



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

JAMES C. DUFF  
Director

WASHINGTON, D.C. 20544

May 25, 2018

Honorable Bob Goodlatte  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Honorable Jerrold Nadler  
Ranking Member  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Goodlatte and Representative Nadler:

Thank you for your letter of May 8, 2018, expressing your interest in the activities of the Federal Judiciary Workplace Conduct Working Group (Working Group).

The Working Group has set a goal for itself to complete its report to the Judicial Conference of the United States by the end of May 2018. It is an ambitious goal, but in the meantime prior to the submission of that report, I am pleased to authorize a briefing of your staff, as you have requested, to provide additional context regarding the matters being studied by the Working Group.

In addition, I am pleased to provide responses to your specific questions, below:

- 1. What process was used to select the members of the Working Group? What criteria were considered and who made the final selection? Please also provide a list of all Members of the Working Group.**

Immediately upon receiving direction from Chief Justice Roberts to form a working group to examine our practices and address these issues, I identified and assembled a diverse team of leaders in the Federal Judiciary who are uniquely qualified for this important task. The seven individuals I appointed to the Working Group and the group's counsel have a breadth of experience in a wide range of judicial operations, the utmost respect from all who work in the Judicial Branch, and subject matter experience and expertise in the matters before our Working Group. Enclosed is a summary of the credentials of the Working Group and its counsel.

**2. What schedule has the Working Group followed? How often have in-person meetings taken place? When not meeting in person, how has business been conducted?**

The Working Group has held four day-long, in-person meetings in Washington, DC, since January 2018—on February 7, March 1, April 6 and May 21. The Working Group members have also communicated between meetings on a continuing basis, and have reviewed extensive resource materials, including both in-person and written suggestions submitted by law clerks and employees.

**3. What are the current procedures for:**

- a. Clerks to report sexual harassment by a judge?**
- b. Clerks to report sexual harassment by another court employee?**
- c. Court employees to report harassment by a judge?**
- d. Court employees to report harassment by a clerk or other court employee?**

As a general matter, the formal procedures for reporting any form of harassment are the same for law clerks and other court employees. Moreover, the Employment Dispute Resolution (EDR) process can be used whether the subject of the complaint is a clerk, other court employee, or a judge. In addition to the EDR process, an individual who believes there has been harassment by a judge may also make a complaint through the Judicial Conduct and Disability Act (JC&D) process (the JC&D process only applies to situations where the subject of a complaint is a judge, in which case the process may be pursued in addition to or instead of an EDR remedy, at the election of the complainant).<sup>1</sup>

Attached is a copy of the Judiciary’s Model EDR Plan—a form of which has been adopted by every federal court in the United States. The JC&D process is set forth in Chapter 16 of Title 28, United States Code. A copy of the implementing rules for the JC&D process are attached.

One of the areas of focus for the Working Group is identifying ways to provide employees with clearer guidance about how they can make use of these two processes to report and seek remedies for harassment.

Any person may file a complaint under the JC&D process—not only the victim—and a circuit chief judge can also identify a complaint. The Model EDR Plan includes a reporting provision that encourages any Judiciary employee who believes they were subjected to, or has knowledge of, sexual harassment or other wrongful conduct to report that to one of the Court’s EDR coordinators, a unit executive, supervisor, a human resource manager or the chief judge. Any one of those persons who receives a report of harassment is obligated to inform the chief judge immediately, who will then ensure that an appropriate investigation is conducted by an impartial

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<sup>1</sup> The EDR process is available to law clerks in 11 of the 13 federal circuits. In the two circuits in which law clerks are not currently covered by the EDR process, they may pursue complaints through the JC&D process. The Working Group will recommend EDR coverage for law clerks in all circuits and the two circuits not currently covering law clerks are considering such changes in their policies.



investigator. Retaliation against any employee making such a report is prohibited. The goal of this reporting provision is to bring to the court's attention any harassment so that it can engage in prompt preventative and remedial action.

**4. Once a report has been filed in the above circumstances, what are the official procedures for investigation of the complaint and any resolution?**

Those procedures are outlined in the Model EDR Plan and the JC&D rules attached in response to question number 3. Both procedures contain mechanisms for thorough, independent investigation of complaints, as well as multiple levels of review and appeal of any findings and proposed remedies.

Under the JC&D process, the circuit chief judge must refer a complaint of cognizable misconduct raising factual issues to a special committee of district and circuit judges for an investigation as extensive as necessary. A special committee has the power to compel witness testimony, ensure witness confidentiality, and may hire an investigator to assist them. After investigating, the special committee then submits a report, including fact finding and recommendations, to the judicial council of the circuit, for consideration. The judicial council determines the course of action based on the report of the special committee. A complainant can file a petition for review from a judicial council's order to the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States. If a Judicial Council determines that a subject judge may have engaged in conduct that may constitute grounds for an impeachment, the judicial council must certify such a determination to the Judicial Conference, and if the Judicial Conference concurs, it certifies and transmits the determination and record of the proceeding to the House of Representatives.

Separately, under the Model EDR Plan's process, a complainant may be actively involved in counseling and mediation, may have a hearing before the chief judge of the court (or a designated judicial officer), and may seek a review of the hearing decision under procedures established by the judicial council of the circuit.

**5. Will the Working Group address the current procedures for reporting, investigating, and resolving sexual harassment claims? If so, do you intend to make recommendations for how the Judicial Branch can improve these procedures?**

Yes, the Working Group plans to make recommendations for improving these procedures. The Working Group intends to suggest advancement in the following areas, among others:

- a. Provide "one click" website access to obtain information and reporting mechanisms for both the EDR and JC&D claims regarding workplace harassment;
- b. Create alternative and less formalized options for seeking assistance with concerns about workplace misconduct, both at the local level and in a national, centralized office at the Administrative Office of the U.S. Courts, to enable employees to raise concerns more easily;



- c. Provide a simplified flowchart of the processes available under the EDR and JC&D;
- d. Establish a process for former law clerks and employees to communicate with and obtain advice from relevant offices and Judiciary entities;
- e. Improve communications with EDR and JC&D complainants during and after procedures;
- f. Revise the Model EDR Plan to provide greater clarity to employees about how to navigate the EDR process.;
- g. Establish qualifications and expand training for EDR Coordinators; and
- h. Lengthen the time available to file EDR complaints.

**6. Will the Working Group address the ways to prevent sexual harassment from occurring within the Judicial Branch? If so, what specific topics will you consider?**

Yes, the Working Group will make recommendations regarding prevention and deterrence of sexual harassment. The Working Group intends to suggest advancement in the following areas, as well as others:

- a. Improve law clerk and employee orientations with increased training on workplace conduct rights, responsibilities, and recourse that will be administered in addition to, as well as separately from, other materials given in orientations;
- b. Continue to examine and clarify the Codes of Conduct for judges and employees;
- c. Conduct exit interviews with court employees/laws to determine if there are misconduct issues and make other suggestion to assist court units in identifying potential misconduct issues; and
- d. Integrate sexual harassment training into existing Judiciary programs on discrimination and courtroom practices.

We have also added instructive programs on our policies and procedures through the Federal Judicial Center (FJC). Since January 2018, the FJC has included workplace conduct sessions in each of the following programs for judges: one conference for chief district judges; one conference for chief bankruptcy judges; one national workshop for district judges; one national workshop for bankruptcy judges; one national workshop for magistrate judges; and three orientation seminars for new district and court of appeals judges. The FJC will include sessions on workplace conduct in scheduled educational programs for new chief circuit, district, and bankruptcy judges, and for court unit executives, as well as in additional national workshops and orientation seminars for judges, all to be held during 2018. The FJC is also revising curriculum for managers and supervisors, and for other court employees, including law clerks, to expand coverage of workplace harassment issues.

