

**RULES OF THE JUDICIAL COUNCIL OF THE
NINTH CIRCUIT
GOVERNING COMPLAINTS OF
JUDICIAL MISCONDUCT OR DISABILITY**

May 25, 2004

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Preface to the Rules

Sections 351-364 of Title 28 of the United States Code¹ (the “Misconduct Statute”) provides a way for any person to complain about a federal judge² who the person believes “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all the duties of office by reason of mental or physical disability.” It also permits the judicial councils of the circuits to adopt rules for the consideration of these complaints. These rules have been adopted under that authority.

Complaints are filed with the clerk of the court of appeals on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, another judge will make this decision; see Rule 18(f).)

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under the Misconduct Statute. The chief judge may also conclude the complaint if the problem has been corrected. If the complaint is not disposed of in either of these two ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the judicial council of the circuit, which decides what action, if any, should be taken. In the Ninth Circuit, the judicial council consists of five judges of the court of appeals and four district judges.

The rules provide, in some circumstances, for review of decisions of the chief judge or the judicial council.

¹ Unless otherwise noted, all references to §§ 351-364 in these Rules and Commentary indicate sections 351-364 of Title 28 of the United States Code.

² Unless otherwise noted, all references to “federal judges” or to “judges” include judges of the court of appeals, district judges, magistrate judges (previously called “magistrates”) and bankruptcy judges.

CHAPTER I: FILING A COMPLAINT

RULE 1. WHEN TO USE THE COMPLAINT PROCEDURE

(a) Purpose of the procedure. The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges engage in conduct that does not meet the standards expected of federal judicial officers or when judges are physically or mentally unable to perform their duties. The law’s purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.

(b) Who may complain. The law allows “any person” to file a complaint. “Any person” includes an association, such as a bar association, so long as the name of a contact person is provided with the complaint.

(c) What may be complained about. The law authorizes complaints about judges who have “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” or who are “unable to discharge all the duties of office by reason of mental or physical disability.”

“Conduct prejudicial to the effective and expeditious administration of the business of the courts” is not a precise term. It includes such things as use of the judge’s office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It does not include making wrong decisions—even very wrong decisions—in cases. The law provides that a complaint may be dismissed if it is “directly related to the merits of a decision or procedural ruling.”

Actions by the chief circuit judge to dismiss or conclude a complaint under Rule 4, by itself, is not the “conduct prejudicial” which can be complained about. Complainant’s recourse is to apply to the circuit council for review of the chief judge’s disposition under Rule 5.

“Mental or physical disability” may include temporary conditions as well as permanent disability.

(d) Who may be complained about. The complaint procedure applies to judges of the United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, and United States magistrate judges. These rules apply, in particular, only to judges of the Court of Appeals for the Ninth Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit. The circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon and Washington.

Complaints about judges of circuits other than the Ninth Circuit should be filed with the Clerk of the Court of Appeals of that other Circuit. Rules and instructions for filing complaints in those circuits are available from the Clerk of the Court of Appeals of those Circuits.

Complaints concerning an attorney or law firm should be made to the relevant state bar association.

Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be satisfactorily resolved at lower levels, it may be referred to the chief judge of the court in which the official is employed.

(e) Time for filing complaints. Complaints should be filed promptly so that fair consideration of the facts is possible. A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

(f) Limitations on use of the procedure. The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case. The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling; only a court can do that.

The complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose.

(g) Abuse of the Complaint Procedure. A complainant who files vexatious, repetitive, harassing, or frivolous complaints, or otherwise abuses the complaint procedure, may be restricted as set forth below.

- (1) **Multiple complaints by single complainant.** After affording the offending complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, the judicial council may restrict or impose conditions upon the complainant's use of the complaint procedure. Such restrictions or conditions will be narrowly tailored to address the specific problem encountered.
- (2) **Identical or substantially identical complaints en masse by multiple complainants.** The Chief Judge may order the Clerk of Court not to formally

process any additional complaints identical or substantially identical to a complaint that has already been dismissed or concluded, but instead to provide complainants a copy of the original Memorandum and Order disposing of the matter. No further action shall be taken with respect to any such identical or substantially identical complaints.

Upon written request of a complainant, the judicial council may revise or withdraw any restrictions or conditions imposed.

COMMENTARY ON RULE 1

Advice to Prospective Complainants on Use of the Complaint Procedure

Potential complainants should consider carefully whether, rather than file a misconduct complaint, it may be more appropriate to seek reconsideration, rehearing or appeal of the judge's decision. Many complainants make the mistake of filing complaints charging that the judge issued a ruling in violation of established legal principles, or charging a conspiracy with only the judge's decision as evidence of conspiratorial behavior. Such charges are not cognizable or remediable under these procedures and will be dismissed. Review procedure in a court, as opposed to the administrative consideration of misconduct charges by the judicial council, at least has the potential to afford an aggrieved party relief in the litigation.

The phrase "conduct prejudicial to the effective and expeditious administration of the business of the courts" is contained in 28 U.S.C. § 351(a); *see also* 332(d)(1) ("[e]ach judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit"). A violation of the Code of Conduct for United States Judges ("the Canons") does not necessarily constitute judicial misconduct under §§ 351-364 unless it is "conduct prejudicial to the effective and expeditious administration of the business of the courts." In re Charge of Judicial Misconduct, 62 F.3d 320 (9th Cir. 1995).

Delay in a single case may be a proper subject for a complaint only in unusual cases, such as where the delay is habitual, is improperly motivated or is the product of improper animus or prejudice toward a particular litigant, or, possibly, where the delay is of such an extraordinary or egregious character as to constitute a clear dereliction of judicial responsibilities. Otherwise, problems of delay—often attributable to caseflow bottlenecks or clerical oversights—can be addressed informally, outside the context of *the Misconduct Statute*.

Rule 1(d) states that the complaint procedure applies to judges "of federal courts within the circuit." This language is intended to make it clear that the circuit in which a judge holds office is the appropriate circuit in which to file a complaint, regardless of where any alleged misconduct occurred.

Time Limitation

These rules do not contain a time limit. However, Rule 1(e) indicates that a complaint may be dismissed, for reasons analogous to laches, if the delay in filing the complaint would prejudice the ability of the judicial council to give fair consideration to the matter.

Identical Complaints

Rule 1(g) addresses abuses of the complaint system. Rule 1(g)(2) provides a remedy for the abuse of the complaint system created when individuals duplicate a complaint en masse. The Misconduct Statute is a remedial statute that is intended to correct conduct or conditions that interfere with the proper administration of justice in the courts. See Rule 1(a). No purpose is served under §§ 351-364 by opening additional separate complaint files and following the process set forth in the statute and the misconduct rules for identical complaints. In fact, following the prescribed procedures would have a serious negative impact on the administration of justice because of the cost in judicial time and resources and would therefore be in direct conflict with the purpose of the statute.

RULE 2. HOW TO FILE A COMPLAINT

(a) Form. Complaints should be filed on the official form for filing complaints in the Ninth Circuit, which is reproduced in the appendix to these rules. Copies of the rules and the form may be obtained by: (1) writing to: Clerk of the Court of Appeals for the Ninth Circuit, P. O. Box 193939, San Francisco, CA 94119-3939; (2) telephoning (415) 556-9800; (3) visiting the Office of the Clerk of the Court of Appeals at 95 Seventh Street, San Francisco, California, or any district court or bankruptcy court within the circuit; or (4) accessing the internet at www.ce9.uscourts.gov.

(b) Statement of facts. A statement should be attached to the complaint form, setting forth with particularity the facts that the claim of misconduct or disability is based on. The statement must not be longer than five pages (five sides), and the paper size must not be larger than the paper the form is printed on. Normally, the statement of facts will include:

- (1) A statement of what occurred;
- (2) The specific date, time and place of the occurrence or occurrences;
- (3) Any other information that would assist an investigator in checking the facts, such as the presence of a court reporter or other witness and their names and addresses.

(c) Legibility. Complaints should be typewritten if possible. If not typewritten, they must be legible.

(d) Submission of documents. Documents such as excerpts from transcripts may be

submitted as evidence of the behavior complained about; if they are, the statement of facts should refer to the specific pages in the documents on which relevant material appears. The five-page limit does not apply to such documents.

(e) Number of copies. If the complaint is about a single judge, the complainant must file five copies of (1) the complaint form, (2) the statement of facts, and (3) any documents submitted. If the complaint is about more than one judge, one extra copy must be filed for each additional judge complained about.

(f) Signature and declaration. The complainant must sign the form and declare under penalty of perjury that the statements are true. The complainant's address must also be provided.

(g) Anonymous complaints. Except as provided in Rule 1(b), anonymous complaints are not handled under these rules. Anonymous complaints received by the clerk will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate, but the complainant will not enjoy the right to notice and participation otherwise provided under these rules. See Rules 2(j) and 20.

(h) Where to file. Complaints should be sent to Clerk, United States Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939.

The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability." Any supplemental material submitted later should be clearly marked with the complaint number, but the name of the judge complained about should not appear on the envelope.

(i) No fee required. There is no filing fee for complaints of misconduct or disability.

