

**JUDICIAL CONFERENCE OF THE UNITED STATES**

**and the**

**TENTH CIRCUIT COURT OF APPEALS**

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

National Rules adopted March 11, 2008  
Tenth Circuit Local Rules adopted August 5, 2009

# RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

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Appendix (Complaint Form)



1 **ARTICLE I. GENERAL PROVISIONS**

2  
3 **1. Scope**

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

8  
9 **Commentary on Rule 1**

10  
11 In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief  
12 Justice Rehnquist and known as the "Breyer Committee," presented a report, known as the "Breyer Committee  
13 Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial  
14 Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. The Breyer Committee had been formed in response to  
15 criticism from the public and the Congress regarding the effectiveness of the Act's implementation. The Executive  
16 Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and  
17 Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to  
18 the Conference.

19  
20 The Breyer Committee found that it could not evaluate implementation of the Act without establishing  
21 interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges  
22 in implementing the Act was the lack of authoritative interpretive standards. *Id.*, at 212-15. The Breyer Committee  
23 then established standards to guide its evaluation, some of which were new formulations and some of which were  
24 taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below.  
25 The principal standards used by the Breyer Committee are in Appendix E of its Report. *Id.* at 238.

26  
27 Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct  
28 and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of  
29 the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act.  
30 To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer  
31 Committee Report and the Illustrative Rules.

32  
33 The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of  
34 Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in  
35 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted,  
36 with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability  
37 Act.

38  
39 After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present Rules were  
40 promulgated by the Judicial Conference on March 11, 2008.

41  
42  
43 **2. Effect and Construction**

- 44 (a) **Generally. These Rules are mandatory; they supersede any conflicting judicial-council rules.**  
45 **Judicial councils may promulgate additional rules to implement the Act as long as those rules do not**  
46 **conflict with these Rules.**
- 47 (b) **Exception. A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a**  
48 **special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and**  
49 **Disability, or the Judicial Conference of the United States expressly finds that exceptional**  
50 **circumstances render application of that Rule in a particular proceeding manifestly unjust or**  
51 **contrary to the purposes of the Act or these Rules.**

52  
53 **Commentary on Rule 2**

54  
55 Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing  
56 the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory  
57 nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to promulgate

1 rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials  
2 pursuant to Rule 8(b).  
3

4 Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in  
5 particular cases.  
6

### 7 8 **3. Definitions**

- 9 (a) **Chief Judge.** “Chief judge” means the chief judge of a United States Court of Appeals, of the United  
10 States Court of International Trade, or of the United States Court of Federal Claims.  
11 (b) **Circuit Clerk.** “Circuit clerk” means a clerk of a United States court of appeals, the clerk of the  
12 United States Court of International Trade, the clerk of the United States Court of Federal Claims, or  
13 the circuit executive of the United States Court of Appeals for the Federal Circuit.  
14 (c) **Complaint.** A complaint is:  
15 (1) a document that, in accordance with Rule 6, is filed by any person in his or her individual  
16 capacity or on behalf of a professional organization; or  
17 (2) information from any source, other than a document described in (c)(1), that gives a chief  
18 judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in  
19 misconduct or may have a disability, whether or not the information is framed as or is  
20 intended to be an allegation of misconduct or disability.  
21 (d) **Court of Appeals, District Court, and District Judge.** “Courts of appeals,” “district court,” and  
22 “district judge,” where appropriate, include the United States Court of Federal Claims, the United  
23 States Court of International Trade, and the judges thereof.  
24 (e) **Disability.** “Disability” is a temporary or permanent condition rendering a judge unable to discharge  
25 the duties of the particular judicial office. Examples of disability include substance abuse, the  
26 inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.  
27 (f) **Judicial Council and Circuit.** “Judicial council” and “circuit,” where appropriate, include any courts  
28 designated in 28 U.S.C. § 363.  
29 (g) **Magistrate Judge.** “Magistrate judge,” where appropriate, includes a special master appointed by  
30 the Court of Federal Claims under 42 U.S.C. § 300aa–12(c).  
31 (h) **Misconduct.** Cognizable misconduct:  
32 (1) is conduct prejudicial to the effective and expeditious administration of the business of the  
33 courts. Misconduct includes, but is not limited to:  
34 (A) using the judge's office to obtain special treatment for friends or relatives;  
35 (B) accepting bribes, gifts, or other personal favors related to the judicial office;  
36 (C) having improper discussions with parties or counsel for one side in a case;  
37 (D) treating litigants or attorneys in a demonstrably egregious and hostile manner;  
38 (E) engaging in partisan political activity or making inappropriately partisan  
39 statements;  
40 (F) soliciting funds for organizations; or  
41 (G) violating other specific, mandatory standards of judicial conduct, such as those  
42 pertaining to restrictions on outside income and requirements for financial  
43 disclosure.  
44 (2) is conduct occurring outside the performance of official duties if the conduct might have a  
45 prejudicial effect on the administration of the business of the courts, including a substantial  
46 and widespread lowering of public confidence in the courts among reasonable people.  
47 (3) does not include:  
48 (A) an allegation that is directly related to the merits of a decision or procedural ruling.  
49 An allegation that calls into question the correctness of a judge's ruling, including a  
50 failure to recuse, without more, is merits-related. If the decision or ruling is alleged  
51 to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic  
52 bias, or improper conduct in rendering a decision or ruling, such as personally  
53 derogatory remarks irrelevant to the issues, the complaint is not cognizable to the  
54 extent that it attacks the merits.  
55 (B) an allegation about delay in rendering a decision or ruling, unless the allegation  
56 concerns an improper motive in delaying a particular decision or habitual delay in a  
57 significant number of unrelated cases.  
58 (i) **Subject Judge.** “Subject judge” means any judge described in Rule 4 who is the subject of a  
59 complaint.

Commentary on Rule 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by complainants under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. See 28 U.S.C. § 351(a) and (b). Under Rule 3(c)(1), complaints may be submitted by a person, in his or her individual capacity, or by a professional organization. Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief judges are expected in some circumstances to trigger the process -- "identify a complaint," see 28 U.S.C. § 351(b) and Rule 5 -- and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief judge, the complainant lacks many rights that a litigant would have, and the chief judge, instead of being limited to the "four corners of the complaint," must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Committee Report, 239 F.R.D. at 183-84.

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

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

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 the 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.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge 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

1 independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to  
2 collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an  
3 official action of a judge -- without more -- is merits-related. The phrase "decision or procedural ruling" is not  
4 limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness  
5 of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as  
6 merits-related -- in other words, as challenging the substance of the judge's administrative determination to dismiss  
7 the complaint -- even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation  
8 that a judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.  
9

10 Conversely, an allegation -- however unsupported -- that a judge conspired with a prosecutor to make a  
11 particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation  
12 attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness -- "the merits"  
13 -- of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member  
14 of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not  
15 merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive.  
16 Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even  
17 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  
18 that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also  
19 not merits-related.  
20

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

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

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

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

#### 49 **4. Covered Judges**

50 **A complaint under these Rules may concern the actions or capacity only of judges of United States courts of**  
51 **appeals, judges of United States district courts, judges of United States bankruptcy courts, United States**  
52 **magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.**  
53

#### 54 **Commentary on Rule 4**

55  
56 This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of complaints against  
57 persons not covered by the Act, such as other court personnel, or against both covered judges and noncovered  
58 persons.