**7. Does the Working Group anticipate making any recommendations for legislative reforms?**

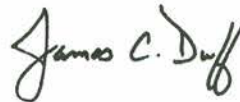
The Working Group does not intend to recommend legislative action. Revisions and improvements to existing JC&D and EDR processes, as well as expansion of other remedial

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options for employees and expanded educational and training programs within the Judiciary, are intended to address the workplace conduct challenges we confront.

Thank you again for your interest in and support for the initiatives of the Working Group. If we may be of assistance to you in this or any other matter, please contact me or our Office of Legislative Affairs at 202-502-1700.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive style with a large, prominent "J" and "D".

James C. Duff  
Director

Enclosures

**MODEL EMPLOYMENT DISPUTE RESOLUTION (EDR) PLAN**  
*(Guide to Judiciary Policy, Vol. 12, Appx. 2B)*

**Judicial Conference of the United States**  
**March 2010**

CHAPTER I – GENERAL PROVISIONS

**§ 1 Preamble**

This Plan shall be known as the Federal Judiciary Model Employment Dispute Resolution Plan (“Model EDR Plan”). It was adopted by the Judicial Conference of the United States in order to provide rights and protections to employees of the United States courts that are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.

The Plan supersedes all previous versions of the Model Employment Dispute Resolution Plan and Appendix I (“Discrimination and Complaint Procedures”) of the Model Equal Employment Opportunity Plan (“Model EEO Plan”), except for Section VI of Appendix I (“Annual Report”) imposing requirements on the courts. Claims arising under Chapters II through VIII of this Plan, or under Sections I through VII of the Judiciary’s Model EEO Plan, shall be treated in accordance with the procedures set forth in Chapter X of this Plan. The duties of the court’s EEO Coordinator will be assumed by the Employment Dispute Resolution Coordinator (established in Section 6 of Chapter X of this Plan), except that the dispute resolution duties assigned to the EEO Coordinator under the Model EEO Plan will be replaced by the dispute resolution procedures set forth in Chapter X of this Plan.

This Plan is to be implemented in the same manner as the Model EEO Plan. Each court shall adopt and implement a plan based thereon. Any modification of this Plan by a court must first be approved by the judicial council of its circuit. Courts and employing offices shall post their plans on their respective internal and external websites. A copy of each plan and any subsequent modifications shall be filed with the Administrative Office. Each court shall annually submit a report on the implementation of its plan to the Administrative Office for inclusion in the Director’s Annual Report to the Judicial Conference.

Policies adopted by individual courts pertaining to adverse action or general grievance proceedings that do not invoke the rights and protections afforded under the Model EDR Plan are not affected by the Plan. Further, local policies relating to rights enumerated under the Plan that are not inconsistent with the rights and procedures established herein will not be affected by the Plan.

The Model EDR Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial officer misconduct or disability under [28 U.S.C. §§ 351, et seq.](#) and otherwise is intended to be the exclusive remedy of the employee relating to rights enumerated under the Plan.

## **§ 2 Scope of coverage**

This Plan applies to all Article III judges and other judicial officers of the United States courts of appeals, district courts, bankruptcy courts, Court of Federal Claims, as well as to judges of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States. The Plan also applies to all employees of the courts of appeals, district courts, bankruptcy courts, Court of Federal Claims and Court of International Trade, or of a judge of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States. Also included are judges' chambers staffs, court unit heads and their staffs, circuit executives and their staffs, federal public defenders and their staffs, and bankruptcy administrators and their staffs.

## **§ 3 Definitions**

For purposes of this Plan:

- A.** The term “claim” means the filing of a request for counseling as set forth in Chapter X, which may be further pursued by the filing of a request for mediation and a request for hearing.
- B.** The term “employee” includes all individuals listed in Section 2 of this Chapter, as well as applicants for employment and former employees, except as provided below. The term “employee” does not include interns or externs providing gratuitous service, applicants for bankruptcy judge or magistrate judge positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, criminal defense investigators not employed by federal public defenders, volunteer counselors or mediators, or other individuals who are not employees of an “employing office” as that term is defined below.
- C.** The term “employing office” includes all offices of the United States courts of appeals, district courts, and bankruptcy courts, including the offices of circuit executives, district court executives, federal public defenders, clerks of court, chief probation officers, chief pretrial services officers, staff attorneys, chief preargument attorneys, circuit librarians, bankruptcy administrators, and any such offices that might be created in the future. The court is the employing office of a judicial officer’s chambers staff.

- D. The term “judicial officer” means a judge appointed under Article III of the Constitution, a United States bankruptcy judge, a United States magistrate judge, a judge on the Court of Federal Claims, or a judge of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.
- E. The term “court” refers to the appropriate court (appeals, district or bankruptcy) in which is located the employing office which would be responsible for redressing, correcting or abating the violation alleged in the complaint. In the case of disputes involving federal public defenders, the term “court” refers to the appropriate court of appeals.

CHAPTER II – EQUAL EMPLOYMENT OPPORTUNITY  
AND ANTI-DISCRIMINATION RIGHTS

**§ 1 General** – Discrimination against employees based on race, color, religion, sex (including pregnancy and sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited. Harassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited. All of the above constitute “wrongful conduct.” The rights and protections of Sections I through VII of the Judiciary’s Model Equal Employment Opportunity Plan shall also apply to employees.

**§ 2 Definition** – The term “disability” means:

- A. a physical or mental impairment that substantially limits one or more of the major life activities of an employee,
- B. a record of such an impairment, or
- C. being regarded as having such an impairment.

See [42 U.S.C. § 12102\(2\)](#).

**§ 3 Special provision for probation and pretrial services officers** – The age discrimination provision of Section I of this Chapter shall not apply to the initial hiring or mandatory separation of probation and pretrial services officers and officer assistants. See Report of the Proceedings of the Judicial Conference of the United States (March 1991), pp. 16-17. Additionally, probation and pretrial services officers must meet all fitness for duty standards, and compliance with such standards does not, in and of itself, constitute discrimination on the basis of disability.



## CHAPTER III – FAMILY AND MEDICAL LEAVE RIGHTS

- § 1 **General** – Title II of the Family and Medical Leave Act of 1993, [5 U.S.C. §§ 6381 et. seq.](#), applies to court employees in the manner prescribed in [Guide to Judiciary Policy, Volume 12, § 920.20.35](#).

## CHAPTER IV – WORKER ADJUSTMENT AND RETRAINING NOTIFICATION RIGHTS

- § 1 **General** – No “employing office closing” or “mass layoff” (as defined in Section 2 of this Chapter) may occur until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to employees who will be affected. This provision shall not apply to an employing office closing or mass layoff which results from the absence of appropriated funds.

### § 2 **Definitions**

- A. The term “employing office closing” means the permanent or temporary shutdown of a single site of employment if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.
- B. The term “mass layoff” means a reduction in force which:
1. is not the result of an employing office closing; and
  2. results in an employment loss at the single site of employment during any 30 day period for
    - a. at least 33 percent of the employees (excluding any part-time employees); and at least 50 employees (excluding any part-time employees); or
    - b. at least 500 employees (excluding any part-time employees).

See [29 U.S.C. § 2101](#).

## CHAPTER V – EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

- § 1 **General** – An employing office shall not discriminate against an eligible employee or deny an eligible employee reemployment rights or benefits under the Uniformed Services Employment and Reemployment Rights Act, [38 U.S.C. §§ 4301 et seq.](#)

## CHAPTER VI – OCCUPATIONAL SAFETY AND HEALTH PROTECTIONS

- § 1 **General** – Each employing office shall provide to its employees a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. Claims that seek a remedy that is exclusively within the jurisdiction of the General Services Administration (“GSA”) or the United States Postal Service (“USPS”) are not cognizable under this Plan; such requests should be filed directly with GSA or the USPS as appropriate.
- § 2 **Court program requirements** – The court shall implement a program to achieve the protections set forth in Section 1 of this Chapter.

## CHAPTER VII – POLYGRAPH TESTS

- § 1 **General** – Unless required for access to classified information, or otherwise required by law, no employee may be required to take a polygraph test.