(j) Identification of a Complaint. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of §§ 351-364 and thereby dispense with the filing of a written complaint. A chief judge who has identified a complaint under this rule will not be considered a complainant and, subject to the second sentence of Rule 18(a), will perform all functions assigned to the chief judge under these rules for the determination of complaints filed by a complainant.

COMMENTARY ON RULE 2

Use of Complaint Form

Paragraph (a) of Rule 2 provides that complaints must be filed on a form. Use of a

complaint form provides a simple means of eliciting some fairly standard information that is helpful in administering the act.

In addition, the use of a complaint form will resolve ambiguities that sometimes arise about whether the author of a complaining letter intends to invoke the procedures of the Misconduct Statute. With the use of the form, the §§ 351-364 procedure will be used only if the complainant clearly invokes it.

Limitation on Length

Paragraph (b) of Rule 2 provides a five-page limit on the statement of facts. Paragraph (d), however, does not restrict the volume of documents that may be submitted as evidence of the behavior complained about. The five-page limit is intended to eliminate long, rambling complaints that do not clearly identify the conduct complained of.

The provision allowing submission of documentary evidence is partly motivated by the concern that a complainant not be unduly restricted in presenting the factual basis of the complaint. It also reflects a sense that a meritorious complaint will normally be accompanied by hard evidence that the alleged misconduct actually occurred as charged.

Statement of Facts

It is especially important that the statement of facts include specific evidence and information that would assist an investigator in verifying the allegations. Charges of “bias,” for example, cannot stand without evidence to support them, e.g. witnesses, documents, transcripts. If the complaint relates to events or actions that allegedly occurred in open court or were otherwise recorded, the statement of facts should specify the date and time of the hearing and, if possible, the complainant should submit copies of the transcript. See Rule 2(d). If the complaint does not include sufficient evidence to raise an inference that misconduct has occurred, or if the statement of facts does not set forth objectively-verifiable facts to warrant further investigation, the complaint will be dismissed. See Rule 4(c)(3).

Expressions of outrage and pleas for justice are not helpful to the chief judge’s review of a complaint and should not be included in a statement of facts. Rather, the statement should set forth the facts and evidence that support the charge of misconduct.

Complaints Against More than One Judicial Officer

A separate complaint for each judicial officer complained about is not required under these rules. Nevertheless, a complainant should be careful to articulate with specificity which charges apply to which judges.

Declaration

Rule 2(f) includes a requirement that complaints be signed and subscribed with written declaration under penalty of perjury that the statement is true and correct. 18 U.S.C. § 1621 includes in the definition of perjury a willfully false statement subscribed pursuant to 28 U.S.C. § 1746.

Anonymous Complaints

The Misconduct Statute clearly contemplates a complainant whose identity and address are known and who therefore can receive notice of decisions taken, be offered the opportunity to appear at proceedings of a special committee, and be accorded the opportunity to petition for review if dissatisfied with the disposition of the complaint. On the other hand, a prohibition against anonymous complaints may effectively bar complaints from the two groups of citizens most likely to have knowledge of serious problems in the administration of justice: lawyers and court employees.

The resolution reflected in Rule 2(g) is to require that complaints under §§ 351-364 be signed but to make it clear the chief judge acting as chairman of the circuit judicial council can, just as he or she always has, consider information from any source, anonymous or otherwise. This solution is consistent with congressional expressions of intention that informal methods of resolving problems, traditionally used under 28 U.S.C. § 332(d)(1), should continue to be used in many cases.³ Hence, under these rules, the formalities of the statute are not invoked by an anonymous complaint, but nothing in the statute or these rules forbids submission of such a complaint or otherwise bars the chief judge and the circuit council from considering or acting upon it.

Initiation of Misconduct Proceedings by the Chief Judge Without the Filing of a Formal Complaint

Section 351(b) [formerly § 372(c)(1)] authorizes the chief judge, by written order stating reasons therefore, to identify a complaint and thereby dispense with the filing of a written complaint. Commentators have asserted that this provision was enacted in response to the experience of one of the circuits where, following a judge's conviction of a crime, the judicial council initially took no action because no complaint had been filed against the judge.⁴ To avoid problems of this nature, § 351(b) now makes it clear that the chief judge may identify a complaint and thereby bring the disciplinary mechanisms of the Misconduct Statute

³ See S. Rep. No. 362, 96th Cong., 1st Sess. 3-4, 6 (1979); 126 Cong. Rec. 28,092 (1980) (remarks of Sen. DeConcini on final passage).

⁴ Kastenmeier, Rep. Robert W., and Remington, Michael J., Judicial Discipline: A Legislative Perspective, 76 Ky. L.J. 763, 781-82 (1988).

into play in the absence of the filing of a written complaint.

Congress has expressed the intention that “[i]n exercising this discretion [to identify a complaint], the chief judge must enter a written order explaining the reasons for waiving the written complaint requirement and must further identify the complaint.”⁵ Because the identification of a complaint is within the discretion of the chief judge, it is anticipated that a chief judge’s failure to identify a complaint will not ordinarily constitute a proper basis for the filing of a complaint of misconduct against the chief judge under §§ 351-364.

Rule 2(j) provides that once the chief judge has identified a complaint, the chief judge (subject to the disqualification provisions of Rule 18(a)) will perform all functions assigned to the chief judge for the determination of complaints filed by a complainant. Rule 2(j) contemplates, therefore, that the identification of a complaint by the chief judge will advance the process no further than would the filing of a complaint by a complainant. Once a complaint has been identified, it will be treated in a manner identical to a filed complaint under these rules. Thus, for example, under Rule 4(e) a special committee ordinarily will not be appointed to investigate an identified complaint until the judge who is the subject of the complaint has been invited to respond to the complaint and has been allowed a reasonable time to do so. Similarly, under Rule 4 the chief judge has the same options in the investigation and determination of an identified complaint that the chief judge would have had if the complaint had been filed.

RULE 3. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A COMPLAINT

(a) Receipt of complaint in proper form.

(1) Upon receipt of a complaint against a judge filed in proper form under these rules, the clerk of the court of appeals will open a file, assign a docket number, and acknowledge receipt of the complaint. The clerk will promptly send copies of the complaint to the chief judge of the circuit (or the judge authorized to act as chief judge under Rule 18(f)) and to each judge whose conduct is the subject of the complaint. The original of the complaint will be retained by the clerk.

(2) If a district judge or magistrate judge is complained about, the clerk will also send a copy of the complaint to the chief judge of the district court in which the judge holds his or her appointment. If a bankruptcy judge is complained about, the clerk will send copies to the chief judges of the district court and the bankruptcy court. However, if the chief judge of a district court or bankruptcy court is a subject of the complaint, the chief judge’s copy will be sent to the judge of such court in regular active service who is most senior in date of

⁵ H.R. Rep. No. 512, 101st Cong., 2d Sess. 18 (1990).

commission among those who are not subjects of the complaint.

(b) Receipt of complaint about official other than a judge of the Ninth Circuit.

If the clerk receives a complaint about an official other than a judge of the Ninth Circuit, the clerk will not accept the complaint for filing and will advise the complainant in writing of the procedure for processing such complaints. *See* Rule 1(d).

(c) Receipt of complaint about a judge of the Ninth Circuit and another official.

If a complaint is received about a judge of the Ninth Circuit and another official, the clerk will accept the complaint for filing only with regard to the judge, and will advise the complainant accordingly.

(d) Receipt of complaint not in proper form.

If the clerk receives a complaint against a judge of this circuit that uses the complaint form but does not comply with the requirements of Rule 2, the clerk will normally return the complaint for filing and will advise the complainant of the appropriate procedures. If a complaint against a judge is received in letter form, the clerk will normally not accept the letter for filing as a complaint, will advise the writer of the right to file a formal complaint under these rules, and will enclose a copy of these rules and the accompanying forms.

COMMENTARY ON RULE 3

Role of Staff Other than the Clerk

Rule 2(h) follows the statutory language and provides that complaints are to be filed with the clerk of the court of appeals. The statute also directs the clerk to transmit copies of a complaint to the chief judge and to the judge complained of (reflected in Rule 3(a)) and states that certain council orders will be made public through the clerk's office.

Except for these limited provisions, the statute does not allocate responsibilities among clerks and other personnel. These rules are based on the assumption that the clerk will maintain the files, receive petitions for review of chief judge orders, and perform similar functions.

Distribution of Complaint to Chief Judge of District Court or Bankruptcy Court

The statute requires that the complaint be transmitted to the chief judge of the circuit and the judge complained about. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, Rule 3(a)(2) requires in addition that a copy be transmitted to the chief judge of the district court and, where a bankruptcy judge is the subject, the chief judge of the bankruptcy court. This provision is included in recognition of the responsibility of every chief judge for the administration of his or her court.

CHAPTER II: REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

RULE 4. REVIEW BY THE CHIEF JUDGE

(a) Purpose of chief judge's review. When a complaint in proper form is sent to the chief judge by the clerk's office, the chief judge will review the complaint to determine whether it should be

- (1) dismissed
- (2) concluded on the ground that corrective action has been taken or that action on the complaint is no longer necessary because of intervening events, or
- (3) referred to a special committee.

(b) Inquiry by chief judge. In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response will not be made available to the complainant unless authorized by the responding judge. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents.