1 **ARTICLE II. INITIATION OF A COMPLAINT**

2  
3 **5. Identification of a Complaint**

- 4 (a) **Identification.** When a chief judge has information constituting reasonable grounds for inquiry into  
5 whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct  
6 an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related  
7 complaint has been filed. A chief judge who finds probable cause to believe that misconduct has  
8 occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory.  
9 If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by  
10 written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct  
11 is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must  
12 identify a complaint. A chief judge must not decline to identify a complaint merely because the  
13 person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.  
14 (b) **Noncompliance with Rule 6(d).** Rule 6 complaints that do not comply with the requirements of Rule  
15 6(d) must be considered under this Rule.

16  
17 **Commentary on Rule 5**

18  
19 This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245-46.

20  
21 The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby  
22 dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes  
23 aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of  
24 a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to  
25 begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a  
26 complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe  
27 that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if  
28 failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and  
29 prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on  
30 marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if  
31 the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a  
32 disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to  
33 identify a complaint.

34  
35 An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge.  
36 Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a  
37 subsequent Rule 6 complaint alleging the identical matter to be concluded, see Rule 11(d), the chief judge must be  
38 sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance  
39 the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this  
40 procedure should encourage attempts at swift remedial action before a formal complaint is filed.

41  
42 When a complaint is identified, a written order stating the reasons for the identification must be provided;  
43 this begins the process articulated in Rule 11. Rule 11 provides that once the chief judge has identified a complaint,  
44 the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all  
45 functions assigned to the chief judge for the determination of complaints filed by a complainant.

46  
47 In high-visibility situations, it may be desirable for the chief judge to identify a complaint without first  
48 seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint  
49 without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

50  
51 A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule  
52 3(h)(3)(A), which excludes merits-related complaints from the definition of misconduct.

53  
54 A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could  
55 be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

56  
57 Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that  
58 only: (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief judge of a circuit in which

1 misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting  
2 by designation, shall have the power or a duty under this Rule to identify a complaint.  
3

4 Subsection (b) provides that complaints filed under Rule 6 that do not comply with the requirements of  
5 Rule 6(d), must be considered under this Rule. For instance, if a complaint has been filed but the form submitted is  
6 unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge  
7 must nevertheless consider the allegations as known information, and proceed to follow the process described in  
8 Rule 5(a).  
9

## 10 11 **6. Filing a Complaint**

- 12 (a) **Form.** A complainant may use the form reproduced in the appendix to these Rules or a form  
13 designated by the rules of the judicial council in the circuit in which the complaint is filed. A  
14 complaint form is also available on each court of appeals' website or may be obtained from the circuit  
15 clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a  
16 complaint, but the complaint must be written and must include the information described in (b).  
17 (b) **Brief Statement of Facts.** A complaint must contain a concise statement that details the specific facts  
18 on which the claim of misconduct or disability is based. The statement of facts should include a  
19 description of:  
20 (1) what happened;  
21 (2) when and where the relevant events happened;  
22 (3) any information that would help an investigator check the facts; and  
23 (4) for an allegation of disability, any additional facts that form the basis of that allegation.  
24 (c) **Legibility.** A complaint should be typewritten if possible. If not typewritten, it must be legible. An  
25 illegible complaint will be returned to the complainant with a request to resubmit it in legible form.  
26 If a resubmitted complaint is still illegible, it will not be accepted for filing.  
27 (d) **Complainant's Address and Signature; Verification.** The complainant must provide a contact  
28 address and sign the complaint. The truth of the statements made in the complaint must be verified  
29 in writing under penalty of perjury. If any of these requirements are not met, the complaint will be  
30 accepted for filing, but it will be reviewed under only Rule 5(b).  
31 (e) **Number of Copies; Envelope Marking.** The complainant shall provide the number of copies of the  
32 complaint required by local rule. Each copy should be in an envelope marked "Complaint of  
33 Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject  
34 judge.  
35

### 36 **Commentary on Rule 6**

37  
38 The Rule is adapted from the Illustrative Rules and is self-explanatory.  
39

### 40 **Tenth Circuit Misconduct Rule 6.1**

41 The "brief statement of facts" in support of a complaint described in National Rule 6(b) should not  
42 exceed five pages in length, whether typed or hand-written. If a complainant believes that more than five  
43 pages are needed to set out a "concise statement that details the specific facts on which the claim of  
44 misconduct or disability is based," *id.*, the complainant should submit a proposed statement of facts to the  
45 Circuit Executive, who will determine whether the complaint will be filed. If the Circuit Executive determines  
46 that the complaint will not be filed as proposed, the complainant will be provided an opportunity to cure the  
47 complaint, i.e. reduce the statement of facts to five pages.  
48

### 49 **Tenth Circuit Misconduct Rule 6.2**

50 Facts specifically and clearly alleged in a complaint will rarely need the support of additional documentation.  
51 If a complainant considers supporting documentation necessary, the complainant should take care to include  
52 only documentation that is required to support the specific facts alleged. Excess or irrelevant documentation  
53 will be returned to the complainant.  
54

### 55 **Tenth Circuit Misconduct Rule 6.3**

56 In connection with National Rule 6(e), the Tenth Circuit requires that only one original complaint be filed,  
57 along with one set of accompanying documents, if any.  
58

1  
2 **7. Where to Initiate Complaints**

- 3 (a) **Where to File.** Except as provided in (b),  
4 (1) a complaint against a judge of a United States court of appeals, a United States district court,  
5 a United States bankruptcy court, or a United States  
6 magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject  
7 judge holds office.  
8 (2) a complaint against a judge of the United States Court of International Trade or the United  
9 States Court of Federal Claims must be filed with the respective clerk of that court.  
10 (3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit  
11 must be filed with the circuit executive of that court.  
12 (b) **Misconduct in Another Circuit; Transfer.** If a complaint alleges misconduct in the course of official  
13 business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291–293  
14 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the  
15 subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or  
16 first-identified complaint. The judicial council of the circuit where the complaint was first filed or  
17 first identified may transfer the complaint to the subject judge's home circuit or to the circuit where  
18 the alleged misconduct occurred, as the case may be.  
19

20 **Commentary on Rule 7**

21  
22 Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the  
23 circuit." However, in many circuits, this role is filled by circuit executives. Accordingly, the term "circuit clerk," as  
24 defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.  
25

26 Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject  
27 judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an  
28 exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability  
29 complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act.  
30 Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds  
31 office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in  
32 constructive ways.  
33

34 However, when judges sit by designation, the non-home circuit has a strong interest in redressing  
35 misconduct in the course of official business, and where allegations also involve a member of the bar -- ex parte  
36 contact between an attorney and a judge, for example -- it may often be desirable to have the judicial and bar  
37 misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or  
38 identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of  
39 the filing or identified circuit to the other circuit.  
40

41 **Tenth Circuit Misconduct Rule 7.1**

42 **Complaints filed with the Tenth Circuit pursuant to National Rule 7(a)(1) should be mailed or delivered to:**

43  
44 **Office of the Circuit Executive**  
45 **United States Courts for the Tenth Circuit**  
46 **Byron White United States Courthouse**  
47 **1823 Stout Street**  
48 **Denver, Colorado 80257**  
49

50 **Tenth Circuit Misconduct Rule 7.2**

51 **Complaints and supporting or supplementary documentation will not be accepted for filing via e-mail or fax.**  
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54 **8. Action by Clerk**

- 55 (a) **Receipt of Complaint.** Upon receiving a complaint against a judge filed under Rule 5 or 6, the circuit  
56 clerk must open a file, assign a docket number according to a uniform numbering scheme  
57 promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and  
58 acknowledge the complaint's receipt.