## CHAPTER VIII – WHISTLEBLOWER PROTECTION

- § 1 **General** – Any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or threaten to take an adverse employment action with respect to an employee (excluding applicants for employment) because of any disclosure of information to –
- A. the appropriate federal law enforcement authority, or
  - B. a supervisor or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts,
- by the latter employee, which that employee reasonably and in good faith believes evidences a violation of any law, rule, or regulation, or other conduct that constitutes gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety, provided that such disclosure of information –
- 1. is not specifically prohibited by law,
  - 2. does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in [Guide to Judiciary Policy, Vol. 20, Ch. 8](#)), and
  - 3. does not reveal information that would endanger the security of any federal judicial officer.

**§ 2 Definition** – For purposes of this Chapter, an “adverse employment action” means a termination, demotion, transfer, or reassignment; loss of pay, benefits, or awards; or any other employment action that is materially adverse to the employee’s job status, compensation, terms, or responsibilities, or the employee’s working conditions.

## CHAPTER IX – REPORTS OF WRONGFUL CONDUCT

A report of wrongful conduct is not the same as initiating or filing a claim under this Plan; thus, employees who wish to file an EDR claim relating to any alleged wrongful conduct as defined in Chapter II, §1 must follow the procedures set forth in Chapter X of this Plan.

Judges and employees are encouraged to report wrongful conduct to the court’s EDR Coordinator, the chief judge, unit executive, human resources manager, or their supervisor as soon as possible, before it becomes severe or pervasive. Retaliation against any employee making a report of wrongful conduct is prohibited. The person receiving such a report has the responsibility to notify the EDR Coordinator as soon as possible.

The EDR Coordinator shall promptly inform the chief judge and unit executive of any report. The chief judge and/or unit executive shall ensure that the allegations in the report are appropriately investigated, either by the human resources manager or other person.

All individuals involved in the investigation shall protect the confidentiality of the allegations of wrongful conduct to the extent possible. Information and records about the allegations shall be shared on a need-to-know basis.

Employees found by the chief judge and/or unit executive to have engaged in wrongful conduct, as defined in this Plan, may be subject to disciplinary action.

## CHAPTER X – DISPUTE RESOLUTION PROCEDURES

**§ 1 General procedure for consideration of alleged violations** – An employee who claims a denial of the rights granted under Chapters II through VIII of this Plan shall seek resolution of such claims through the procedures of this Chapter. Generally, the process consists of:

- A.** counseling and mediation;
- B.** hearing before the chief judge of the court (or a designated judicial officer) in which the alleged violation arises; and



C. review of the hearing decision under procedures established by the judicial council of the circuit.

**§ 2 Alleged Violation by Employee** – Before invoking a request for counseling an employee (to the extent feasible) is encouraged to bring his or her concerns to his or her supervisor or unit executive, unless the supervisor or unit executive is the alleged violator. In such a situation, the court or employing office should specify alternative neutral points of contact for the initial inquiry. An employee alleging that any of the rights granted under the Model EEO Plan or this Model EDR Plan have been violated, and who seeks relief under this Plan, must file a request for counseling with their court’s EDR Coordinator in accordance with Section 8 of this Chapter.

**§ 3 Alleged Violation by Judge** – Any employee alleging that a judge violated any rights granted under the Model EEO Plan or this Model EDR Plan may file an EDR claim in accordance with this Plan. In such an instance, however, all the claims procedures of this Chapter shall be performed by the circuit council, either by members of the council directly or by persons designated to act on its behalf, which may include the chief judge of the circuit. If a judge becomes the subject of both an EDR claim and a judicial misconduct complaint under the Judicial Conduct and Disability Act, [28 U.S.C. §§ 351-364](#), the circuit judicial council or its designee, which may include the chief judge of the circuit, will craft a procedure for determining any common issues of fact and processing both complaints, subject to all requirements of the Act, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and, as practicable, the EDR Plan. In so doing, the council or its designee, who may include the chief judge of the circuit, may determine that all or part of the EDR claim must be abated until action is taken on the judicial misconduct complaint.

**§ 4 Confidentiality** – The court or employing office shall protect the confidentiality of allegations filed under this Plan to the extent possible. However, information about allegations filed under this Plan shall be shared on a need-to-know basis. Records relating to violations under this Plan shall be kept confidential on the same basis.

**§ 5 General provisions and protections**

**A. Prohibition against retaliation** – Claimants under this Plan have the right to be free from retaliation because of filing a claim pursuant to this Plan. Likewise, any person who participates in the filing or processing of a claim, such as an employment dispute resolution coordinator, mediator, witness, representative, or co-worker, is also entitled to freedom from retaliation.

**B. Right to representation** – Every individual invoking the dispute resolution procedures of this Plan has the right to be represented by a person of his

or her choice if such person is available and consents to be a representative. A court employee may accept the responsibilities of representation if it will not unduly interfere with his or her court duties or constitute a conflict of interest, as determined by the representative's appointing officer.

- C. Case preparation** – To the extent feasible, every individual invoking the dispute resolution procedures of this Plan may use a reasonable amount of official time to prepare his or her case, so long as it does not unduly interfere with the performance of his or her court duties.
- D. Extensions of time** – The chief judge of the court, or other presiding judicial officer, may extend any of the deadlines set forth in this Chapter for good cause.
- E. Dismissal of claim** – On his or her own initiative or at the request of any party, the chief judge or presiding judicial officer may at any time in the proceedings, dismiss a claim on the grounds that it does not invoke violations of the rights or protections granted under the Model EEO Plan or this Model EDR Plan, is untimely, is unduly repetitive of a previous claim, adverse action, or grievance, is frivolous, or fails to state a claim upon which relief may be granted.
- F. Records** – At the conclusion of formal and informal proceedings under this Plan, all papers, files, and reports will be filed with the court's Employment Dispute Resolution Coordinator ("EDR Coordinator"). No papers, files, or reports relating to a dispute will be filed in any employee's personnel folder, except as necessary to implement an official personnel action.

**§ 6 Designation and duties of employment dispute resolution coordinator** – Each court shall designate a person to serve as the EDR Coordinator. Courts may designate more than one EDR Coordinator. The duties of such persons shall include the following:

- A.** to provide information to the court and employees regarding the rights and protections afforded under this Plan;
- B.** to coordinate and organize the procedures and establish and maintain official files of the court pertaining to claims and other matters initiated and processed under the court's employment dispute resolution plan;
- C.** to coordinate the counseling of individuals in the initial stages of the claims process, in accordance with Section 8 of this Chapter; and

- D. to collect, analyze, and consolidate statistical data and other information pertaining to the court's employment dispute resolution process.

**§ 7 General disqualification provision** – Each court and judicial council shall make available procedures through which a party may seek the disqualification of a judicial officer, employee or other person involved in a dispute under this Chapter.

**§ 8 Counseling**

**A. Initiating a proceeding; formal request for counseling** – An employee who believes that his or her rights under Chapters II through VIII of this Plan have been violated must first request counseling.

**B. Form and manner of requests** – Requests for counseling:

1. are to be submitted to the court's EDR Coordinator;
2. must be made in writing and contain all the violations asserted by the claimant; and
3. must be made within 30 days of the alleged violation or within 30 days of the time the employee becomes aware of the alleged violation.

**C. Procedures**

1. **Who may serve as counselor** – The counseling shall be conducted by the court's EDR Coordinator, unless the EDR Coordinator is disqualified from serving as counselor under Section 7 of this Chapter, or is otherwise unavailable. In such instances, the chief judge of the court shall designate another qualified individual to perform the counseling function. The EDR Coordinator shall promptly provide a copy of the request for counseling to the unit executive and the chief judge of the court.
2. **Purposes of counseling** – The purposes of the counseling shall be to discuss the employee's concerns and elicit information regarding the matter which the employee believes constitutes a violation; to advise the employee of his or her rights and responsibilities and the procedures of the court applicable to the employment dispute resolution process; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.