All communications and records maintained pursuant to the Private Assistance Line Service ("PALS") are confidential and the chief judge shall not seek any information from the PALS providers without the prior written consent of the judge who is the subject of the inquiry.

(c) Dismissal. A complaint may be dismissed if the chief judge concludes:

- (1) that the complaint is directly related to the merits of a decision or procedural ruling; or
- (2) that the claimed conduct, even if the claim is true,
 - (A) is not "conduct prejudicial to the effective and expeditious administration of the business of the courts," or
 - (B) in the case of a disability complaint, does not indicate a mental or physical disability resulting in inability to discharge the duties of office;or
- (3) that the complaint is frivolous, a term that includes making charges that are wholly unsupported or alleging facts that are shown by a limited

inquiry pursuant to Rule 4(b) to be

(A) plainly untrue,

(B) incapable of being established through investigation, or

(C) lacking sufficient evidentiary support either

(i) to raise an inference that some kind of cognizable misconduct has occurred, or

(ii) to warrant further investigation; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) Corrective action or intervening events. The complaint proceeding may be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint, that the claimed conduct is an isolated mistake unlikely to be repeated, or that action on the complaint is no longer necessary because of intervening events.

(e) Appointment of special committee. If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee, constituted as provided in Rule 9, to investigate the complaint and make recommendations to the judicial council. However, ordinarily a special committee will not be appointed until the judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, separate complaints may be joined and assigned to a single special committee; similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(f) Notice of chief judge's action.

(1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken, the chief judge will set forth either in the order or in a supporting memorandum the allegations of the complaint and the reasons for the disposition but will not include the name of the complainant or of the judge whose conduct was complained of. The order and memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2). The complainant will be notified of the right to petition the judicial council for review of the decision and of the deadline for filing a petition.

(2) If a special committee is appointed, the chief judge will notify the complainant, the judge whose conduct is complained of, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2) that the matter has been referred, and will inform them of the membership of the committee.

(g) Public availability of chief judge's decision. Materials related to the chief judge's decision will be made public at the time and in the manner set forth in Rule 17.

(h) Report to judicial council. The chief judge will from time to time report to the judicial council of the circuit on actions taken under this rule.

(i) Consolidation of complaints. Complaints making similar or related allegations can be consolidated and treated as a single complaint.

COMMENTARY ON RULE 4

Purpose of Chief Judge's Review

Although the statute permits the chief judge to conclude the proceeding “if the chief judge finds that” appropriate corrective action has been taken, the chief judge, in cases in which a complaint appears to have merit, should make every effort to determine whether it is possible to fashion a remedy without the necessity of appointing a special committee. The formal investigatory procedures are to be regarded as a last resort; the remedial purposes of the statute are on the whole better and more promptly served if an informal solution can be found that will correct the problem giving rise to a complaint.

Inquiry by Chief Judge

Under the statute the chief judge is not required to act solely on the facts alleged in the complaint. The power to conclude a complaint proceeding on the basis that corrective action has been taken implies some power to determine whether the facts alleged are true. Rule 4(b) addresses the boundary line of that power—the point at which a chief judge invades the territory reserved for special committees—by stating that the chief judge may conduct a limited inquiry to determine whether the facts of the complaint are “either plainly untrue or are incapable of being established through investigation.”

Such determinations necessarily require the chief judge to do some fact finding. However, because only the council has authority to impose discipline under § 354(a)(1)(C), and can do so only after receiving the report of a special investigative committee, the statute clearly contemplates that serious findings adverse to the judge are the exclusive domain of the special investigative committee. Accordingly, if the chief judge's limited inquiry reveals serious misconduct, he or she cannot make such factual findings but must appoint a special investigative committee to give the matter a more thorough investigation before making its own findings.

Grounds for Dismissal of Complaints

Complaints about the merits of a judge's decision or ruling may be dismissed. The appeal and review processes are available to correct any such errors of the court, and the misconduct procedures cannot offer another avenue to relitigate those issues. Other charges,

such as bias or incompetence, may also be dismissed if they are based solely on the merits of a judge's decision. Absent other evidence of a problem, the "wrongness" of a judicial determination is not grounds for misconduct proceedings.

Many complaints are dismissed as "frivolous." The National Commission on Judicial Discipline and Removal expressed concern about this term's being misunderstood. National Commission Report at 98. This term, used in the statute, does not mean that the complaint's charges were insincere, malicious, or insignificant. Law dictionaries define a "frivolous" complaint as one that is "insufficient on its face." Accordingly, a complaint based on sincerely held beliefs charging serious misconduct may be dismissed as frivolous if the charges are unsupported by evidence or if the charges are incapable of verification. See Commentary to Rule 2.

Rule 4(c)(4) also provides that a complaint may be dismissed as "otherwise not appropriate for consideration." This language is intended to accommodate dismissals of complaints for reasons such as untimeliness (see Rule 1(d)) or mootness.

Opportunity of Judge to Respond

Rule 4(e) states that a judge will ordinarily be invited to respond to the complaint before a special committee is appointed.

Judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 4(b), the chief judge may request a response if it is thought necessary. These responses are not available to the complainant because they are not an exercise by the judge of rights under Rule 8(d).

Many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the judge complained about to devote time to a defense. By assuring judges that a special committee will not ordinarily be appointed unless an invitation to respond has been issued by the chief judge, Rule 4(e) is intended to discourage judges from responding unnecessarily.

Notification to Complainant and Judge

Section 352(b) requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. Rule 4(f) contemplates that a formal order disposing of the complaint and an order or memorandum of reasons be provided to the complainant. Rule 17, dealing with availability of information to the public, contemplates that the order and memorandum be made public, usually without disclosing the names of the complainant or the judge involved.

When complaints are disposed of by chief judges, the statutory purposes are best served by providing the complainant with a relatively expansive explanation. See also the discussion

of Rule 17, dealing with public availability.

Rule 4(f) also provides that the complainant will be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. Although the complainant should in all cases have a copy of the circuit rules at the time the complaint is filed, it seems appropriate to provide a reminder at the time of dismissal of the complaint.

CHAPTER III: REVIEW OF CHIEF JUDGE'S DISPOSITION OF A COMPLAINT

RULE 5. PETITION FOR REVIEW OF CHIEF JUDGE'S DISPOSITION

If the chief judge dismisses a complaint or concludes the proceeding on the ground that corrective action has been taken or that action on the complaint is no longer necessary because of intervening events, a petition for review may be addressed to the judicial council of the circuit. The judicial council may affirm the order of the chief judge, return the matter to the chief judge for further action, or, in exceptional cases, take other appropriate action.

COMMENTARY ON RULE 5

Petition to the Judicial Council for Review

Section 352(c) provides that a complainant or judge aggrieved by a chief judge's order dismissing a complaint or concluding a proceeding on the basis of corrective action or intervening events may "petition the judicial council of the circuit for review thereof." The council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. This view has been carried into the rules, which state that the circuit council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action. The "exceptional cases" language would permit the council to deny review rather than affirm in a case in which the process was obviously being abused.

RULE 6. HOW TO PETITION FOR REVIEW OF A DISPOSITION BY THE CHIEF JUDGE

(a) Time. A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter to the complainant transmitting the chief judge's order.

(b) Form. A petition should be in the form of a letter, addressed to the clerk of the court of appeals, beginning, "I hereby petition the judicial council for review of the chief judge's order"

(c) Legibility. Petitions should be typewritten if possible. If not typewritten, they must be legible.

(d) Number of copies. The complainant must file an original and fifteen copies of the petition for review, along with ten copies of the original complaint.

(e) Statement of grounds for petition. The letter should set forth a brief statement

of the reasons why the petitioner believes that the chief judge should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the circuit council considering the petition. New allegations or evidence not included within the complaint for which review is sought will not be considered by the judicial council. If the complainant wishes to lodge new allegations or present new evidence, a new complaint must be filed.

(f) Signature. The letter must be signed.

(g) Where to file. Petition letters should be sent to Clerk, United States Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939.

The envelope should be marked “Misconduct Petition” or “Disability Petition” and should show the complaint number. The name of the judge complained about should not appear on the envelope.

(h) No fee required. There is no fee for filing a petition under this procedure.

COMMENTARY ON RULE 6

Time for Filing Petition for Review

Rule 6(a) contains a limit of thirty days for the filing of a petition for review in order to provide finality to the process. The judge complained about should know at some point that the matter is closed. Thirty days should be enough time for a complainant, even an unrepresented one, to make a decision and submit a petition.

In accordance with this approach, Rule 7(c) of the rules provides for an automatic extension of the time if a person files a petition that is rejected for failure to comply with formal requirements.

RULE 7. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A PETITION FOR REVIEW

(a) Receipt of timely petition in proper form. Upon receipt of a petition for review filed within the time allowed and in proper form under these rules, the clerk of the court of appeals will acknowledge receipt of the petition. The clerk will promptly send to each member of the judicial council, except for any member disqualified under Rule 18, copies of:

- (1) the complaint form and statement of facts;
- (2) any response filed by the judge;
- (3) any record of information received by the chief judge in connection

with the chief judge's consideration of the complaint;

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

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

(6) the petition for review;

(7) any other documents in the files of the clerk that appear to be relevant and material to the petition;

(8) a list of any documents in the clerk's files that are not being sent because they are not considered relevant and material; and

(9) a ballot that conforms with Rule 8(a). The clerk will also send the same materials, except for the ballot, to the chief judge of the circuit, the circuit executive, and each judge whose conduct is at issue, except that materials previously sent to a person may be omitted.