- 1 (b) **Distribution of Copies.** The clerk must promptly send copies of a complaint filed under Rule 6 to the  
2 chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints  
3 filed under Rule 5 or 6 to each subject judge. The clerk must retain the original complaint. Any  
4 further distribution should be as provided by local rule.
- 5 (c) **Complaints Against Noncovered Persons.** If the clerk receives a complaint about a person not  
6 holding an office described in Rule 4, the clerk must not accept the complaint for filing under these  
7 Rules.
- 8 (d) **Receipt of Complaint about a Judge and Another Noncovered Person.** If a complaint is received  
9 about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk  
10 must accept the complaint for filing under these Rules only with regard to the judge and must inform  
11 the complainant of the limitation.

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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.

#### **Tenth Circuit Misconduct Rule 8.1**

The Office of the Circuit Executive processes all misconduct matters. The term “circuit clerk” used throughout the National Rules will refer to the Circuit Executive of the Tenth Circuit and his/her staff.

#### **Tenth Circuit Misconduct Rule 8.2**

Internal distribution of complaints, pursuant to National Rule 8(b), will be made as follows: If a district or magistrate judge is complained about, a copy of the complaint will be sent, in addition to those individuals identified in National Rule 8(b), to the chief judge of the district court in which the district or magistrate judge holds his or her appointment. If a bankruptcy judge is complained about, copies of the complaint will also be sent to the chief judge of the appropriate district and bankruptcy courts. However, and similar to the provisions of National Rule 25(f), if the chief judge of a district or bankruptcy court is a subject of a complaint, the copy ordinarily sent to that chief judge will be sent to the judge of such court in regular active service who is most senior in date of commission among those who are not subjects of the complaint.

#### **Tenth Circuit Misconduct Rule 8.3**

Complaints against noncovered person, discussed in National Rule 8(c), will be returned to the complainant(s) who sent them for filing, along with notice of the reasons the complaint was not accepted for filing.

### **9. Time for Filing or Identifying a 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 impractical, 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 the Complaint Procedure**

- (a) **Abusive Complaints.** A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the

1 complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition  
2 previously imposed.

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

8  
9 **Commentary on Rule 10**

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11 This Rule is adapted from the Illustrative Rules.

12  
13 Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single  
14 complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be  
15 abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some  
16 circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the  
17 same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances  
18 against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing  
19 campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and  
20 processed according to these Rules, there would be a serious drain on court resources without any benefit to the  
21 adjudication of the underlying merits.

22  
23 A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept  
24 repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different  
25 complainants. When the first complaint or complaints have been dismissed on the merits, and when further,  
26 essentially identical submissions follow, the judicial council may issue a second order noting that these are identical  
27 or repetitive complaints, directing the circuit clerk not to accept these complaints or any further such complaints for  
28 filing, and directing the clerk to send each putative complainant copies of both orders.  
29  
30

1 **ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE**

2  
3 **11. Review by the Chief Judge**

- 4 (a) **Purpose of Chief Judge's Review.** When a complaint is identified by the chief judge or is filed, the  
5 chief judge must review it unless the chief judge is disqualified under Rule 25. If the complaint  
6 contains information constituting evidence of misconduct or disability, but the complainant does not  
7 claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability  
8 and give notice to the subject judge. After reviewing the complaint, the chief judge must determine  
9 whether it should be:  
10 (1) dismissed;  
11 (2) concluded on the ground that voluntary corrective action has been taken;  
12 (3) concluded because intervening events have made action on the complaint no longer  
13 necessary; or  
14 (4) referred to a special committee.
- 15 (b) **Inquiry by Chief Judge.** In determining what action to take under Rule 11(a), the chief judge may  
16 conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with  
17 the complainant, the subject judge, and any others who may have knowledge of the matter, and may  
18 review transcripts or other relevant documents. In conducting the inquiry, the chief judge must not  
19 determine any reasonably disputed issue.
- 20 (c) **Dismissal.**  
21 (1) **Allowable grounds.** A complaint must be dismissed in whole or in part to the extent that the  
22 chief judge concludes that the complaint:  
23 (A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious  
24 administration of the business of the courts and does not indicate a mental or  
25 physical disability resulting in inability to discharge the duties of judicial office;  
26 (B) is directly related to the merits of a decision or procedural ruling;  
27 (C) is frivolous;  
28 (D) is based on allegations lacking sufficient evidence to raise an inference that  
29 misconduct has occurred or that a disability exists;  
30 (E) is based on allegations which are incapable of being established through  
31 investigation;  
32 (F) has been filed in the wrong circuit under Rule 7; or  
33 (G) is otherwise not appropriate for consideration under the Act.  
34 (2) **Disallowed grounds.** A complaint must not be dismissed solely because it repeats allegations  
35 of a previously dismissed complaint if it also contains material information not previously  
36 considered and does not constitute harassment of the subject judge.
- 37 (d) **Corrective Action.** The chief judge may conclude the complaint proceeding in whole or in part if:  
38 (1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the  
39 complaint was filed under Rule 6, or  
40 (2) the chief judge determines that the subject judge has taken appropriate voluntary corrective  
41 action that acknowledges and remedies the problems raised by the complaint.
- 42 (e) **Intervening Events.** The chief judge may conclude the complaint proceeding in whole or in part upon  
43 determining that intervening events render some or all of the allegations moot or make remedial  
44 action impossible.
- 45 (f) **Appointment of Special Committee.** If some or all of the complaint is not dismissed or concluded, the  
46 chief judge must promptly appoint a special committee to investigate the complaint or any relevant  
47 portion of it and to make recommendations to the judicial council. Before appointing a special  
48 committee, the chief judge must invite the subject judge to respond to the complaint either orally or  
49 in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's  
50 discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a  
51 single complaint about more than one judge may be severed and more than one special committee  
52 appointed.
- 53 (g) **Notice of Chief Judge's Action; Petitions for Review.**  
54 (1) **When special committee is appointed.** If a special committee is appointed, the chief judge  
55 must notify the complainant and the subject judge that the matter has been referred to a  
56 special committee and identify the members of the committee. A copy of the order  
57 appointing the special committee must be sent to the Judicial Conference Committee on  
58 Judicial Conduct and Disability.  
59

- 1 (2) When chief judge disposes of complaint without appointing special committee. If the chief  
2 judge disposes of the complaint under Rule 11(c), (d), or (e), the chief judge must prepare a  
3 supporting memorandum that sets forth the reasons for the disposition. Except as  
4 authorized by 28 U.S.C. § 360, the memorandum must not include the name of the  
5 complainant or of the subject judge. The order and the supporting memorandum, which  
6 may be one document, must be provided to the complainant, the subject judge, and the  
7 Judicial Conference Committee on Judicial Conduct and Disability.
- 8 (3) Right of petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d),  
9 or (e), the complainant and subject judge must be notified of the right to petition the judicial  
10 council for review of the disposition, as provided in Rule 18. If a petition for review is filed,  
11 the chief judge must promptly transmit all materials obtained in connection with the inquiry  
12 under Rule 11(b) to the circuit clerk for transmittal to the judicial council.
- 13 (h) Public Availability of Chief Judge's Decision. The chief judge's decision must be made public to the  
14 extent, at the time, and in the manner provided in Rule 24.