3. **Confidentiality** – The court or employing office shall protect the confidentiality of allegations filed under this Plan to the extent possible. However, information about allegations filed under this Plan shall be shared on a need-to-know basis. Records relating to violations under this Plan shall be kept confidential on the same basis.
  4. **Form of settlement** – The EDR Coordinator shall reduce to writing any settlement achieved during the counseling process and secure the signatures of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.
- D. Duration of counseling period** – The period for counseling shall be 30 days (or a shorter period if counseling is concluded at an earlier date), beginning on the date that the request for counseling is received by the EDR Coordinator.
- E. Conclusion of the counseling period and notice** – The EDR Coordinator shall notify the employee in writing of the end of the counseling period. As part of the notice, the EDR Coordinator shall inform the employee of the right and obligation, should the employee choose to pursue his or her claim, to file with the EDR Coordinator a request for mediation in accordance with Section 9 of this Chapter.

## § 9 Mediation

- A. Initiation** – Within 15 days after receipt by the employee of the notice of the conclusion of the counseling period, the employee may file with the EDR Coordinator a request for mediation. The request must be made in writing and must state the claim(s) presented. The EDR Coordinator shall promptly provide a copy of the request for mediation to the unit executive and the chief judge of the court. Failure to pursue mediation will preclude further processing of the employee's claim under any other provisions of this Chapter.
- B. Procedures**
1. **Designation of mediator** – As soon as possible after receiving the request for mediation, the chief judge or EDR Coordinator shall designate a mediator and provide written notice of such designation.
  2. **Who may serve as mediator** – Any person with the skills to assist in resolving disputes, except the court's EDR Coordinator, may serve as a mediator under this Plan.

3. **Purpose of mediation** – The mediator shall meet separately and/or jointly with the employee and his or her representative, if any, and the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.
  4. **Confidentiality** – Any person or party involved in the mediation process shall not disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the mediation process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties.
  5. **Form of settlement** – The mediator shall reduce to writing any settlement achieved during the mediation process and secure the signature of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.
- C. **Duration of mediation period** – The mediation period shall be 30 days (or a shorter period if mediation is concluded at an earlier date), beginning on the date the request for mediation is received. The employee is required to attend at least one mediation session. Thereafter, he or she may proceed to file a request for hearing.
- D. **Conclusion of mediation period and notice** – If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the EDR Coordinator shall provide the employee, the employee's representative, if any, and the employing office with written notice that the mediation period has concluded. The notice shall also inform the employee of his or her right to file a complaint under Section 10 of this Chapter.

## § 10 Complaint and hearing

- A. **Complaint** – Not later than 15 days after receiving notice of the end of the mediation period, an employee may file a complaint under procedures established by the court. The complaint shall be in writing, shall identify the complainant and all involved parties and individuals, and shall set forth a short and plain statement of the complainant's claim and the relief or remedy being sought. Claims that were not presented in §9(A) may not be pursued. The respondent shall be the employing office which would be responsible for redressing, correcting or abating the violation(s) alleged in the complaint. No individual shall be named as a respondent in the complaint.

## **B. Hearing procedures**

- 1. Presiding judicial officer** – If the chief judge or presiding judicial officer does not dismiss the complaint, the chief judge or presiding judicial officer shall hold a hearing on the merits of the complaint unless he or she determines that no material factual dispute exists.
- 2. Specific provisions** – The presiding judicial officer may provide for such discovery and investigation as is necessary. In general, the presiding judicial officer shall determine the time, place, and manner of conducting the hearing. However, the following specific provisions shall apply to hearings conducted under this Section:
  - a.** the hearing shall be commenced no later than 60 days after the filing of the complaint;
  - b.** the complainant and the head of the office against which the complaint has been filed must receive written notice of the hearing; such notice shall also be provided to the individual alleged to have violated rights protected by this Plan;
  - c.** at the hearing, the complainant will have the right to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses; the employing office will have the right to present evidence on its behalf and to cross-examine adverse witnesses;
  - d.** a verbatim record of the hearing must be kept and shall be the sole official record of the proceeding;
  - e.** in reaching his or her decision, the chief judge or presiding judicial officer shall be guided by judicial and administrative decisions under the laws related to Chapters II through VIII of this Plan and by decisions of the judicial council of the appropriate circuit under Section 11 of this Chapter;
  - f.** remedies may be provided in accordance with Section 12 of this Chapter where the hearing officer finds that the complainant has established by a preponderance of the evidence that a substantive right protected by this Plan has been violated;
  - g.** the final decision of the chief judge or presiding judicial officer must be issued in writing not later than 30 days after the conclusion of the hearing; and



- h. all parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing.

**§ 11 Review of decision** – A party or individual aggrieved by a final decision of the chief judge or presiding judicial officer, or by a summary dismissal of the complaint, may petition for review of that decision under procedures established by the judicial council of the circuit. Any review will be conducted by a judicial officer(s), based on the record created by the hearing officer, and shall be affirmed if supported by substantial evidence.

**§ 12 Remedies**

- A. Where judicial officers acting pursuant to section 10 or 11 of this Plan find that a substantive right protected by this Plan has been violated, they may order a necessary and appropriate remedy. A remedy may be directed at correcting a past violation, prospectively ensuring compliance with the rights protected by this Plan, or both. A remedy shall be tailored as closely as possible to the specific violation involved.
- B. Remedies which may be provided to successful complainants under this Plan include, but are not limited to:
  - 1. placement of an employee in a position previously denied;
  - 2. placement in a comparable alternative position;
  - 3. reinstatement to a position from which the employee was previously removed;
  - 4. prospective promotion to a position;
  - 5. priority consideration for a future promotion or position;
  - 6. back pay and associated benefits, including attorney's fees, where the statutory criteria of the Back Pay Act, [5 U.S.C. § 5596](#), are satisfied;
  - 7. records modification and/or expungement;
  - 8. "equitable" relief, such as temporary stays of adverse actions;
  - 9. granting of family and medical leave; and
  - 10. accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours, or other appropriate means.

C. Remedies which are *not* legally available include:

1. payment of attorney's fees (except as authorized under the Back Pay Act);
2. compensatory damages; and
3. punitive damages.

**§ 13 Record of final decisions** – Final decisions under this Plan shall be made available to the public in accordance with procedures established by the judicial council of the circuit.

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## **§ 310 Overview**

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

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

### **Preface**

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

### **ARTICLE I. GENERAL PROVISIONS**

#### **1. Scope**

These Rules govern proceedings under the Judicial Conduct and Disability Act (the Act), [28 U.S.C. §§ 351–364](#), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of

**the business of the courts or is unable to discharge the duties of office because of mental or physical disability.**

COMMENTARY ON RULE 1

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

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

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

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

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

**2. Effect and Construction**

- (a) Generally. These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate**

**additional rules to implement the Act as long as those rules do not conflict with these Rules.**

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

#### COMMENTARY ON RULE 2

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

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

#### 3. Definitions

- (a) Chief Judge. “Chief judge” means the chief judge of a United States court of appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.**
- (b) Circuit Clerk. “Circuit clerk” means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.**
- (c) Complaint. A complaint is:**
  - (1) a document that, in accordance with Rule 6, is filed by any person in his or her individual capacity or on behalf of a professional organization; or**
  - (2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.**

- (d) **Court of Appeals, District Court, and District Judge.** “Courts of appeals,” “district court,” and “district judge,” where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.
- (e) **Disability.** “Disability” is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.
- (f) **Judicial Council and Circuit.** “Judicial council” and “circuit,” where appropriate, include any courts designated in [28 U.S.C. § 363](#).
- (g) **Magistrate Judge.** “Magistrate judge,” where appropriate, includes a special master appointed by the Court of Federal Claims under [42 U.S.C. § 300aa-12\(c\)](#).
- (h) **Misconduct. Cognizable misconduct:**
  - (1) **is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:**
    - (A) using the judge’s office to obtain special treatment for friends or relatives;
    - (B) accepting bribes, gifts, or other personal favors related to the judicial office;
    - (C) having improper discussions with parties or counsel for one side in a case;
    - (D) treating litigants, attorneys, or others in a demonstrably egregious and hostile manner;
    - (E) engaging in partisan political activity or making inappropriately partisan statements;
    - (F) soliciting funds for organizations;
    - (G) retaliating against complainants, witnesses, or others for their participation in this complaint process;
    - (H) refusing, without good cause shown, to cooperate in the investigation of a complaint under these Rules; or





and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief judges are expected in some circumstances to trigger the process — “identify a complaint,” see 28 U.S.C. § 351(b) and Rule 5 — and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief judge, the complainant lacks many rights that a litigant would have, and the chief judge, instead of being limited to the “four corners of the complaint,” must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Committee Report, 239 F.R.D. at 183–84.