(b) Receipt of untimely petition. The clerk will refuse to accept a petition that is received after the deadline set forth in Rule 6(a).

(c) Receipt of timely petition not in proper form. Upon receipt of a petition filed within the time allowed but not in proper form under these rules (including a document that is ambiguous about whether a petition for review is intended), the clerk will acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraph (a) of this rule. If the deficiencies are not corrected, the clerk will reject the petition.

COMMENTARY ON RULE 7

Transmittal of Documents by Clerk

The rules include no limit on the volume of documents that may be submitted in support of a complaint. One of the problems created by this liberality is that some complaint files may get very thick with attachments. Hence, the clerk should have some discretion to decide what portions of the file should be duplicated and transmitted to the members of the circuit council. Rule 7(a) provides such discretion but requires the clerk to furnish a list of the documents not transmitted. Rule 8(b) enables each member of the council, as well as the judge complained about, to obtain a copy of any document not originally transmitted by the clerk.

RULE 8. REVIEW BY THE JUDICIAL COUNCIL OF A CHIEF JUDGE'S ORDER

(a) Mail ballot. Each member of the judicial council to whom a ballot was sent will return a signed ballot, or otherwise communicate the member's vote, to the clerk of the court of appeals. The ballot form will provide opportunities to vote to (1) affirm the chief judge's disposition, or (2) place the petition on the agenda of a meeting of the judicial council. The form will also provide an opportunity for members to indicate that they have disqualified themselves from participating in consideration of the petition.

If any member votes to place the petition on the agenda of a council meeting, that will be done. Votes will be tabulated 20 days from the date the petition and related materials were sent to members of the judicial council.

(b) Availability of documents. Upon request, the clerk will make available to any member of the judicial council or to the judge complained about any document from the files that was not sent to the council members pursuant to Rule 7(a).

(c) Vote at meeting of judicial council. If a petition is placed on the agenda of a meeting of the judicial council, council action may be taken by a majority of the members present and voting.

(d) Rights of judge complained about.

(1) At any time after the filing of a petition for review by a complainant, the judge complained about may voluntarily file a written response with the clerk of the court of appeals. The clerk will promptly distribute copies of the response to each member of the judicial council who is not disqualified, to the chief judge, and to the complainant. The judge may not communicate with individual council members about the matter, either orally or in writing.

(2) The judge complained about will be provided with copies of any communications that may be addressed to the members of the judicial council by the complainant.

(3) If the judicial council votes to place a petition for review on its agenda, the judge complained about will be notified of that action.

(e) Notice of council decision.

(1) The order of the judicial council, together with any accompanying memorandum in support of the order, will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2).

(2) If the decision is unfavorable to the complainant, the complainant will be notified that the law provides for no further review of the decision.

(3) A memorandum supporting a council order will not include the name of the complainant or the judge whose conduct was complained of. If the order of the council affirms the chief judge's disposition, a supporting memorandum will be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation.

(f) Public availability of council decision. Materials related to the council's decision will be made public at the time and in the manner set forth in Rule 17.

COMMENTARY ON RULE 8

Voting Procedures

Rule 8(a) adopts the use of mail ballots on petitions for review. The mail ballot procedure specified here assures that there will be full discussion in the council if any member believes that summary affirmance may not be appropriate. Any member of the council may cause the question to be placed on the agenda of a council meeting.

It should be emphasized that the "rule of one" on the mail ballot is not intended to invoke the analogy of the Supreme Court's certiorari jurisdiction. A vote to affirm on the mail ballot is intended to be a vote on the merits. The "rule of one" is intended to guarantee an opportunity for discussion and a vote following discussion if any member of the council is uncomfortable with a summary affirmance.

CHAPTER IV. INVESTIGATION AND RECOMMENDATION BY SPECIAL COMMITTEE

RULE 9. APPOINTMENT OF SPECIAL COMMITTEE

(a) Membership. A special committee appointed pursuant to Rule 4(e) will consist of the chief judge of the circuit and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee will be from districts other than the district of the judge complained about.

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

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

(d) Provision of documents. The chief judge will certify to each other member of the committee and to the advisor, if any, copies of (1) the complaint form and statement of facts, and (2) any other documents on file pertaining to the complaint (or to that portion of the complaint referred to the special committee).

(e) Continuing qualification of committee members. A member of a special committee who was qualified at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under article III, section 1, of the Constitution of the United States. However, an advisor appointed under Rule 9(c) may not continue to serve after the advisor has relinquished the position of bankruptcy judge or magistrate judge.

(f) Inability of committee member to complete service. In the event that a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge of the circuit will determine whether to appoint another circuit or district judge, as the case may be, as a replacement member. However, no special committee appointed under these rules will

function with only a single member, and the quorum and voting requirements for a two-member committee will be applied as if the committee had three members.

COMMENTARY ON RULE 9

Membership and Presiding Officer

Rule 9 leaves the size of a special committee flexible, to be determined on a case-by-case basis.

There is good reason to preserve the statutory flexibility in this regard. The question of committee size is one that should be weighed with some care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the statute requires that the chief judge be a member of each special committee, it does not require that the chief judge preside.⁶ Once again, the rules leave the decision for case-by-case determination at the time the committee is appointed.

Section 356(a) provides that a special committee will have subpoena powers as provided in 28 U.S.C. § 332(d). The latter section provides that subpoenas shall be issued on behalf of circuit councils by the clerk of the court of appeals "at the direction of the chief judge of the circuit or his designee." While it might be regarded as implicit that a special committee can exercise its subpoena power through its own presiding officer, strict compliance with the letter of § 332(d) would appear to be the safer course. Rule 9(b) therefore invites the chief judge, when designating someone else as presiding officer, to make an explicit delegation of the authority to direct the issuance of subpoenas related to committee proceedings.

The rule does not specifically address the case in which, because of disqualification of the chief judge, another judge is exercising the powers of the chief judge in the the Misconduct Statute proceeding. If the chief judge has reason for disqualification, however, it would be inappropriate for him or her to retain exclusive control over the issuance of subpoenas. Accordingly, the subpoena power should be vested in the judge who is exercising all of the other powers of the chief judge under §§ 351-364.

Bankruptcy Judge or Magistrate Judge as Advisor

Rule 9(c) requires the chief judge to designate a bankruptcy judge or magistrate judge, as the case may be, to join the committee as advisor when a bankruptcy judge or magistrate

⁶ See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 11 (1980) (chief judge may appoint another judge as presiding officer).

judge is the subject of the complaint and requests that an advisor be appointed.

The advisor will have all the privileges of a member of a committee except the franchise. That would include participating in all deliberations of the committee, questioning witnesses at hearings, and even writing a separate statement to accompany the report of the special committee to the judicial council.

Continuing Qualification

Rule 9(e) provides that a member of a special committee who remains an article III judge may continue to serve on the committee even though the member's status changes. Thus, a committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. Consistent with this, a new chief circuit judge need not appoint himself or herself to any continuing investigative committee appointed by his the chief circuit judge's predecessor. This provision reflects the belief that stability of membership will make an important contribution to the quality of the work of such committees.

Inability of Committee Member to Complete Service

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

RULE 10. CONDUCT OF AN INVESTIGATION

(a) Extent and methods to be determined by committee. Each special committee will determine the extent of the investigation and the methods of conducting it that are appropriate in the light of the allegations of the complaint. If, in the course of the investigation, the committee develops reason to believe that the judge may have engaged in misconduct that is beyond the scope of the complaint, the committee may, with written notice to the judge, expand the scope of the investigation to encompass such misconduct. All communications and records maintained pursuant to the Private Assistance Line Service ("PALS") are confidential and the special committee shall not seek any information from the PALS providers without the prior written consent of the judge who is the subject of the inquiry.

(b) Criminal matters. In the event that the complaint alleges criminal conduct on the part of a judge, or in the event that the committee becomes aware of possible criminal conduct, the committee will consult with the appropriate prosecuting authorities to the extent permitted by 28 U.S.C. § 360 in an effort to avoid compromising any criminal investigation. However, the committee will make its own determination about the timing of its activities, having in mind the importance of ensuring the proper administration of the business of the courts.

(c) Staff. The committee may arrange for staff assistance in the conduct of the investigation. It may use existing staff of the judicial branch or may arrange, through the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

(d) Delegation. The committee may delegate duties in its discretion to subcommittees, to staff members, to individual committee members, or to an advisor designated under Rule 9(c). The authority to exercise the committee's subpoena powers may be delegated only to the presiding officer.

(e) Report. The committee will file with the judicial council a comprehensive report of its investigation, including findings of the investigation and the committee's recommendations for council action. Any findings adverse to the judge will be based on evidence in the record. The report will be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held pursuant to Rule 11.

(f) Voting. All actions of the committee will be by vote of a majority of all of the members of the committee.

(g) Contempt. In the case of failure to comply with a subpoena issued under the Misconduct Statute, the judicial council or the special committee may institute a contempt proceeding in any district court in which the person or entity who fails to comply with the subpoena shall be ordered to show cause before the court why the person or entity should not be held in contempt of court.

