

Where the complaint is against all circuit and district judges, no member of the judicial council can perform the duties assigned to the council under the statute.

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

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

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

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

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

Rule 26. Transfer to Another Judicial Council.

(a) Transfer of a Proceeding.

In exceptional circumstances, a chief circuit judge or a judicial council may request the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request should be made in writing and describe the circumstances that make such a transfer appropriate. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference pursuant to Rule 20(b)(3) or a petition for review filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or transfer the proceeding to a ~~select the transferee~~ judicial council ~~selected by the Chief Justice~~, which may then exercise the powers of a judicial council under these Rules. The judicial council to which the proceeding is transferred shall immediately notify in writing the subject judge and complainant of the transfer.

Commentary to Rule 26

Rule 26 is new but implements the Breyer Committee's recommended use of transfers. Breyer Report, 239 F.R.D. at 214-15. Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council; where the issues are highly visible and a local disposition may weaken public confidence in the process; where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

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

Rule 27. Withdrawal of Complaints and Petitions for Review.

(a) Complaint Pending Before Chief Circuit Judge.

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

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

After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both the

subject judge and ~~either the special committee (before its report has been filed) or~~ the judicial council.

(c) Petitions for Review.

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

Commentary on Rule 27

Rule 27 is adapted from the Illustrative Rules.

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

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

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

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

Rule 28. Availability of Rules and Forms.

These rules and copies of the complaint form as provided in Rule 6(b) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. The homepage of each court's website must also prominently display a link (with a title such as judicial complaints or judicial misconduct) to ~~make~~ these rules and the complaint form or to the rules and complaint form that are available on the judiciary's national website,

www.uscourts.gov. The websites should also include information that would assist persons seeking to learn about the complaint process.

Rule 29. Effective Date.

These rules will become effective 30 days after promulgation by the Judicial Conference of the United States.

APPENDIX: COMPLAINT FORM

JUDICIAL COUNCIL OF THE _____

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

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

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

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

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

1. Complainant’s name:

Address:

Daytime telephone:()

2. Subject Judge(s):

Name:

Court:

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

Yes No

If “yes,” give the following information about each lawsuit:

Court:

Case Number:

Docket numbers of any appeals to the the Circuit:

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

Party Lawyer Neither

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

4. Have you filed any lawsuits against the judge?

Yes No

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

Court:

Docket Number:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

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

Declaration and signature:

I declare under penalty of perjury that:

- (1) I have reviewed the Rules Governing Judicial Misconduct and Disability Proceedings, and;
- (2) The statements made in this complaint are true and correct to the best of my knowledge.

(Signature) _____

(Date) _____