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

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

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

Even where specific, mandatory rules exist — for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations — the distinction between the misconduct statute and these specific, mandatory rules must be

borne in mind. For example, an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

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

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

Rule 3(h)(2) reflects that 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. And some conduct in the categories listed under subsection (h)(1), or in categories not listed, might depending on the circumstances amount to "misconduct" under subsection (h)(2), or under both subsection (h)(1) and subsection (h)(2). Also, the Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge solicited funds for a charity or participated in 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 cause some reasonable people to have diminished confidence in the courts. Rule 3(h)(2) states that conduct of this sort is covered, for example, when it might lead to a "substantial and widespread" lowering of such confidence.

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. 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 judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, 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. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

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

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

With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge — in other words, assigning a low priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a

significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.

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

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

### ARTICLE II. INITIATION OF COMPLAINT

#### 5. Identification of Complaint

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

#### COMMENTARY ON RULE 5



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

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

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

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

In high-visibility situations, it may be desirable for a chief judge to identify a complaint without first seeking an informal resolution (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.

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

A chief judge may not 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.

Subsection (a) concludes by stating that this Rule is “subject to Rule 7.” This is intended to establish that only (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief 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 the power or a duty under this Rule to identify a complaint.

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

## 6. Filing of Complaint

- (a) **Form.** A complainant may use the [form reproduced in the appendix to these Rules](#) or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals’ website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).
- (b) **Brief Statement of Facts.** A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:
  - (1) what happened;
  - (2) when and where the relevant events happened;
  - (3) any information that would help an investigator check the facts; and
  - (4) for an allegation of disability, any additional facts that form the basis of that allegation.
- (c) **Legibility.** A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a

resubmitted complaint is still illegible, it will not be accepted for filing.

- (d) **Complainant's Address and Signature; Verification.** The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the submission will be accepted, but it will be reviewed under only Rule 5(b).
- (e) **Number of Copies; Envelope Marking.** The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

#### COMMENTARY ON RULE 6

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

#### 7. Where to Initiate Complaint

- (a) **Where to File.** Except as provided in (b),
  - (1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.
  - (2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.
  - (3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.
- (b) **Misconduct in Another Circuit; Transfer.** If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under [28 U.S.C. §§ 291–293 and 294\(d\)](#), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the

**subject judge’s home circuit or to the circuit where the alleged misconduct occurred, as the case may be.**

#### COMMENTARY ON RULE 7

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

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

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

#### **8. Action by Circuit Clerk**

- (a) Receipt of Complaint.** Upon receiving a complaint against a judge filed under Rule 6 or identified under Rule 5, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability, and acknowledge the complaint’s receipt.
- (b) Distribution of Copies.** The circuit clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 6 or identified under Rule 5 to each subject judge. The circuit clerk must retain the original complaint. Any further distribution should be as provided by local rule.

- (c) **Complaint Against Noncovered Person.** If the circuit clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint under these Rules.
- (d) **Complaint Against Judge and Another Noncovered Person.** If the circuit clerk receives a complaint about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint under these Rules only with regard to the judge and must so inform the complainant.

#### COMMENTARY ON RULE 8

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

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

Complaints against noncovered 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.

#### 9. Time for Filing or Identifying Complaint

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

#### COMMENTARY ON RULE 9

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

#### 10. Abuse of 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 right to file further complaints should not be limited, the judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.



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

#### COMMENTARY ON RULE 10

This Rule is adapted from the Illustrative Rules.

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

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

### ARTICLE III. REVIEW OF COMPLAINT BY CHIEF JUDGE

#### 11. Chief Judge's Review

- (a) Purpose of Chief Judge's Review.** When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25. If a complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice

to the subject judge. After reviewing a complaint, the chief judge must determine whether it should be:

- (1) dismissed;
  - (2) concluded on the ground that voluntary corrective action has been taken;
  - (3) concluded because intervening events have made action on the complaint no longer necessary; or
  - (4) referred to a special committee.
- (b) **Chief Judge's Inquiry.** In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report.
- (c) **Dismissal.**
- (1) **Permissible grounds.** A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:
    - (A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office;
    - (B) is directly related to the merits of a decision or procedural ruling;
    - (C) is frivolous;
    - (D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;
    - (E) is based on allegations that are incapable of being established through investigation;



**committee must be sent to the Committee on Judicial Conduct and Disability.**

- (2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. Except as authorized by [28 U.S.C. § 360](#), the memorandum must not include the name of the complainant or of the subject judge. The order and memoranda incorporated by reference in the order must be promptly sent to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.**
  - (3) Right to petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and the subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If the chief judge so disposes of a complaint that was identified under Rule 5 or filed by its subject judge, the chief judge must transmit the order and memoranda incorporated by reference in the order to the judicial council for review in accordance with Rule 19. In the event of such a transmission, the subject judge may make a written submission to the judicial council but will have no further right of review except as allowed under Rule 21(b)(1)(B). When a disposition is to be reviewed by the judicial council, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the council.**
- (h) Public Availability of Chief Judge's Decision. The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.**

#### COMMENTARY ON RULE 11

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

a trial when the judge was asleep must be treated as a complaint regarding disability. A formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

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

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to the judicial council and its special committee. An allegation of fact is ordinarily not “refuted” 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 otherwise cognizable. If it is the complainant's word against the subject judge's— in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability — 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 when a complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. *Id.* The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. *Id.* In this example, the matter remains reasonably in dispute. If all five witnesses say the subject judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. *Id.*

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

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

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

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239–45. Subsection (c)(1)(A) 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 on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 3 and its accompanying Commentary.

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

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

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider 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 subject judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge’s proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer’s statement that he or she 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 that 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 under Rule 11(c)(1)(D).

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



unnamed witness come forward so that the chief judge can learn the unnamed witness's account. *Id.* 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. *Id.* at 243–44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. *Id.*

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

Dismissal is also appropriate 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)(2) 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 not be undertaken, 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 voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. at 244–45. The Act authorizes the chief judge to conclude the complaint proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after a complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. 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. *Id.* Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. *Id.* The chief 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. *Id.* Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on identical conduct.

"Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the

directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. *Id.* Neither the chief 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). *Id.* Compliance with a previous judicial-council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. *Id.*

Where a subject 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, or a pledge to refrain from similar conduct in the future. *Id.* 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. *Id.* In some cases, corrective action may 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 judge's order, in a direct communication from the subject judge, or otherwise. *Id.*

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

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief 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 judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of a complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. *Id.*

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 must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief 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 a proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the subject judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

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

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

## **ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE**

### **12. Special Committee’s Composition**

- (a) Membership.** Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. For the courts named in [28 U.S.C. § 363](#), the special committee must be selected from the judges serving on the subject judge's court.
- (b) Presiding Officer.** When appointing the special committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.
- (c) Bankruptcy Judge or Magistrate Judge as Adviser.** If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the special committee’s appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser

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

- (d) **Provision of Documents.** The chief judge must certify to each other member of the special committee and to any adviser copies of the complaint and statement of facts, in whole or relevant part, and any other relevant documents on file.
- (e) **Continuing Qualification of Special-Committee Member.** A member of a special committee may continue to serve on the committee even though the member relinquishes the position of chief 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, or under [28 U.S.C. § 171](#).
- (f) **Inability of Special-Committee Member to Complete Service.** If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.
- (g) **Voting.** All actions by a special committee must 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 the size of a special committee 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. Rule 12(a) acknowledges the common practice of including senior judges in the membership of a special committee.