COMMENTARY ON RULE 10

Nature of the Process

Rule 10 and the three rules that follow are all concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has what are generally regarded in our jurisprudence as two distinct roles. The committee will often be performing an investigative role of the kind that is characteristically given to executive branch agencies in our system of justice and, in some stages, a more formalized fact-finding

role. Even though the same body has responsibility for both roles under §§ 351-364, it is important to distinguish between them in order to ensure that due process rights are afforded at appropriate times to the judge complained about.

Criminal Matters

One of the difficult questions that can arise under the judicial discipline statute is the relationship between proceedings under this statute and criminal investigations. Rule 10(b) assigns coordinating responsibility to the special committee in cases in which criminal conduct is suspected and gives the committee the authority to decide what the appropriate pace of its activity should be in light of any criminal investigation. A special committee should not, however, abdicate its responsibility by assenting to indefinite deferral of its own work. It is noted that a special committee may be barred from disclosing some information to a prosecutor or grand jury under 28 U.S.C. § 360. This provision is discussed in the commentary under Rule 16.

Delegation

Rule 10(d) permits the committee, in its discretion, to delegate any of its duties to subcommittees, individual committee members, or staff. This is consistent with the general principle, expressed in Rule 10(a), that each special committee will determine the methods of conducting the investigation that are appropriate in the light of the allegations of the complaint. It is, of course, not contemplated that the ultimate duty of adopting a report would be delegable.

Rule 9(b) suggests that, where the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the clerk of the court of appeals to issue subpoenas related to committee proceedings.

Basis of Findings

Rule 10(e) requires that findings adverse to the judge complained about be based on evidence in the record. There is no similar requirement in the rules for determinations favorable to the judge. A committee may, in some circumstances, recommend dismissal of a complaint on the ground that preliminary investigation reveals no basis for going forward with hearings on the record.

Voting in the Special Committee

Rule 10(f) provides that actions of a special committee will be by vote of a majority of all of the members. It seems reasonable to expect that, almost always, all the members of a committee will participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a

majority of some smaller quorum.

Contempt

Section 356(b) grants the judicial council or its special committee the full subpoena powers provided under § 332(d). Section 332(d) requires that, at the council's request and at the direction of the chief judge of the circuit or his designee, a subpoena be issued by the court of appeals and be served in the manner set out in Fed. R. Civ. P. 45(c). Although §§ 351-364 do not explicitly address contempt, § 332(d)(2) suggests that with the subpoena power comes the authority to enforce a subpoena. Moreover, Fed. R. Civ. P. 45(e) provides that failure to comply with a subpoena issued under 45(c) may be a contempt of the court from which the subpoena issued. See also Commentary to Rule 16 (inferring contempt power from the Misconduct Statute's legislative history).

RULE 11. CONDUCT OF HEARINGS BY SPECIAL COMMITTEE

(a) Purpose of hearings. The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. Evidence received and testimony taken shall be subject to the right of the committee to determine competency, relevancy, and materiality. The proceedings shall be under the control of the committee. Among other things, it shall determine the mode and the order of interrogating witnesses and of otherwise presenting evidence tendered to it. If the committee is investigating allegations against more than one judge it may, in its discretion, hold joint hearings or separate hearings.

(b) Notice to judge complained about. The judge complained about will be given adequate notice in writing of any hearing held, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The judge may at any time suggest additional witnesses to the committee.

(c) Committee witnesses. All persons who are believed to have substantial information to offer will be called as committee witnesses. Such witnesses may include the complainant and the judge complained about. The witnesses will be questioned by committee members, staff, or both. The judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel.

(d) Witnesses called by the judge. The judge complained about may also call witnesses and may examine them personally or through counsel. Such witnesses may also be examined by committee members, staff, or both.

(e) Witness fees. Witness fees will be paid as provided in 28 U.S.C. § 1821.

(f) Rules of evidence; oath. The Federal Rules of Evidence and common law rules of evidence will be utilized when, in the judgment of the committee, they would be appropriate. All testimony taken at such a hearing will be given under oath or affirmation.

(g) Record and transcript. A record and transcript will be made of any hearing held.

COMMENTARY ON RULE 11

The Role of Hearings in the Investigation Process

The roles of a special committee include an investigative role and a fact-finding role. In conformity with this concept of roles, hearings should be held only after some preliminary investigative work has been done and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Rule 11 is concerned only with the conduct of hearings, and does not govern the earlier, investigative stages of a special committee's work.

Inevitably, a hearing will have something of an adversary character. The judge who has been complained about will surely feel threatened if the matter has reached this stage. Although an investigation may have two distinct 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.

In conformity with this view, Rule 11(c) contemplates that witnesses at hearings should generally be called as committee witnesses, regardless of whether their testimony will be favorable or unfavorable to the judge complained about. Staff or others who are organizing the hearings should regard it as their role to present the entire picture, and not to act as prosecutors. Even the judge complained about should normally be called as a committee witness. Although Rule 11(d) preserves the statutory right of the judge to call witnesses on his or her own behalf, it should not often be necessary for the judge to do so.

RULE 12. RIGHTS OF JUDGE IN INVESTIGATION

(a) Notice. The judge complained about is entitled to written notice of the investigation (Rule 4(f)), to written notice of expansion of the scope of an investigation (Rule 10(a)), and to written notice of any hearing (Rule 11(b)).

(b) Presentation of evidence. The judge is entitled to a hearing if he or she requests one and has the right to present oral and documentary evidence and to compel the attendance of witnesses and the production of documents and to cross-examine witnesses at the hearing. Upon request of the judge, the chief judge or the chief judge's designee will direct the clerk of the court of appeals to issue a subpoena in accordance with 28 U.S.C. § 332(d)(1).

(c) Presentation of argument. The judge may submit written argument to the special committee at any time and will be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(d) Attendance at hearings. The judge will have the right to attend any hearing held by the special committee and to receive copies of the transcript and any documents introduced, as well as to receive copies of any written arguments submitted by the complainant to the committee.

(e) Committee Report. The judicial council may in its discretion release a copy of the report of the special committee to the judge after it is filed with the judicial council.

(f) Representation by counsel. The judge may be represented by counsel in the exercise of any of the rights enumerated in this rule. The costs of such representation may be borne by the United States as provided in Rule 14(h).

COMMENTARY ON RULE 12

Right to Attend Hearings

The statute states that rules adopted by judicial councils shall contain provisions requiring that “the judge whose conduct is the subject of a complaint under this chapter 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.” To implement this provision, Rule 12(d) gives the judge the right to attend any hearing held by the committee. The word “hearings” is used in the rules to include sessions held for the purpose of receiving evidence of record or hearing argument.

The statute does not require that the judge be permitted to attend all proceedings of the special committee. Hence, the rules do not accord a right to attend such proceedings as meetings at which the committee is engaged in preliminary investigative activity (such as interviewing a possible witness or examining documents delivered pursuant to a subpoena duces tecum to determine if they contain relevant evidence) or meetings at which the committee is deliberating on the evidence.

RULE 13. RIGHTS OF COMPLAINANT IN INVESTIGATION

(a) Notice. The complainant is entitled to written notice of the investigation as provided in Rule 4(f). Upon the filing of the special committee’s report with the judicial council, the complainant will be notified that the report has been filed and is before the council for decision.

(b) Opportunity to provide evidence. The complainant is entitled to be interviewed by a representative of the committee. If it is believed that the complainant has substantial information to offer, the complainant will be called as a witness at a hearing.

(c) Presentation of argument. The complainant may submit written argument to the special committee at any time. In the discretion of the special committee, the complainant may be permitted to offer oral argument.

(d) Representation by counsel. A complainant permitted to offer oral argument may do so through counsel.

(e) Committee report. The judicial council may in its discretion release a copy of the report of the special committee to the complainant after it is filed with the judicial council.

(f) Forfeiture of rights. If a special committee determines that a complainant has compromised the confidentiality of its proceedings, it may, in the interest of (1) justice, (2) the integrity of the investigation and (3) the privacy of the judge and witnesses, terminate the complainant's rights to further notice and participation in the proceedings.

COMMENTARY ON RULE 13

In accordance with the view of the process as fundamentally administrative, these rules do not give the complainant the rights of a party to litigation. The rules leave the complainant's role largely within the discretion of the special committee. However, Rule 13(b) promises complainants that, where a special committee has been appointed, the complainant will at a minimum be interviewed by a representative of the committee. Such an interview may, of course, be in person or by telephone, and the representative of the committee may be either a member or staff. In almost every case, such an interview would be regarded by the committee as essential in the performance of its task. Complainants should have an opportunity to tell their stories orally.

Rule 13 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting argument. Opening the proceedings to the complainant would be inconsistent with the statutory mandate of confidentiality, 28 U.S.C. § 360 . In exceptional cases, the special committee may also exercise its discretion to permit the complainant, individually or through counsel, to attend or otherwise participate in its proceedings.