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Commentary on Rule 11

Subsection (a) lists the actions available to a chief judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. A 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. Some 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 a special committee and the judicial council. 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 the 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 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 (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 (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

1 material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if  
2 "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty  
3 Lobby, 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material  
4 fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).  
5

6 Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the  
7 Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-45. Subsection (c)(1)(A) permits  
8 dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard.  
9 The proper standards are set out in Rule 3 and discussed in the Commentary on that Rule. Subsection (c)(1)(B)  
10 permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed  
11 by Rule 3 and its accompanying Commentary.  
12

13 Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that are "frivolous,  
14 lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are  
15 incapable of being established through investigation." 28 U.S.C. § 352(b)(1)(A)(iii).  
16

17 Dismissal of a complaint as "frivolous," under Rule 11(c)(1)(C), will generally occur without any inquiry  
18 beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia  
19 of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.  
20

21 A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider  
22 a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to  
23 him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies  
24 it. In such a case, the chief judge's proper course of action may turn on whether the source had any role in the  
25 allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex  
26 parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it  
27 would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a  
28 disinterested third party and that disinterested party denied that the statement had been made, there would be no  
29 value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule  
30 11(c)(1)(D).  
31

32 Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or  
33 identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For  
34 example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. Id. The subject  
35 judge denies it. The chief judge requests that the complainant (who does not purport to have observed the judge do  
36 X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the  
37 unnamed witness's account. Id. The complainant responds that he has spoken with the unnamed witness, that the  
38 unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be  
39 identified or to come forward. Id. at 243-44. The allegation is then properly dismissed as containing allegations that  
40 are incapable of being established through investigation. Id.  
41

42 If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For  
43 example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other  
44 witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially  
45 incredible or so lacking indicia of reliability warranting dismissal under Rule 11(c)(1)(C), a special committee must  
46 be appointed because there is a material factual question that is reasonably in dispute.  
47

48 Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss,  
49 death, or changes to unknown residences prevent a proper investigation.  
50

51 Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim  
52 preclusion principles where new and material evidence becomes available. However, it also recognizes that at some  
53 point a renewed investigation may constitute harassment of the subject judge and should be foregone, depending of  
54 course on the seriousness of the issues and the weight of the new evidence.  
55

56 Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been  
57 taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. 244-45. The Act authorizes the chief  
58 judge to conclude the proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under  
59 the Rule, action taken after the complaint is filed is "appropriate" when it acknowledges and remedies the problem

1 raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of  
2 judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Id. Terminating a  
3 complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or  
4 redress of misconduct or a disability is preferable to sanctions. Id. The chief judge may facilitate this process by  
5 giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting  
6 appropriate corrective measures. Id. Moreover, when corrective action is taken under Rule 5 satisfactory to the  
7 chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint  
8 based on the identical conduct. "Corrective action" must be voluntary action taken by the subject judge. Breyer  
9 Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court  
10 without the participation of the subject judge in formulating the directive or without the subject judge's subsequent  
11 agreement to such action does not constitute the requisite voluntary corrective action. Id. Neither the chief judge  
12 nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council  
13 can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). Id. Compliance with a previous council order  
14 may serve as corrective action allowing conclusion of a later complaint about the same behavior. Id.  
15

16 Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another  
17 individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the  
18 harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the  
19 future. Id. While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to  
20 correct a specific harm to an individual, if such harm can reasonably be remedied. Id. In some cases, corrective  
21 action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual  
22 harmed is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct  
23 communication from the subject judge, or otherwise. Id.  
24

25 Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the  
26 complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might  
27 impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee  
28 Report, 239 F.R.D. at 244-45. In other words, minor corrective action will not suffice to dispose of a serious matter.  
29 Id.  
30

31 Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the  
32 proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation  
33 from judicial office. Ordinarily, however, stepping down from an administrative post such as chief judge, judicial-  
34 council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a  
35 complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of the  
36 complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. Id.  
37

38 If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed.  
39 Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is  
40 appointed, if no earlier response was invited.  
41

42 Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief  
43 judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if  
44 it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are  
45 accepted as true, and there is no need for the subject judge to devote time to a defense.  
46

47 The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of  
48 reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with  
49 availability of information to the public, contemplates that the order will be made public, usually without disclosing  
50 the names of the complainant or the subject judge. If desired for administrative purposes, more identifying  
51 information can be included in a non-public version of the order.  
52

53 When complaints are disposed of by chief judges, the statutory purposes are best served by providing the  
54 complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See also  
55 Commentary on Rule 24, dealing with public availability.  
56

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

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

2  
3 **12. Composition of Special Committee**

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

35 **Commentary on Rule 12**

36  
37 This Rule is adapted from the Act and the Illustrative Rules.

38  
39 Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The  
40 question of committee size is one that should be weighed with care in view of the potential for consuming the  
41 members' time; a large committee should be appointed only if there is a special reason to do so.

42  
43 Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. §  
44 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge  
45 does not preside, he or she must designate another committee member as the presiding officer.

46  
47 Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser  
48 to a special committee at the request of a bankruptcy or magistrate subject judge.

49  
50 Subsection (c) also provides that the adviser will have all the privileges of a committee member except a  
51 vote. The adviser, therefore, may participate in all deliberations of the committee, question witnesses at hearings,  
52 and write a separate statement to accompany the special committee's report to the judicial council.

53  
54 Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to  
55 serve on the committee even though the member's status otherwise changes. Thus, a committee that originally  
56 consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue  
57 to function even though changes of status alter that composition. This provision reflects the belief that stability of  
58 membership will contribute to the quality of the work of such committees.  
59

1 Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in  
2 which a special committee loses a member before its work is complete. The Rule permits the chief judge to  
3 determine whether a replacement member should be appointed. Generally, appointment of a replacement member is  
4 desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs.  
5 However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult  
6 for a new member to play a meaningful role. The Rule also preserves the collegial character of the committee  
7 process by prohibiting a single surviving member from serving as a committee and by providing that a committee of  
8 two surviving members will, in essence, operate under a unanimity rule.  
9

10 Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members.  
11 All the members of a committee should participate in committee decisions. In that circumstance, it seems  
12 reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of  
13 some smaller quorum.  
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15