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

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge. Subsection (c) also provides that the adviser will have all the privileges of a member of the special committee except a vote. The adviser, therefore, may participate in all deliberations of the special committee, question witnesses at hearings, and write a separate statement to accompany the committee's report 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 special committee that originally consisted of the chief 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 permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the special committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a special 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 also preserves the collegial character of the special-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 must be by vote of a majority of all the members. All the members of a special committee should participate in committee decisions. In that circumstance, it seems reasonable to require that special-committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

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

- (a) Extent and Methods of Special-Committee Investigation. A special committee should determine the appropriate extent and methods of its investigation in light of the allegations of the complaint and its preliminary inquiry. The investigation may include use of appropriate experts or other professionals. If, in the course of the investigation, the special 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 refer the new matter to the chief judge for a determination of whether**

**action under Rule 5 or Rule 11 is necessary before the committee's investigation is expanded to include the new matter.**

- (b) Criminal Conduct.** If the special committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The special committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.
- (c) Staff.** The special committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judiciary or may hire special staff through the Director of the Administrative Office of the United States Courts.
- (d) Delegation of Subpoena Power; Contempt.** The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under [28 U.S.C. § 332\(d\)](#) against anyone who fails to comply with a subpoena.

#### COMMENTARY ON RULE 13

This Rule is adapted from the Illustrative Rules.

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

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



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

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

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination 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.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of a judicial council by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of the special committee, the presiding officer also be delegated the authority to direct the circuit clerk 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. See Rule 12(g).

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

- (a) Purpose of Hearings.** The special committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the special committee is investigating allegations against more than one judge, it may hold joint or separate hearings.
- (b) Special-Committee Evidence.** Subject to Rule 15, the special committee must obtain material, nonredundant evidence in the form it considers appropriate. In the special committee's discretion, evidence may be obtained by committee members, staff, or both.

**Witnesses offering testimonial evidence may include the complainant and the subject judge.**

- (c) Counsel for Witnesses.** The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.
- (d) Witness Fees.** Witness fees must be paid as provided in [28 U.S.C. § 1821](#).
- (e) Oath.** All testimony taken at 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 all hearings.

#### COMMENTARY ON RULE 14

This Rule is adapted from the Act, 28 U.S.C. § 353, 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, special-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 material evidence will be obtained by the special committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a special-committee witness. Cases may arise in which the subject judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

## 15. Subject Judge's Rights

- (a) Notice.**
  - (1) Generally.** The subject judge must receive written notice of:
    - (A)** the appointment of a special committee under Rule 11(f);
    - (B)** the expansion of the scope of an investigation under Rule 13(a);
    - (C)** any hearing under Rule 14, including its purposes, the names of any witnesses the special committee intends to call, and the text of any statements that have been taken from those witnesses.
  - (2) Suggestion of additional witnesses.** The subject judge may suggest additional witnesses to the special committee.
- (b) Special-Committee Report.** The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.
- (c) Presentation of Evidence.** At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under [28 U.S.C. § 332\(d\)\(1\)](#). The subject judge must be given the opportunity to cross-examine special-committee witnesses, in person or by counsel.
- (d) Presentation of Argument.** The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.
- (e) Attendance at Hearings.** The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the special committee.
- (f) Representation by Counsel.** The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

## 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(e) gives the subject judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

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

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

- (a) Notice.** The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee’s report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.
- (b) Opportunity to Provide Evidence.** If the complainant knows of relevant evidence not already before the special committee, the complainant may briefly explain in writing the basis of that knowledge and the nature of that evidence. If the special committee determines that the complainant has information not already known to the committee that would assist in the committee’s investigation, a representative of the committee must interview the complainant.
- (c) Presentation of Argument.** The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.
- (d) Representation by Counsel.** A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

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

#### COMMENTARY ON RULE 16

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

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

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

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

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

#### **17. Special-Committee Report**

**The special committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was**

**adopted, any separate or dissenting statements of special-committee members, and the record of any hearings held under Rule 14. In addition to being sent to the subject judge under Rule 15(b), a copy of the report and any accompanying statements and documents must be sent to the Committee on Judicial Conduct and Disability.**

#### COMMENTARY ON RULE 17

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

### ARTICLE V. REVIEW BY JUDICIAL COUNCIL

#### 18. Petition for Review of Chief-Judge Disposition Under Rule 11(c), (d), or (e)

- (a) **Petition for Review.** After the chief judge issues an order under Rule 11(c), (d), or (e), the complainant or the subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under [28 U.S.C. § 358](#), the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.
- (b) **When to File; Form; Where to File.** A petition for review must be filed in the office of the circuit clerk within 42 days after the date of the chief judge's order. The petition for review should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The petition for review should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . ." and state the reasons why the petition should be granted. It must be signed.
- (c) **Receipt and Distribution of Petition.** A circuit clerk who receives a petition for review filed in accordance with this Rule must:
  - (1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;
  - (2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

- (A) copies of the complaint;
  - (B) all materials obtained by the chief judge in connection with the inquiry;
  - (C) the chief judge's order disposing of the complaint;
  - (D) any memorandum in support of the chief judge's order;
  - (E) the petition for review; and
  - (F) an appropriate ballot; and
- (3) send the petition for review to the Committee on Judicial Conduct and Disability. Unless the Committee on Judicial Conduct and Disability requests them, the circuit clerk will not send copies of the materials obtained by the chief judge.
- (d) **Untimely Petition.** The circuit clerk must refuse to accept a petition that is received after the time allowed in (b).
- (e) **Timely Petition Not in Proper Form.** When the circuit clerk receives a petition for review filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the circuit clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within the original time allowed for filing the petition or within 21 days after the date on which a notice of the deficiencies was sent to the complainant, whichever is later. If the deficiencies are corrected within the time allowed, the circuit clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the circuit clerk must reject the petition.

#### COMMENTARY ON RULE 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits the subject judge, as well as the complainant, to petition for review of the chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, the chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge



did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

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

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

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

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

- (a) Rights of Subject Judge. At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The circuit clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual judicial-council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.**
- (b) Judicial-Council Action. After considering a petition for review and the materials before it, the judicial council may:**
  - (1) affirm the chief judge's disposition by denying the petition;**
  - (2) return the matter to the chief 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 judge with directions to appoint a special committee under Rule 11(f); or**
  - (4) in exceptional circumstances, take other appropriate action.**
- (c) Notice of Judicial-Council Decision. Copies of the judicial council's order, together with memoranda incorporated by reference in the**

**order and separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.**

- (d) Memorandum of Judicial-Council Decision.** If the judicial council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a judicial-council order must not include the name of the complainant or the subject judge.
- (e) Review of Judicial-Council Decision.** If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented, the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b).
- (f) Public Availability of Judicial-Council Decision.** Materials related to the judicial council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

#### COMMENTARY ON RULE 19

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

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

#### 20. Judicial-Council Action Following Appointment of Special Committee

- (a) Subject Judge's Rights.** Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The subject judge must also be given an opportunity to present argument, personally or through counsel, written or oral, as determined by the judicial council. The subject judge must not otherwise communicate with judicial-council members about the matter.
- (b) Judicial-Council Action.**
  - (1) Discretionary actions.** Subject to the subject judge's rights set forth in subsection (a), the judicial council may:

- (A) dismiss the complaint because:**
  - (i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;**
  - (ii) the complaint is directly related to the merits of a decision or procedural ruling;**
  - (iii) the facts on which the complaint is based have not been established; or**
  - (iv) the complaint is otherwise not appropriate for consideration under [28 U.S.C. §§ 351–364](#).**
- (B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.**
- (C) refer the complaint to the Judicial Conference with the judicial council’s recommendations for action.**
- (D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:**
  - (i) censuring or reprimanding the subject judge, either by private communication or by public announcement;**
  - (ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;**
  - (iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under [28 U.S.C. § 631\(i\)](#) or [42 U.S.C. § 300aa-12\(c\)\(2\)](#);**
  - (iv) in the case of a bankruptcy judge, removing the judge from office under [28 U.S.C. § 152\(e\)](#);**
  - (v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived;**

- (vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under [28 U.S.C. § 372\(b\)](#) so that an additional judge may be appointed; and
      - (vii) in the case of a circuit chief judge or district chief judge, finding that the judge is temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge in accordance with [28 U.S.C. § 45\(d\)](#) or [§ 136\(e\)](#).
    - (E) take any combination of actions described in (b)(1)(A)-(D) of this Rule that is within its power.
  - (2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:
    - (A) might constitute ground for impeachment; or
    - (B) in the interest of justice, is not amenable to resolution by the judicial council.
- (c) **Inadequate Basis for Decision.** If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.
- (d) **Judicial-Council Vote.** Judicial-council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the judicial council.
- (e) **Recommendation for Fee Reimbursement.** If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office use funds appropriated to the judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not

have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

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

#### COMMENTARY ON RULE 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within 21 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 argument to the judicial council, personally or through counsel, or both, at the direction of the council. Whether that argument is written or oral would be for the judicial council to determine. The subject judge may not otherwise communicate with judicial-council members about the matter.

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

Under 28 U.S.C. §§ 45(d) and 136(e), which provide for succession where "a chief judge is temporarily unable to perform his duties as such," the determination

whether such an inability exists is not expressly reserved to the chief judge. Nor, indeed, is it assigned to any particular judge or court-governance body. Clearly, however, a chief judge's inability to function as chief could implicate "the effective and expeditious administration of justice," which the judicial council of the circuit must, under 28 U.S.C. § 332(d)(1), "make all necessary and appropriate orders" to secure. For this reason, such reassignment is among a judicial council's remedial options, as subsection (b)(1)(D)(vii) makes clear. Consistent with 28 U.S.C. §§ 45(d) and 136(e), however, any reassignment of chief-judge duties must not outlast the subject judge's inability to perform them. Nor can such reassignment result in any extension of the subject judge's term as chief judge.

Rule 20(c) provides that 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 judicial council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

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

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

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

Disability for review. The same will apply where a complaint was filed by its subject judge.

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

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

- (a) Committee Review.** The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its review of judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion. Its disposition of petitions for review is ordinarily final. The Judicial Conference may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.
- (b) Reviewable Matters.**

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

    - (A) Rule 20(b)(1)(A), (B), (D), or (E); or**
    - (B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order.**
  - (2) Upon Committee's initiative.** At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.
- (c) Committee Vote.** Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review related to that subject judge. Committee



decisions under (b) of this Rule must be by majority vote of the qualified Committee members. Those members hearing the petition for review should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only six members are qualified to consider a petition for review, the Chief Justice shall select an additional judge to join the qualified members to consider the petition. If four or fewer members are qualified to consider a petition for review, the Chief Justice shall select a panel of five judges, including the qualified Committee members, to consider it.

- (d) **Additional Investigation.** Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under [28 U.S.C. § 331](#).
- (e) **Oral Argument; Personal Appearance.** There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions.
- (f) **Committee Decision.** A Committee decision under this Rule must be transmitted promptly to the Judicial Conference. Other distribution will be by the Administrative Office at the direction of the Committee chair.
- (g) **Finality.** All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

#### COMMENTARY ON RULE 21

This Rule is largely self-explanatory.

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

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of a dismissal or a conclusion of a complaint under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented, the complainant or the subject judge has the right to petition for review by the Committee. Under Rule 21(b)(2), the Committee may review such a dismissal or conclusion in its sole discretion, whether or not a dissent occurred, and only as to the appointment of a

special committee. Any review under Rule 21(b)(2) will be conducted as soon as practicable after the dismissal or conclusion at issue. No party has a right to such review, and such review will be rare.

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

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

## **22. Procedures for Review**

- (a) **Filing Petition for Review.** A petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), may be filed by sending a brief written statement to the Committee on Judicial Conduct and Disability at [JCD\\_PetitionforReview@ao.uscourts.gov](mailto:JCD_PetitionforReview@ao.uscourts.gov) or to:

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

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

- (b) **Form and Contents of Petition.** No particular form is required. The petition for review must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition for review should not normally exceed 20 pages plus

necessary attachments. A petition for review must be signed by the petitioner or his or her attorney.

- (c) **Time.** A petition for review must be submitted within 42 days after the date of the order for which review is sought.
- (d) **Action on Receipt of Petition.** When a petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), is submitted in accordance with this Rule, the Administrative Office shall acknowledge its receipt, notify the chair of the Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

#### COMMENTARY ON RULE 22

Rule 22 is self-explanatory.

### ARTICLE VII. MISCELLANEOUS RULES

#### 23. Confidentiality

- (a) **General Rule.** The consideration of a complaint by a chief judge, a special committee, a judicial council, or the Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judiciary or by any person who records or transcribes testimony except as allowed by these Rules. A chief judge may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability.
- (b) **Files.** All files related to a complaint must be separately maintained with appropriate security precautions to ensure confidentiality.
- (c) **Disclosure in Decisions.** Except as otherwise provided in Rule 24, written decisions of a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of a council or the Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.
- (d) **Availability to Judicial Conference.** On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee on Judicial Conduct and Disability to

records of proceedings under the Act at the site where the records are kept.

- (e) **Availability to District Court.** If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.
- (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) **Subject Judge's Consent.** If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted under these Rules, not be revealed.
- (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 disclosure is justified by special circumstances and is not prohibited by the Act. Disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.
- (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 under Rule 24.
- (j) **Assistance and Consultation.** Nothing in this Rule prohibits a chief judge, a special committee, a judicial council, or the Judicial Conference or its Committee on Judicial Conduct and Disability, in

**the performance of any function authorized under the Act or these Rules, from seeking the help of qualified staff or experts or from consulting other judges who may be helpful regarding the performance of that function.**

## COMMENTARY ON RULE 23

Rule 23 was adapted from the Illustrative Rules.

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

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

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

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the chief 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 judge under Rule 11(b).

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. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that written decisions, 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. However, subsection (c) is subject to Rule 24(a),

which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes 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 it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of a 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.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief 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 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 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 judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

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.

Subsection (h) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial 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 a complaint proceeding 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. In authorizing disclosure, a judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or when those materials constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(j), any of the specified judges or entities performing a function authorized under these Rules may seek expert or staff assistance or may consult with other judges who may be helpful regarding performance of that function; the confidentiality requirement does not preclude this. A chief judge, for example, may properly seek the advice and assistance of another judge who the chief 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 judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, a chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

#### **24. Public Availability of Decisions**

- (a) General Rule; Specific Cases. When final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including memoranda incorporated by reference in those orders and any dissenting opinions or separate statements by members of the judicial council, but excluding any orders under Rule 5 or 11(f), must be made public, with the following exceptions:**
- (1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.**
  - (2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.**
  - (3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.**
  - (4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.**
  - (5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders 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 circuit clerk and by placing the orders on the court’s public website. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Committee on Judicial Conduct and Disability will make available on the judiciary’s website, [www.uscourts.gov](http://www.uscourts.gov), selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.
- (c) Orders of Committee on Judicial Conduct and Disability.** Orders of the Committee on Judicial Conduct and Disability constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the circuit clerk of the relevant court of appeals. The Committee on Judicial Conduct and Disability will also make such orders available on the judiciary’s website, [www.uscourts.gov](http://www.uscourts.gov). When authorized by the Committee on Judicial Conduct and Disability, other orders related to complaint proceedings will similarly be made available.
- (d) Complaints Referred to Judicial Conference.** If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

#### COMMENTARY ON RULE 24

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

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference “urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act.” Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits “to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services.” Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that “[p]osting

such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of a chief judge, a judicial council, and the Committee on Judicial Conduct and Disability, as well as the texts of memoranda incorporated by reference in those orders, together with any dissenting opinions or separate statements by members of the judicial council. No memoranda other than those incorporated by reference in those orders shall be disclosed. 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 subject judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief 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.