Rule 13(f) was prompted by breaches of confidentiality in prior investigations, during which complainants improperly revealed the substance of hearings to the press, apparently in an attempt to gain publicity for themselves or for their charges. Because confidentiality rules prohibit judiciary sources from responding to such public comment to correct errors or to place the statements in proper context, media reports based on such disclosures will almost always be unfair to the judge who is being investigated. But see Commentary to Rule 16 (quoting legislative history that suggests some kind of limited public response may be permissible). If a complainant has violated the confidentiality of the proceeding by disclosing its existence to the press, the special committee and the judicial council should be able to withhold further

information regarding the proceeding from the complainant in order to stem future disclosures. Rule 13(f) allows them to do that. Such action must, of course, be weighed against the importance of the person's testimony and/or participation to the integrity and completeness of the proceedings.

**CHAPTER V: JUDICIAL COUNCIL CONSIDERATION OF
RECOMMENDATIONS OF SPECIAL COMMITTEE**

RULE 14. ACTION BY JUDICIAL COUNCIL

(a) Purpose of judicial council consideration. After receipt of a report of a special committee, the judicial council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that action on the complaint is no longer necessary because of intervening events, order or conduct additional investigation, refer the complaint to the Judicial Conference of the United States, or order corrective action.

(b) Basis of council action. Subject to the rights of the judge to submit argument to the council as provided in Rule 15(a), the council may take action on the basis of the report of the special committee and the record of any hearings held. If the council finds that the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee or (2) conduct such additional investigation as it deems appropriate.

(c) Dismissal. The council may dismiss a complaint if it concludes:

- (1) that the complaint is directly related to the merits of a decision or procedural ruling; or
- (2) that the claimed conduct, even if the claim is true,
 - (A) is not “conduct prejudicial to the effective and expeditious administration of the business of the courts” or,
 - (B) in the case of a disability complaint, does not indicate a mental or physical disability resulting in inability to discharge the duties of office;or
- (3) that the facts on which the complaint is based have not been demonstrated; or
- (4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) Conclusion of the proceeding on the basis of corrective action taken. The council may conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint or that action on the complaint is no longer necessary because of intervening events.

(e) Referral to Judicial Conference of the United States. The judicial council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council’s recommendations for action. It is required to refer such a complaint to the Judicial

Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct:

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

(f) Order of corrective action. If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the judicial council will take other action to assure the effective and expeditious administration of the business of the courts. Such action may include, among other measures:

- (1) Censuring or reprimanding the judge, either by private communication or by public announcement;
- (2) Ordering that, for a fixed temporary period, no new cases be assigned to the judge;
- (3) In the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, or recommending the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i);
- (4) In the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152;
- (5) In the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and
- (6) In the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(g) Combination of actions. Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f)(3) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

(h) Recommendation about fees. Upon the request of the judge complained about, the judicial council may, if the complaint has been finally dismissed, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the federal judiciary, for those reasonable expenses, including attorneys' fees,

incurred by that judge during the investigation which would not have been incurred but for the requirements of the Misconduct Statute and these rules.

(i) Notice of action of judicial council. Council action will be by written order and memorandum. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the council will set forth, either in the order or in a supporting memorandum, the factual determinations on which it is based and the reasons for the council action. The order and memorandum will not include the name of the complainant or of the judge whose conduct was complained about, except as provided in Rule 17(a)(3). The order and memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge will be notified of any right to seek review of the judicial council's decision by the Judicial Conference of the United States and of the procedure for filing a petition for review.

(j) Public availability of council action. Materials related to the council's action will be made public at the time and in the manner set forth in Rule 17.

COMMENTARY ON RULE 14

Basis of Council Action

Section 354 states that, upon receipt of a report from a special committee, the judicial council may conduct any additional investigation that it considers to be necessary. While the statute does not explicitly provide authority to ask the special committee to do further work and file a supplemental report, it appears that such a procedure is so inherently a part of a committee process that the authority for it may safely be assumed. An investigation of any magnitude by the entire judicial council would be warranted in only the rarest cases, since it would constitute a substantial drain on judicial resources of the circuit. There may be some cases, however, in which a loose end can be tied up without the necessity of a remand.

Council Action

Section 354(a)(2) enumerates actions that the council may take after receipt of the report of a special committee and the conduct of any additional investigation that it deems necessary. There are two notable omissions from this statutory enumeration: conclusion of the proceedings on the ground that corrective action has been taken or that action on the complaint is no longer necessary because of intervening events. Moreover, the authority to conclude proceedings on these grounds does not easily fit into the catch-all clause of section 354(a)(2)(C) (with reference to a magistrate judge, action by the judicial council may include "directing the chief judge of the district of the magistrate judge to take such action as the

judicial council considers appropriate”), since the general introductory language of section 354(a)(1)(C) seems to assume that a finding of misconduct or disability has been made. That language authorizes the judicial council to “take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.” Conclusion of the proceeding on the basis of corrective action taken or because intervening events have made action on the complaint unnecessary must be action permitted under paragraphs 354(a)(2) and (a)(3). In these rules, this option is included in the enumerated alternatives for council action.

The alternatives enumerated in 354(a) are not exclusive. The council has a broad range of alternatives for addressing issues of misconduct, both within and without the §§ 351-364 procedure. Section 354(a)(2) and (a)(3) allows a full range of options, up to but not including removal from office. In addition, when it enacted the Misconduct Statute, Congress contemplated that the informal methods councils had been using under § 332(d) for resolving problems would continue to be used. See Commentary to Rule 20.

Combination of Actions

Rule 14(g) states that referral of a complaint to the Judicial Conference of the United States, or to a district court in a case involving a magistrate judge, will not preclude the judicial council from simultaneously taking other action to assure the effective and expeditious administration of the business of the courts.

Referral to the Judicial Conference of the United States may take place under either 354(b)(1) or (b)(2). Subsection (b)(1) states that, “[i]n addition to the authority [to take appropriate action] granted under subsection (a),” judicial councils may, in their discretion, refer matters to the Judicial Conference of the United States with recommendations for action by the Conference. Subsection (b)(2) mandates judicial council referral of complaints to the Judicial Conference in certain circumstances; it is not introduced with the phrase, “In addition to the authority granted under subsection (a).” This distinction in the introductory language was not intended to suggest a difference in the authority of the judicial council to take corrective action simultaneously with referral of a matter to the Conference. “In addition to” in subsection (b)(1) says no more than that referral is another action within the council’s authority, in addition to those actions listed in subsection (a).

Recommendation About Fees

Section 361 [formerly section 372(c)(16)] makes explicit the authority of the judicial council, upon the request of the judge who is the subject of the complaint, to recommend to the Director of the Administrative Office of the United States Courts that the judge who is the subject of the complaint be reimbursed for reasonable expenses, including attorneys’ fees, incurred during the investigation. Under the statutory provision, the judicial council has the authority to recommend such reimbursement only where, after investigation by a special

committee, the complaint has been finally dismissed under § 354(a)(1)(B). The statute confers upon the judicial council no such authority where the council instead takes any other action available to it under paragraphs 354(a)(2) or (b). Accordingly, there is no basis in the statute for a recommendation of reimbursement for attorneys' fees where the judicial council, after an investigation, concludes the proceeding under § 354(a)(1)(C) on the ground that corrective action has been taken or that intervening events have made action on the complaint unnecessary.

Notice of Council Action

Rule 14(i) 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 judge complained about. The two "interests of justice" exceptions are derived from 28 U.S.C. §§ 354(b)(3) and 360(b) .

Right to Petition for Review of Judicial Council Action

Rule 14(i) requires that the notification to the complainant and the judge complained about include notice of any right to petition the Judicial Conference of the United States for review of the council's decision.

It is noted that the right to petition for review is limited to orders under section 354(a) . A decision of the council to refer a matter to the Judicial Conference under 354(b)(1) is not reviewable.

RULE 15. PROCEDURES FOR JUDICIAL COUNCIL CONSIDERATION OF A SPECIAL COMMITTEE'S REPORT

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

(b) Conduct of additional investigation by the council. If the judicial council decides to conduct additional investigation, the judge complained about will 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 10 through 13 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony to avoid unnecessary repetition of testimony presented before the special committee.

(c) Voting. Council action will 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 of the members of the council.

COMMENTARY ON RULE 15

Voting

Section 354(a)(3)(B) requires that removal of a bankruptcy judge be in accordance with 28 U.S.C. § 152. Subsection (e) of that section requires the concurrence of a majority of all of the members of the council in the order of removal. It is not appropriate 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.

Rights of a Judge under Rule 15

Rule 15(a) prevents an accused judge or someone acting on the accused judge's behalf from initiating communication with council members in their individual capacities. It does not prevent the council's designation of a member or members to receive communications from the judge or to initiate such communications with the accused judge.

CHAPTER VI: MISCELLANEOUS RULES

RULE 16. CONFIDENTIALITY

(a) General rule. Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration shall not be disclosed by any person in any proceeding except in accordance with these rules.

(b) Files. All files related to complaints of misconduct or disability, whether maintained by the clerk, the chief judge, members of a special committee, members of the judicial council, or staff, and whether or not the complaint was accepted for filing, will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

(c) Papers, documents and records of proceedings. All papers, documents and records of proceedings related to investigations conducted pursuant to these Rules shall be confidential and shall not be disclosed by any person in any proceeding except as provided in §§ 355 and 360.

(d) Disclosure in memoranda of reasons. Memoranda supporting orders of the chief judge or the judicial council, and dissenting opinions or separate statements of members of the council, may contain such information and exhibits as the authors deem appropriate, and such information and exhibits may be made public pursuant to Rule 17.