### 16 **13. Conduct of an Investigation**

- 17 (a) **Extent and Methods of Special-Committee Investigation.** Each special committee must determine the  
18 appropriate extent and methods of the investigation in light of the allegations of the complaint. If, in  
19 the course of the investigation, the committee has cause to believe that the subject judge may have  
20 engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee  
21 must refer the new matter to the chief judge for action under Rule 5 or Rule 11.
- 22 (b) **Criminal Conduct.** If the committee's investigation concerns conduct that may be a crime, the  
23 committee must consult with the appropriate prosecutorial authorities to the extent permitted by the  
24 Act to avoid compromising any criminal investigation. The committee has final authority over the  
25 timing and extent of its investigation and the formulation of its recommendations.
- 26 (c) **Staff.** The committee may arrange for staff assistance to conduct the investigation. It may use  
27 existing staff of the judicial branch or may hire special staff through the Director of the  
28 Administrative Office of the United States Courts.
- 29 (d) **Delegation of Subpoena Power; Contempt.** The chief judge may delegate the authority to exercise the  
30 committee's subpoena powers. The judicial council or special committee may institute a contempt  
31 proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.  
32

#### 33 **Commentary on Rule 13**

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

37 Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which a special committee carries  
38 out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation.  
39 First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or  
40 discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-  
41 disposition role that is characteristically left to juries, judges, or arbitrators. Id. Rule 13 generally governs the  
42 investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to  
43 distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject  
44 judge.  
45

46 One of the difficult questions that can arise is the relationship between proceedings under the Act and  
47 criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which  
48 criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity  
49 in light of any criminal investigation.  
50

51 Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28  
52 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of judicial councils by the  
53 circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where  
54 the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be  
55 delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not  
56 intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone.  
57 See Rule 12(g).  
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60

1 **14. Conduct of Hearings by Special Committee**

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

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Commentary on Rule 14

This Rule is adapted from Section 353 of the Act and the Illustrative Rules.

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

Rule 14(b) contemplates that material evidence will be obtained by the 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 committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(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. Rights of Subject Judge**

- (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 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 committee.
- (b) **Report of the Special Committee.** 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 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.

- 1 (e) **Attendance at Hearings.** The subject judge has the right to attend any hearing held under Rule 14  
2 and to receive copies of the transcript, of any documents introduced, and of any written arguments  
3 submitted by the complainant to the committee.  
4 (f) **Representation by Counsel.** The subject judge may choose to be represented by counsel in the  
5 exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear  
6 the costs of the representation.  
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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 judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

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

## 16. Rights of Complainant in Investigation

- (a) **Notice.** The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.
- (b) **Opportunity to Provide Evidence.** If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.
- (c) **Presentation of Argument.** The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.
- (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, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

Commentary on Rule 16

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

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed and it determines that the complainant may have additional evidence, 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 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.

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

9 **The committee must file with the judicial council a comprehensive report of its investigation, including**  
10 **findings and recommendations for council action. The report must be accompanied by a statement of the vote**  
11 **by which it was adopted, any separate or dissenting statements of committee members, and the record of any**  
12 **hearings held under Rule 14. A copy of the report and accompanying statement must be sent to the Judicial**  
13 **Conference Committee on Judicial Conduct and Disability.**  
14

15 **Commentary on Rule 17**

16 This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy  
17 of the special-committee report and accompanying statement to the Judicial Conference Committee is new.  
18

1 **ARTICLE V. JUDICIAL-COUNCIL REVIEW**

2  
3 **18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e)**

- 4 (a) **Petitions for Review.** After the chief judge issues an order under Rule 11(c), (d), or (e), a  
5 complainant or subject judge may petition the judicial council of the circuit to review the order. By  
6 rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed  
7 under this Rule to a panel of no fewer than five members of the council, at least two of whom must be  
8 district judges.
- 9 (b) **When to File; Form; Where to File.** A petition for review must be filed in the office of the circuit  
10 clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order.  
11 The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked  
12 "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on  
13 the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby  
14 petition the judicial council for review of . . ." and state the reasons why the petition should be  
15 granted. It must be signed.
- 16 (c) **Receipt and Distribution of Petition.** A circuit clerk who receives a petition for review filed within  
17 the time allowed and in proper form must:
- 18 (1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may  
19 be;
- 20 (2) promptly distribute to each member of the judicial council, or its relevant panel, except for  
21 any member disqualified under Rule 25, or make available in the manner provided by local  
22 rule, the following materials:
- 23 (A) copies of the complaint;
- 24 (B) all materials obtained by the chief judge in connection with the inquiry;
- 25 (C) the chief judge's order disposing of the complaint;
- 26 (D) any memorandum in support of the chief judge's order;
- 27 (E) the petition for review; and
- 28 (F) an appropriate ballot;
- 29 (3) send the petition for review to the Judicial Conference Committee on Judicial Conduct and  
30 Disability. Unless the Judicial Conference Committee requests them, the clerk will not send  
31 copies of the materials obtained by the chief judge.
- 32 (d) **Untimely Petition.** The clerk must refuse to accept a petition that is received after the deadline in (b).
- 33 (e) **Timely Petition Not in Proper Form.** When the clerk receives a petition filed within the time allowed  
34 but in a form that is improper to a degree that would substantially impair its consideration by the  
35 judicial council — such as a document that is ambiguous about whether it is intended to be a petition  
36 for review — the clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and  
37 give the filer the opportunity to correct the deficiencies within 21 days of the date of the clerk's letter  
38 about the deficiencies or within the original deadline for filing the petition, whichever is later. If the  
39 deficiencies are corrected within the time allowed, the clerk will proceed according to paragraphs (a)  
40 and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

41  
42 **Commentary on Rule 18**

43  
44 Rule 18 is adapted largely from the Illustrative Rules.

45  
46 Subsection (a) permits a subject judge, as well as the complainant, to petition for review of a chief judge's  
47 order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events  
48 have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject  
49 judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, a chief judge's order may include  
50 language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject  
51 judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order  
52 and is given the opportunity to petition the judicial council of the circuit for review.

53  
54 Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is important to  
55 establish a time limit on petitions for review of chief judges' dispositions in order to provide finality to the process.  
56 If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should  
57 know that the matter is closed.

58  
59 The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to  
60 petitions for review. See Fed. R. App. P. 25(a)(2)(A) and (C).

1 Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person  
2 files a petition that is rejected for failure to comply with formal requirements.  
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## 5 **19. Judicial-Council Disposition of Petitions for Review**

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

### 37 **Commentary on Rule 19**

38  
39 This Rule is largely adapted from the Act and is self-explanatory.  
40

41 The council should ordinarily review the decision of the chief judge on the merits, treating the petition for  
42 review for all practical purposes as an appeal. The judicial council may respond to a petition by affirming the chief  
43 judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.  
44  
45

## 46 **20. Judicial-Council Consideration of Reports and Recommendations of Special 47 Committees**

- 48 (a) **Rights of Subject Judge.** Within 21 days after the filing of the report of a special committee, the  
49 subject judge may send a written response to the members of the judicial council. The judge must  
50 also be given an opportunity to present argument through counsel, written or oral, as determined by  
51 the council. The judge must not otherwise communicate with council members about the matter.
- 52 (b) **Judicial-Council Action.**
- 53 (1) **Discretionary actions.** Subject to the judge's rights set forth in subsection (a),  
54 the judicial council may:
    - 55 (A) **dismiss the complaint because:**
      - 56 (i) even if the claim is true, the claimed conduct is not conduct prejudicial to  
57 the effective and expeditious administration of the business of the courts  
58 and does not indicate a mental or physical disability resulting in inability to  
59 discharge the duties of office;