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 subject judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full judicial 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.

Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief 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 24(b) makes clear that circuits must post on their external websites all orders required to be made public under Rule 24(a).

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

## 25. Disqualification

- (a) **General Rule.** Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If a complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.
- (b) **Subject Judge.** A subject judge is disqualified from considering a complaint except to the extent that these Rules provide for participation by a subject judge.
- (c) **Chief Judge Disqualified from Considering Petition for Review of Chief Judge's Order.** If a petition for review of the chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council's consideration of the petition.
- (d) **Member of Special Committee Not Disqualified.** A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.
- (e) **Subject Judge's Disqualification After Appointment of Special Committee.** Upon appointment of a special committee, the subject judge is disqualified from participating in the identification or consideration of any complaint, related or unrelated to the pending matter, under the Act or these Rules. The disqualification continues

until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

- (f) **Substitute for Disqualified Chief Judge.** If the chief judge is disqualified from performing duties that the Act and these Rules assign to a chief judge, those duties must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council.
- (g) **Judicial-Council Action When Multiple Judges Disqualified.** Notwithstanding any other provision in these Rules to the contrary,
  - (1) a member of the judicial council who is a subject judge may participate in its disposition if:
    - (A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;
    - (B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or those judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and
    - (C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.
  - (2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).
- (h) **Disqualification of Members of Committee on Judicial Conduct and Disability.** No member of the Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

## COMMENTARY ON RULE 25

Rule 25 is adapted from the Illustrative Rules.

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

Subsection (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. For example, the subject judge cannot initiate complaints by identification, conduct limited inquiries, or choose between dismissal and special-committee investigation as the threshold disposition of a complaint. Likewise, the subject judge cannot participate in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference, or the Committee on Judicial Conduct and Disability. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is 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 judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, 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. Rule 25(e) bars such participation.

Under the Act, a complaint against the chief 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 judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief 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 "duties that the Act and these Rules assign to a chief judge" does not apply to determine the acting presiding member of the

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 judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules 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 judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be 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 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 en 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 is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief 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 subject judges 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 1992) (same). There is no unfairness in permitting the chief 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 the chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the judicial 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 for review 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 25(h) recognizes that the jurisdictional statement of the Committee on Judicial Conduct and Disability contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

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

**In exceptional circumstances, a chief judge or a judicial council may ask 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 for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.**

### COMMENTARY ON RULE 26

Rule 26 implements the Breyer Committee's recommended use of transfers. Breyer Committee 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 judicial 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 judicial 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 judicial council shall determine the proper stage at which to begin consideration of the complaint — for example, reference to the transferee chief judge, appointment of a special committee, etc.

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

- (a) Complaint Pending Before Chief Judge.** With the chief judge's consent, the complainant may withdraw a complaint that is before the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent the chief judge from identifying or having 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 the special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.
- (c) Petition for Review.** A petition for review addressed to the judicial council under Rule 18, or the Committee on Judicial Conduct and Disability under Rule 22, may be withdrawn if no action on the petition has been taken.

### COMMENTARY ON RULE 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief 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 subsection (a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief 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 judge and often by the judicial council as well in such a case.

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

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

#### **29. Effective Date**

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

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

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# Federal Judiciary Workplace Conduct Working Group Formed

*Published on January 12, 2018*

James C. Duff, Director of the Administrative Office of the U.S. Courts, has established a Federal Judiciary Workplace Conduct Working Group to review the safeguards currently in place within the Judiciary to protect employees from inappropriate conduct in the workplace.

Chief Justice John G. Roberts, Jr., noted in his 2017 Year-End Report on the Federal Judiciary that he asked Director Duff to form the working group, observing, “The Judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure exemplary workplace conduct for every judge and every court employee.”

Chief Justice Roberts directed the working group to examine whether changes may be needed to the Judiciary’s codes of conduct; its guidance to employees – including law clerks – on issues of confidentiality and reporting instances of misconduct; its educational programs; and its rules for investigating and processing misconduct complaints.

Working Group Members are:

**James C. Duff**, Director of the Administrative Office of the U.S. Courts, Chairman. As Director and Secretary to the Judicial Conference, Mr. Duff has been involved in several high profile judicial misconduct matters and oversees staff support to Judicial Conference Committees, including the Codes of Conduct Committee and the Judicial Conduct and Disability Committee. Mr. Duff served as counselor to the Chief Justice during the Presidential impeachment trial in 1999.

**Chief Judge Jeffrey R. Howard**, First Circuit. Chief Judge Howard is a member of the Judicial Conference of the United States. As Circuit Chief, he has the statutory authority to review all judicial misconduct and disability complaints and presides over the Circuit Council. Before becoming a judge, he had been chair of the New Hampshire Governor’s Commission on Domestic Violence and Sexual Assault, which developed interdisciplinary response protocols that became the model for programs in a number of other states.

**Judge M. Margaret McKeown**, Ninth Circuit. Judge McKeown chaired the Judicial Conference Codes of Conduct Committee, is chair of the newly formed Ninth Circuit Workplace Environment Committee, and served on various committees, working groups, and panels related to workplace and gender discrimination while on the bench and in private practice.

**Chief Judge Julie A. Robinson**, District of Kansas. Judge Robinson served on the Tenth Circuit Judicial Council and was a member of the committee that developed the 2010 and 2015 Strategic

Plan for the Federal Judiciary, which dealt with workplace issues, ethics, and integrity, as well as other topics.

**Judge Sarah S. Vance**, Eastern District of Louisiana. Judge Vance is a former Chief Judge of the district and a former member of the Fifth Circuit Judicial Council. She also was a member of the Executive Committee of the Judicial Conference of the United States and the Board of the Federal Judicial Center.

**Margaret A. Wiegand**, Circuit Executive for the Third Circuit. Ms. Wiegand supports the Chief Circuit Judge in administering the Judicial Conduct and Disability Act and manages and supports the workplace complaint process under the Consolidated Equal Employment Opportunity and Employee Dispute Resolution Plan. She also chairs the federal Judiciary's Human Resources Advisory Council.

**Jeffrey P. Minear**, Counselor to the Chief Justice for the past 11 years. Previously Mr. Minear clerked for a federal appellate judge and before joining the Supreme Court, held a variety of policy, legislative, and appellate positions at the Department of Justice.

**John S. Cooke**, Deputy Director of the Federal Judicial Center for the last 12 years. Before joining the center in 1998 as Director of Judicial Education, Mr. Cooke was the Chief Judge of the Army Court of Criminal Appeals. In 2013-2014 he served on a committee established by the Secretary of Defense to study responses to sexual assault in the armed forces.

**Sheryl Walter**, General Counsel at the Administrative Office of the U.S. Courts, will serve as counsel to the working group. She previously held senior positions at the Department of Justice and Department of State and on the staff of the Senate Judiciary Committee. She also clerked for a federal appellate judge.

In the course of its review, the working group will examine workplace relations practices in the public and private sectors and consult with other authorities as appropriate. The group will also solicit input from federal judges, law clerks, and other judicial employees. In addition, the group will coordinate its efforts with those of other federal courts that are reviewing similar matters. It will submit a written report and recommendations to the relevant committees of the Judicial Conference of the United States.