(e) Availability to Judicial Conference. In the event that a complaint is referred under Rule 14(e) to the Judicial Conference of the United States, the clerk will provide the Judicial Conference with copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the Judicial Conference or its Committee to Review Circuit Council Conduct and Disability Orders, in connection with their consideration of a referred complaint or a petition under 28 U.S.C. § 354(b)(2) for review of a council order, the clerk will furnish any other records related to the investigation.

(f) Availability to district court. In the event that the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 14(f)(3), the clerk will provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the chief judge of the district court, the judicial council may authorize release of any other records relating to the investigation.

(g) Impeachment proceedings. The judicial council may release to the legislative branch any materials that are believed necessary to an impeachment investigation of a judge or a trial on articles of impeachment.

(h) Consent of judge complained about. Any materials from the files may be disclosed to any person upon the written consent of both the judge complained about and the chief judge of the circuit. In any disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a special committee or the judicial council or in a limited inquiry conducted by the chief judge, be shielded.

(i) Disclosure by judicial council in special circumstances. The judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that the council concludes that such disclosure is justified by special circumstances and is not prohibited by 28 U.S.C. § 360.

(j) Disclosure of identity by judge complained about. Nothing in this rule will preclude the judge complained about from acknowledging that he or she is the judge referred to in documents made public pursuant to Rule 17.

(k) Private Assistance Line Service. Notwithstanding anything to the contrary contained herein, no communication between a judge who is the subject of a complaint and a PALS provider and no record maintained by a PALS provider may be disclosed to the Judicial Conference, the legislative branch or to any district court without the prior written consent of the judge who is the subject of the complaint.

COMMENTARY ON RULE 16

Scope of Confidentiality Requirement

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

With regard to the first question, Rule 16(a) echoes the statutory language: “any person in any proceeding.” This language includes anyone who has participated in any way in an inquiry or investigation, including but not limited to the complainant, the judge complained about, the members of the committee and their staff, people involved in recording and transcribing the proceedings, and any witnesses who testified before, or were interviewed by, the committee.

With regard to the second question, the reference to “investigations” suggests that § 360 technically applies only in cases in which a special committee has been appointed. However, Rule 16(a) applies the rule of confidentiality more broadly, covering consideration of a complaint at any stage.

With regard to the third question, it seems clear that there is no barrier of confidentiality between a judicial council and the Judicial Conference, and that members of the Judicial Conference or its standing committee may have access to any of the confidential records for use in their consideration of a referred matter or a petition for review. It is implicit that a district court may have similar access if the judicial council orders in response to a complaint that the district court initiate proceedings to remove a magistrate judge from office, and Rule 16(f) so provides. It would be absurd if the district court were in this circumstance denied access to the evidence on which the order was based.

On the other hand, the statute makes it clear that there is a barrier of confidentiality between the judicial branch and the legislative; it provides, as an exception to the rule of confidentiality, that material is to be disclosed to Congress only if it is “believed necessary to an impeachment investigation or trial of a judge under article I.”

Exceptions to Confidentiality Rule

With regard to the exception for impeachment proceedings, Rule 16(g) tracks the statutory language, and deliberately preserves the ambiguity about who must believe that disclosure is necessary to an impeachment investigation or trial. There is some possibility of conflict between the legislative and judicial branches about this issue. It may never arise in fact, and it does not seem appropriate to try to resolve it in advance by rule.

Another exception to the rule of confidentiality is provided by § 360(a)(3) which states that confidential materials may be disclosed if authorized in writing by the judge complained about and by the chief judge of the circuit.

Rule 16 also recognizes that there must be some implicit exceptions to the confidentiality requirement. For example, 28 U.S.C. § 360(b) requires that certain orders and the reasons for them shall be made public; it would be a barren collection of reasons that could not refer to the evidence. Rule 16(d) thus makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public.

Other implicit exceptions necessarily include the subpoenaed witness, who may have to show the subpoena to an employer in order to explain his or her absence from work. The witness need not disclose the nature of the charges or the name of the judge, however, and any such disclosure would violate this rule. Also, it is not contemplated that a complainant should be barred from disclosing the fact that a complaint was filed or the nature of his or her complaint. Any official action on the complaint, however, including the appointment of a special committee or actions taken by judges or judiciary employees to investigate the charges are “proceedings” within the meaning of this rule and must not be disclosed.

Rule 16(i) permits disclosure of additional information by order of the council in circumstances not enumerated. Unfortunately, the statutory language does not explicitly authorize exceptions, so many cases will present issues of statutory interpretation. A strong case could be made for disclosure to permit a prosecution for perjury based on testimony given before a special committee. A more difficult case would be presented if a special committee turned up evidence of criminal conduct by a judge and wanted to refer the matter to a grand jury. The rule refers to the statutory prohibition but does not attempt to resolve such questions.

One exception contemplated in the legislative history, however, is when the confidentiality of the proceeding has already been compromised. Congress clearly contemplated that some kind of public response is permitted:

If knowledge of an investigation of a judge is “leaked” to the public, the Committee feels that a public statement should be issued which provides that such an investigation is no indication of the judge’s guilt. If the circumstances merit it, the statement may include its procedures in processing and investigating a judge. If the judge is subsequently cleared, a statement stating that the judge has been cleared should be issued.

In the case of a complainant who publicizes the fact that he has filed a complaint which may include some type of misrepresentation, the Committee endorses the policy determination that efforts be made to clarify any misunderstanding by indicating such facts that a complaint had been filed and other general procedural information without disclosing the specifics of any particular case, thereby protecting the judge from malicious publicity.

S. Rep. No. 362, 96th Cong., 2d Sess. 4315, 4330 (1980).

Violations of Confidentiality

Disclosure violating § 360 and these rules may result in contempt proceedings. The law explicitly contemplates contempt proceedings against judiciary employees who compromise the confidentiality of the proceedings, 28 U.S.C. § 332(d)(2), but the legislative history of the Misconduct Statute says that anyone involved in the investigation could be held in contempt for such conduct.⁷ It would frustrate the entire confidential investigatory scheme if a complainant or witness were permitted to hold press conferences, revealing the existence and nature of pending proceedings. Disclosure by the complainant may also result in termination of the complainant’s rights as provided in these rules. See Rule 13(f).

⁷ S. Rep. No. 362, 96th Cong., 1st Sess. 4315, 4330 (1980).

RULE 17. PUBLIC AVAILABILITY OF DECISIONS

(a) General rule. The texts of any memoranda supporting orders of the chief judge and the judicial council and any dissenting opinions or separate statements by members of the judicial council will be made public when final action on the complaint has been taken and is no longer subject to review.

(1) If the complaint is finally disposed of without appointment of a special committee, or if it is disposed of by council order dismissing the complaint for reasons other than mootness or because intervening events have made action on the complaint unnecessary, the publicly available materials will not disclose the name of the judge complained about without his or her consent.

(2) If the complaint is finally disposed of by censure or reprimand by means of private communication, the publicly available materials will not disclose either the name of the judge complained about or the text of the reprimand.

(3) If the complaint is finally disposed of by any other action taken pursuant to Rule 14(d) or (f) except dismissal because intervening events have made action on the complaint unnecessary, the text of the dispositive order will be included in the materials made public, and the name of the judge will be disclosed.

(4) If the complaint is dismissed as moot or because intervening events have made action on the complain unnecessary, at any time after the appointment of a special committee, the judicial council will determine whether the name of the judge is to be disclosed. The name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure.

(b) Manner of making public. The records referred to in paragraph (a) will be made public by placing them in a publicly accessible file in the Office of the Clerk of the Court of Appeals at 95 Seventh Street, San Francisco, CA 94103. The clerk will send copies of the publicly available materials to the Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002, where such materials will also be available for public inspection. In cases which appear to have precedential value, the chief judge may cause the order and memorandum to be published.

(c) Decisions of Judicial Conference Standing Committee. To the extent consistent with the policy of the U.S. Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, opinions of that committee about complaints arising from this circuit will also be made available to the public in the office of the clerk of the court of appeals.

(d) Special rule for decisions of judicial council. When the judicial council has taken

final action on the basis of a report of a special committee, and no petition for review has been filed with the Judicial Conference within thirty days of the council's action, the materials referred to in paragraph (a) will be made public in accordance with this rule as if there were no further right of review.

(e) Complaints referred to the Judicial Conference of the United States. If a complaint is referred to the Judicial Conference of the United States pursuant to Rule 14(e), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

COMMENTARY ON RULE 17

Section 360(b) provides that “[e]ach written order to implement any action under section 354(a)(1)(C)” shall be made publicly available and that, “[u]nless contrary to the interest of justice,” each such order shall be accompanied by written reasons. Section 360(a) states that “papers, documents, and records of proceedings related to investigations” shall be confidential. Section 354(a)(2) lists, among possible council actions following an investigation, censure or reprimand “by means of private communication” or “by means of public announcement.” These three provisions exhaust the statutory guidance with respect to public availability of decisions on complaints.

Rule 17 provides for public availability of decisions of the chief judge and the judicial council, and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. Whether the name of the judge is disclosed will then depend upon the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than censure or reprimand by means of private communication) the name of the judge will be made public. If the final action is dismissal of the complaint, or a conclusion of the proceeding by the chief judge on the basis of corrective action taken, the name of the judge will not be disclosed.