- 1 (ii) the complaint is directly related to the merits of a decision or procedural  
2 ruling;
- 3 (iii) the facts on which the complaint is based have not been established; or
- 4 (iv) the complaint is otherwise not appropriate for consideration under 28  
5 U.S.C. §§ 351–364.
- 6 (B) conclude the proceeding because appropriate corrective action has been taken or  
7 intervening events have made the proceeding unnecessary.
- 8 (C) refer the complaint to the Judicial Conference of the United States with the council's  
9 recommendations for action.
- 10 (D) take remedial action to ensure the effective and expeditious administration of the  
11 business of the courts, including:
- 12 (i) censuring or reprimanding the subject judge, either by private  
13 communication or by public announcement;
- 14 (ii) ordering that no new cases be assigned to the subject judge for a limited,  
15 fixed period;
- 16 (iii) in the case of a magistrate judge, ordering the chief judge of the district  
17 court to take action specified by the council, including the initiation of  
18 removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa–12(c)(2);
- 19 (iv) in the case of a bankruptcy judge, removing the judge from office under 28  
20 U.S.C. § 152(e);
- 21 (v) in the case of a circuit or district judge, requesting the judge to retire  
22 voluntarily with the provision (if necessary) that ordinary length-of-service  
23 requirements will be waived; and
- 24 (vi) in the case of a circuit or district judge who is eligible to retire but does not  
25 do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that  
26 an additional judge may be appointed.
- 27 (E) take any combination of actions described in (b)(1)(A)–(D) of this Rule that is within  
28 its power.
- 29 (2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial Conference if  
30 the council determines that a circuit judge or district judge may have engaged in conduct  
31 that:
- 32 (A) might constitute ground for impeachment; or
- 33 (B) in the interest of justice, is not amenable to resolution by the judicial council.
- 34 (c) **Inadequate Basis for Decision.** If the judicial council finds that a special committee's report,  
35 recommendations, and record provide an inadequate basis for decision, it may return the matter to  
36 the committee for further investigation and a new report, or it may conduct further investigation. If  
37 the judicial council decides to conduct further investigation, the subject judge must be given adequate  
38 prior notice in writing of that decision and of the general scope and purpose of the additional  
39 investigation. The judicial council's conduct of the additional investigation must generally accord  
40 with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation  
41 by a special committee.
- 42 (d) **Council Vote.** Council action must be taken by a majority of those members of the council who are  
43 not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all  
44 the members of the council.
- 45 (e) **Recommendation for Fee Reimbursement.** If the complaint has been finally dismissed or concluded  
46 under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may  
47 recommend that the Director of the Administrative Office of the United States Courts use funds  
48 appropriated to the Judiciary to reimburse the judge for reasonable expenses incurred during the  
49 investigation, when those expenses would not have been incurred but for the requirements of the Act  
50 and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful  
51 defense or prosecution of a proceeding under Rule 21(a) or (b).
- 52 (f) **Council Action.** Council action must be by written order. Unless the council finds that extraordinary  
53 reasons would make it contrary to the interests of justice, the order must be accompanied by a  
54 memorandum setting forth the factual determinations on which it is based and the reasons for the  
55 council action. The order and the supporting memorandum must be provided to the complainant,  
56 the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The  
57 complainant and the subject judge must be notified of any right to review of the judicial council's  
58 decision as provided in Rule 21(b).
- 59  
60

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not otherwise communicate with council members about the matter.

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

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1) (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 council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

**Tenth Circuit Misconduct Rule 20.1**

**National Rule 11(g)(2) specifically provides that a chief judge must prepare a written order and memorandum when disposing a case under that rule. The rule notes that the order and memorandum may be one document. National Rule 20 also requires a written order and memorandum - by the Judicial Council, but contains no notation about whether these documents may be joined. This circuit will ordinarily consolidate the written order and memorandum required by Rule 20 into one document.**

1 **ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT**  
2 **AND DISABILITY**  
3

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

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

50  
51 **Commentary on Rule 21**  
52

53 This Rule is largely self-explanatory.  
54

55 Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on  
56 Judicial Conduct and Disability to dispose of petitions does not preclude review of such dispositions by the  
57 Conference. However, there is no right to such review in any party.  
58

1 Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of dismissals or  
2 conclusions of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a  
3 petition have dissented on the ground that a special committee should have been appointed, the complainant or  
4 subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2),  
5 the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in  
6 its sole discretion, whether or not such a dissent occurred, and only as to the appointment of a special committee.  
7 No party has a right to such review, and such review will be rare.  
8

9 Rule 21(c) provides for review only by Committee members from circuits other than that of the subject  
10 judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six  
11 members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to  
12 consider that petition for review.  
13

14 Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial  
15 Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily  
16 constitute final action on a complaint for purposes of Rule 24.  
17  
18

## 19 **22. Procedures for Review**

- 20 (a) **Filing a Petition for Review.** A petition for review of a judicial-council decision may be filed by  
21 sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and  
22 Disability, addressed to:

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

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

- 30 (b) **Form and Contents of Petition for Review.** No particular form is required. The petition must  
31 contain a short statement of the basic facts underlying the complaint, the history of its consideration  
32 before the appropriate judicial council, a copy of the judicial council's decision, and the grounds on  
33 which the petitioner seeks review. The petition for review must specify the date and docket number  
34 of the judicial-council order for which review is sought. The petitioner may attach any documents or  
35 correspondence arising in the course of the proceeding before the judicial council or its special  
36 committee. A petition should not normally exceed 20 pages plus necessary attachments.
- 37 (c) **Time.** A petition must be submitted within 63 days of the date of the order for which review is  
38 sought.
- 39 (d) **Copies.** Seven copies of the petition for review must be submitted, at least one of which must be  
40 signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of  
41 inability to pay the expense of duplicating the petition, the Administrative Office must accept the  
42 original petition and must reproduce copies at its expense.
- 43 (e) **Action on Receipt of Petition for Review.** The Administrative Office must acknowledge receipt of a  
44 petition for review submitted under this Rule, notify the chair of the Judicial Conference Committee  
45 on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for  
46 their deliberation.  
47  
48  
49

50 **Commentary on Rule 22**

51 Rule 22 is self-explanatory.  
52

1 **ARTICLE VII. MISCELLANEOUS RULES**

2  
3 **23. Confidentiality**

- 4 (a) **General Rule.** The consideration of a complaint by the chief judge, a special committee, the judicial  
5 council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential.  
6 Information about this consideration must not be disclosed by any judge or employee of the judicial  
7 branch or by any person who records or transcribes testimony except as allowed by these Rules. In  
8 extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these  
9 Rules when necessary to maintain public confidence in the federal judiciary's ability to redress  
10 misconduct or disability.
- 11 (b) **Files.** All files related to complaints must be separately maintained with appropriate security  
12 precautions to ensure confidentiality.
- 13 (c) **Disclosure in Decisions.** Except as otherwise provided in Rule 24, written decisions of the chief judge,  
14 the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability, and  
15 dissenting opinions or separate statements of members of the council or Committee may contain  
16 information and exhibits that the authors consider appropriate for inclusion, and the information  
17 and exhibits may be made public.
- 18 (d) **Availability to Judicial Conference.** On request of the Judicial Conference or its Committee on  
19 Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a  
20 complaint. For auditing purposes, the circuit clerk must provide access to the Committee to records  
21 of proceedings under the Act at the site where the records are kept.
- 22 (e) **Availability to District Court.** If the judicial council directs the initiation of proceedings for removal  
23 of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of  
24 the district court copies of the report of the special committee and any other documents and records  
25 that were before the judicial council at the time of its decision. On request of the chief judge of the  
26 district court, the judicial council may authorize release to that chief judge of any other records  
27 relating to the investigation.
- 28 (f) **Impeachment Proceedings.** If the Judicial Conference determines that consideration of impeachment  
29 may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the  
30 House of Representatives.
- 31 (g) **Subject Judge's Consent.** If both the subject judge and the chief judge consent in writing, any  
32 materials from the files may be disclosed to any person. In any such disclosure, the chief judge may  
33 require that the identity of the complainant, or of witnesses in an investigation conducted by a chief  
34 judge, a special committee, or the judicial council, not be revealed.
- 35 (h) **Disclosure in Special Circumstances.** The Judicial Conference, its Committee on Judicial Conduct  
36 and Disability, or a judicial council may authorize disclosure of information about the consideration  
37 of a complaint, including the papers, documents, and transcripts relating to the investigation, to the  
38 extent that disclosure is justified by special circumstances and is not prohibited by the Act.  
39 Disclosure may be made to judicial researchers engaged in the study or evaluation of experience  
40 under the Act and related modes of judicial discipline, but only where the study or evaluation has  
41 been specifically approved by the Judicial Conference or by the Judicial Conference Committee on  
42 Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the  
43 subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards  
44 to protect against the dissemination of confidential information may be imposed.
- 45 (i) **Disclosure of Identity by Subject Judge.** Nothing in this Rule precludes the subject judge from  
46 acknowledging that he or she is the judge referred to in documents made public under Rule 24.
- 47 (j) **Assistance and Consultation.** Nothing in this Rule precludes the chief judge or judicial council acting  
48 on a complaint filed under the Act from seeking the help of qualified staff or from consulting other  
49 judges who may be helpful in the disposition of the complaint.

50  
51 **Commentary on Rule 23**

52  
53 Rule 23 was adapted from the Illustrative Rules.

54  
55 The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to  
56 investigations conducted under this chapter" and states that they may not be disclosed "by any person in any  
57 proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the  
58 confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have  
59 access to information without breaching the rule?  
60

1 With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and  
2 those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality  
3 requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).  
4

5 With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of  
6 a complaint at any stage.  
7

8 With regard to the third question, there is no barrier of confidentiality among a chief judge, judicial council,  
9 the Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have  
10 access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or  
11 monitoring the administration of the Act. A district court may have similar access if the judicial council orders the  
12 district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.  
13

14 In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules.  
15 The disclosure of such information in high-visibility or controversial cases is to reassure the public that the federal  
16 judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does  
17 not prevent the chief judge from "communicat[ing] orally or in writing with . . . [persons] who may have  
18 knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).  
19

20 Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For  
21 example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b).  
22 Rule 23(c) makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting  
23 opinions and separate statements, may contain references to information that would otherwise be confidential and  
24 that such information may be made public. However, subsection (c) is subject to Rule 24(a) which provides the  
25 general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made  
26 public in a decision if disclosure of the name is prohibited by that Rule.  
27

28 The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative.  
29 It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment  
30 investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial  
31 Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that  
32 impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.  
33

34 The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge  
35 and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this requirement. Once the subject judge has  
36 consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse  
37 consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who  
38 have testified in investigatory proceedings or who have provided information in response to a limited inquiry  
39 undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the  
40 identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any  
41 materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular  
42 witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the  
43 chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case  
44 where the complainant is delusional or where the complainant or a particular witness has already demonstrated a  
45 lack of concern about maintaining the confidentiality of the proceedings).  
46

47 Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example,  
48 disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special  
49 committee. Another example might involve evidence of criminal conduct by a judge discovered by a special  
50 committee.  
51

52 Subsection (h) also permits the authorization of disclosure of information about the consideration of a  
53 complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers  
54 engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule  
55 envisions disclosure of information from the official record of complaint proceedings to a limited category of  
56 persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual  
57 identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to  
58 release particular materials when such release would be contrary to the interests of justice, or that constitute purely  
59 internal communications. The Rule does not envision disclosure of purely internal communications between judges  
60 and their colleagues and staff.

1 Under Rule 23(j), chief judges and judicial councils may seek staff assistance or consult with other judges  
2 who may be helpful in the process of complaint disposition; the confidentiality requirement does not preclude this.  
3 The chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge  
4 deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action.  
5 As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have  
6 been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the  
7 complaint only to the extent the chief judge deems necessary under the circumstances.  
8  
9

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

- 11 (a) **General Rule; Specific Cases.** When final action has been taken on a complaint and it is no longer  
12 subject to review, all orders entered by the chief judge and judicial council, including any supporting  
13 memoranda and any dissenting opinions or separate statements by members of the judicial council,  
14 must be made public, with the following exceptions:
- 15 (1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special  
16 committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the  
17 publicly available materials must not disclose the name of the subject judge without his or  
18 her consent.
  - 19 (2) if the complaint is concluded because of intervening events, or dismissed at any time after a  
20 special committee is appointed, the judicial council must determine whether the name of the  
21 subject judge should be disclosed.
  - 22 (3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the  
23 publicly available materials must not disclose either the name of the subject judge or the text  
24 of the reprimand.
  - 25 (4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private  
26 censure or reprimand, the text of the dispositive order must be included in the materials  
27 made public, and the name of the subject judge must be disclosed.
  - 28 (5) the name of the complainant must not be disclosed in materials made public under this Rule  
29 unless the chief judge orders disclosure.
- 30 (b) **Manner of Making Public.** The orders described in (a) must be made public by placing them in a  
31 publicly accessible file in the office of the circuit clerk or by placing the orders on the court's public  
32 website. If the orders appear to have precedential value, the chief judge may cause them to be  
33 published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability will  
34 make available on the Federal Judiciary's website, [www.uscourts.gov](http://www.uscourts.gov), selected illustrative orders  
35 described in paragraph (a), appropriately redacted, to provide additional information to the public  
36 on how complaints are addressed under the Act.
- 37 (c) **Orders of Judicial Conference Committee.** Orders of this Committee constituting final action in a  
38 complaint proceeding arising from a particular circuit will be made available to the public in the  
39 office of the clerk of the relevant court of appeals. The Committee will also make such orders  
40 available on the Federal Judiciary's website, [www.uscourts.gov](http://www.uscourts.gov). When authorized by the Committee,  
41 other orders related to complaint proceedings will similarly be made available.
- 42 (d) **Complaints Referred to the Judicial Conference of the United States.** If a complaint is referred to the  
43 Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be  
44 made public only if ordered by the Judicial Conference.  
45  
46

### 47 **Commentary on Rule 24**

48 Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.  
49

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

1 further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges  
2 directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239  
3 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of  
4 materials.  
5

6 Rule 24 provides for public availability of orders of the chief judge, the judicial council, and the Judicial  
7 Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders,  
8 together with any dissenting opinions or separate statements by members of the judicial council. However, these  
9 orders and memoranda are to be made public only when final action on the complaint has been taken and any right  
10 of review has been exhausted. The provision that decisions will be made public only after final action has been  
11 taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of  
12 the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order  
13 predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the  
14 name of the judge must be made public. If the final action is dismissal of the complaint, the name of the subject  
15 judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the  
16 chief judge on the basis of voluntary corrective action, the name of the subject judge must not be disclosed.  
17 Shielding the name of the subject judge in this circumstance should encourage informal disposition.  
18

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

25 Once a special committee has been appointed, and a proceeding is concluded by the full council on the  
26 basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.  
27

28 Finally, Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge  
29 so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that  
30 the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may  
31 not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's  
32 order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public  
33 identification.  
34

### 35 **Tenth Circuit Misconduct Rule 24.1**

36 **National Rule 24(a) requires that all orders entered by the chief judge and the judicial council, with certain**  
37 **listed exceptions, "must be made public." It is the policy of this circuit, and permitted by National Rule 24(b),**  
38 **to make such orders public by posting them on the circuit court's external website. The website address is**  
39 **[www.ca10.uscourts.gov](http://www.ca10.uscourts.gov) ; the qualifying orders are posted under "Judicial Misconduct."**  
40  
41

## 42 **25. Disqualification**

- 43 (a) **General Rule.** Any judge is disqualified from participating in any proceeding under these Rules if  
44 the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the  
45 complaint is filed by a judge, that judge is disqualified from participating in any consideration of the  
46 complaint except to the extent that these Rules provide for a complainant's participation. A chief  
47 judge who has identified a complaint under Rule 5 is not automatically disqualified from considering  
48 the complaint.
- 49 (b) **Subject Judge.** A subject judge is disqualified from considering the complaint except to the extent  
50 that these Rules provide for participation by a subject judge.
- 51 (c) **Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge's Order.** If a  
52 petition for review of a chief judge's order entered under Rule  
53 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is not  
54 disqualified from participating in the council's consideration of the petition.
- 55 (d) **Member of Special Committee Not Disqualified.** A member of the judicial council who serves on a  
56 special committee, including the chief judge, is not disqualified from participating in council  
57 consideration of the committee's report.
- 58 (e) **Subject Judge's Disqualification After Appointment of a Special Committee.** Upon appointment of a  
59 special committee, the subject judge is automatically disqualified from participating in any  
60 proceeding arising under the Act or these Rules as a member of any special committee, the judicial

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

30  
31 **Commentary on Rule 25**

32  
33 Rule 25 is adapted from the Illustrative Rules.

34  
35 Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply  
36 because the subject judge is on the same court. However, this subsection recognizes that there may be cases in  
37 which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge  
38 as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When  
39 such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

40  
41 Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's  
42 participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial  
43 council, Judicial Conference, or the Judicial Conference Committee. The Illustrative Rule, based on Section 359(a)  
44 of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the  
45 bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in  
46 light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief  
47 circuit or district judge. It would also create a substantial deterrence to the appointment of special committees,  
48 particularly where a special committee is needed solely because the chief judge may not decide matters of credibility  
49 in his or her review under Rule 11.

50  
51 While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in  
52 which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these  
53 Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in  
54 creating substantive and procedural precedents governing such proceedings; Rule 25(e) bars such participation.

55  
56 Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active  
57 service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges  
58 other than the chief judge is to be determined by date of commission, with the result that complaints against the chief  
59 judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The  
60 Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the

1 presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence  
2 prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these Rules"  
3 does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal  
4 rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a  
5 member of the judicial council and who is not disqualified will preside.  
6

7 Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules  
8 are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial  
9 council will be without appellate members. Where the complaint is against all circuit and district judges, under  
10 normal rules no member of the judicial council can perform the duties assigned to the council under the statute.  
11

12 A similar problem is created by successive complaints arising out of the same underlying grievance. For  
13 example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is  
14 dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge  
15 for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third  
16 complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again,  
17 there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint.  
18 Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges  
19 participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a  
20 majority of the judicial council as subject judges.  
21

22 In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is  
23 given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial  
24 administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any  
25 active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound  
26 judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of  
27 the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible  
28 to obtain a quorum.  
29

30 Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., In re  
31 Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); In re Complaint of  
32 Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the  
33 chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.  
34

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

41 In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a  
42 special committee, it would normally be necessary to request a transfer under Rule 26.  
43

44 Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference Committee contemplates  
45 consultation between members of the Committee and judicial participants in proceedings under the Act and these  
46 Rules. Such consultation should not automatically preclude participation by a member in that proceeding.  
47  
48

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

50 **In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a**  
51 **proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of**  
52 **another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to**  
53 **the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22.**  
54 **Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial**  
55 **council, which may then exercise the powers of a judicial council under these Rules.**  
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Rule 26 is new; it implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214-15.

1  
2 Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief  
3 Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple  
4 disqualifications among the original council, where the issues are highly visible and a local disposition may weaken  
5 public confidence in the process, where internal tensions arising in the council as a result of the complaint render  
6 disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of  
7 the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council  
8 over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.  
9

10 Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to  
11 begin consideration of the complaint -- for example, reference to the transferee chief judge, appointment of a special  
12 committee, etc.  
13  
14

## 15 **27. Withdrawal of Complaints and Petitions for Review**

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

### 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 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 27(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 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 and the complaint form available on the court's website, or provide an Internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

1 **29. Effective Date**

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

# A P P E N D I X

## **COMPLAINT FORM**

A two-page complaint form follows.

# Judicial Council of the Tenth Circuit

## COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 5 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The rules are available in federal court clerks' offices, on individual federal courts' websites, and on [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov).

Your complaint (this form and the statement of facts) should be typewritten and must be legible. Pursuant to Tenth Circuit Misconduct Rule 6.3, only one original need be filed. Enclose the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: \_\_\_\_\_  
Contact Address: \_\_\_\_\_  
\_\_\_\_\_  
Daytime telephone: ( \_\_\_ ) \_\_\_\_\_

2. Name(s) of Judge(s): \_\_\_\_\_  
Court: \_\_\_\_\_

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

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

Court: \_\_\_\_\_  
Case Number: \_\_\_\_\_  
Docket number of any appeal to the \_\_\_\_ Circuit: \_\_\_\_\_

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

Party  Lawyer  Neither

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. Have you filed any lawsuits against the judge?

Yes  No

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

Court: \_\_\_\_\_

Case Number: \_\_\_\_\_

Present status of lawsuit: \_\_\_\_\_

Name, address, and telephone number of your lawyer for the lawsuit against the judge:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Court to which any appeal has been taken in the lawsuit against the judge:

\_\_\_\_\_

Docket number of the appeal: \_\_\_\_\_

Present status of the appeal: \_\_\_\_\_

5. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation. See Tenth Circuit Misconduct Rule 6.1; such statement should be limited to five (5) pages.

6. **Declaration and signature:**

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

(Signature) \_\_\_\_\_

(Date) \_\_\_\_\_