If a complaint is dismissed as moot after appointment of a special committee, Rule 17(a)(4) leaves it to the judicial council to determine whether the judge will be identified. In such a case, no final decision has been reached on the merits, but it may be in the public interest--particularly if a judicial officer resigns in the course of an investigation--to make the identity of the judge known.

Rule 17 provides for apparently inconsistent treatment where a proceeding is concluded on the basis of corrective action taken or that action on the complaint is no longer necessary because of intervening events. If a chief judge concludes a proceeding on that basis, Rule 17(a)(1) provides that the name of the judge will not be disclosed. Shielding the name of the judge in this circumstance should contribute to the frequency of this kind of informal

disposition. Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of corrective action taken, Rule 17(a)(3) provides for disclosure of the name of the judge. An “informal” resolution of the complaint at this stage is likely to look very much like any other council order, and should be disclosed in the same manner.

The proposal that decisions be made public only after final action has been taken is designed in part to avoid disclosure of the existence of pending proceedings. Because the Judicial Conference of the United States has not established a deadline for filing petitions for review with the Committee to Review Judicial Council Conduct and Disability Orders, Rule 17(d) provides for making decisions public if thirty days have elapsed without the filing of a petition for review.

Public availability of orders under 28 U.S.C. § 354(a) is a statutory requirement. The statute does not prescribe the time at which these orders must be made public, and it might be thought implicit that it should be without delay. Similarly, the statute does not state whether the name of the judge must be disclosed, but it could be argued that such disclosure is implicit. In view of the legislative interest in protecting a judge from public airing of unfounded charges, the law is reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known. In this connection, congressional leaders described the public availability requirement as applying to “sanctioning orders.”⁸

Finally, the rule provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the judge is not identified would of course increase the likelihood that the identity of the judge would become publicly known, thus thwarting the policy of nondisclosure. If the identity of the complainant is not to be made public in such cases, there is no particular reason to change the rule and make it public routinely in cases in which the judge is identified. However, it may not always be practicable to shield the complainant’s identity while making public disclosure of the judicial council’s order and memoranda; in some circumstances, moreover, the complainant may consent to public identification.

RULE 18. DISQUALIFICATION

(a) Complainant. If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. A chief judge who has identified a complaint under Rule 2(j) will not be considered a “complainant” for these purposes and therefore will not be automatically disqualified from participating in the consideration of the complaint; the chief judge may nonetheless consider in his or her discretion whether the circumstances warrant

⁸ 126 Cong. Rec. 28,093 (1980) (remarks of Sen. DeConcini); id. at 28,617 (remarks of Rep. Kastenmeier).

disqualification.

(b) Judge complained about. A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except as otherwise provided in these rules.

(c) Disqualification of chief judge on consideration of a petition for review of a chief judge's order. If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the judicial council pursuant to Rule 5, the chief judge who entered the order will not participate in the council's consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the judge complained about. The chief judge may not communicate with individual council members about the matter, either orally or in writing.

(d) Member of special committee not disqualified. A member of the judicial council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

(e) Judge under investigation. Upon appointment of a special committee, the judge complained about will automatically be disqualified from serving on (1) any special committee appointed under Rule 4(e), (2) the judicial council of the circuit, (3) the Judicial Conference of the United States, and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings regarding the complaint are finally terminated, with no further right of review. The proceedings will be deemed terminated thirty days after the final action of the judicial council if no petition for review has at that time been filed with the Judicial Conference.

(f) Substitute for disqualified chief judge. If the chief judge of the circuit is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge in regular active service who is the most senior in date of commission of those who are not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to refer the complaint to a circuit judge from another circuit pursuant to 28 U.S.C. § 291(a), or whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Judicial council action where multiple judges are disqualified. Notwithstanding any other provision in these rules to the contrary, a member of the judicial council who is a subject of the complaint may participate in the disposition thereof if (a) participation by

members who are subjects of the complaint is necessary to obtain a quorum of the judicial council, and (b) the judicial council votes that it is necessary, appropriate and in the interest of sound judicial administration that such complained-against members be eligible to act. Members of the judicial council who are subjects of the complaint may participate in this determination if necessary to obtain a quorum of the judicial council. Under no circumstances, however, shall the judge who acted as chief judge of the circuit in ruling on the complaint under Rule 4 be permitted to participate in this determination.

COMMENTARY ON RULE 18

Disqualification of Chief Judge on Review of Chief Judge's Order

Rule 18(c) bars the chief judge from participating in decisions on petition to the circuit council, but does so only if the chief judge is the one who ruled on the complaint in the first instance. A new chief judge, for example, could participate in the review of a complaint dismissed by his predecessor. This policy is calculated to assure complainants that their petitions will receive fair consideration.

Disqualification of Judge Under Investigation

28 U.S.C. § 359(a) states that a judge under investigation will be disqualified from certain activities “until all proceedings under this chapter relating to such investigation have been finally terminated.” In the absence of Judicial Conference rules regulating the time within which a petition for review must be filed, Rule 18(e) provides that the proceedings will be deemed terminated if no petition for review is filed within thirty days after the final action of the judicial council.

Substitute for Disqualified Chief Judge

Under 28 U.S.C. § 351(c), a complaint against the chief judge is to be handled by “that circuit judge in regular active service next senior in date of commission.” This language is read as simply a statement that seniority among judges other than the chief is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. No evidence exists that Congress intended to depart from the normal order of precedence.

Disqualification When Multiple Judges Are Complained Against

Sometimes a single complaint is filed against a large group of judges. Complaints have been filed against all the members of the court of appeals and at least one has been filed against all circuit and district court judges of the circuit. If the normal disqualification rules are observed in the former case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. In the latter case-- where

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

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, (see Rule 1(c) and when that complaint is dismissed by the next senior judge, still a third complaint is filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint.

The judicial council has concluded that it should be accorded authority to determine (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate and in the interest of sound judicial administration to permit complained-against members of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

The judicial council does not believe that any reasonable observer will view invocation of a rule of necessity in these situations to be inconsistent with the appearance of justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council 1992) (same); National Commission Report at 105. There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit. The remaining option is to use intercircuit assignment procedures under 28 U.S.C. § 291(a) to assign a circuit judge from another circuit to perform the statutory duties of the chief judge. Given the administrative inconvenience and delay involved in this alternative, the judicial council has concluded that it is desirable to use intercircuit assignment procedures only if it determines that the complaint is substantial enough to warrant such action.

Similarly, there is no unfairness in permitting complained-against judges, in these circumstances, to participate in the review of a chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council might ask the judicial council of another circuit to consider the petition or might ask the Chief Justice to assign the matter to either the judicial council of another circuit or the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. Given the administrative inconvenience and delay involved in these alternatives, the judicial council has concluded that it is desirable to refer the petition to another body only if it determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to

consider the report of a special committee, it would normally be necessary to refer the matter to another body. There is legislative history suggesting that in such a circumstance, the council should use the authority provided in § 354(b)(1) to refer the complaint to the Judicial Conference for consideration.⁹

RULE 19. WITHDRAWAL OF COMPLAINTS AND PETITIONS FOR REVIEW

(a) Complaint pending before chief judge. A complaint that is before the chief judge for a decision under Rule 4 may be withdrawn by the complainant with the consent of the chief judge.

(b) Complaint pending before special committee or judicial council. After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both (1) the judge complained about and (2) the special committee (before its report has been filed) or the judicial council.

(c) Petition for review of chief judge's disposition. A petition to the judicial council for review of the chief judge's disposition of a complaint may be withdrawn by the petitioner at any time before the judicial council acts on the petition.

COMMENTARY ON RULE 19

Rule 19 treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. The complainant is denied the unrestricted power to terminate the proceeding by withdrawing the complaint.

Under Rule 19(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. In appropriate cases, the chief judge may accordingly be saved the burden of preparing a formal order and memorandum.

If the chief judge appoints a special committee, however, Rule 19(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 judge complained about. Once a complaint has reached the stage of appointment of a special committee, the complainee is thus given the right to insist that the matter be resolved on the merits, thereby escaping the ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to petitions for judicial council review, Rule 19(c) grants the petitioner unrestricted authority to withdraw the petition. The public's interest in the proceeding will be adequately protected, since there will necessarily have been a decision by the chief judge in

⁹ H.R. Rep. No. 1313, 96th Cong., 2d Sess. 12 (1980).

such a case.

RULE 20. AVAILABILITY OF OTHER PROCEDURES

The availability of the complaint procedure under these rules and the Misconduct Statute will not preclude the chief judge of the circuit or the judicial council of the circuit from considering any information that may come to their attention suggesting that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge all the duties of office by reason of disability. Pursuant to Rule 2(j), in the interests of the effective and expeditious administration of the business of the courts and on the basis of any information available, the chief judge may by written order identify a complaint for purposes of 28 U.S.C. §§351-364.

COMMENTARY ON RULE 20

Rule 20 reflects the fact that the enactment of the Misconduct Statute was not intended to displace the historic functions of the chief judge and the circuit judicial council to respond to problems that come to their attention. As stated by Senator DeConcini in his remarks upon final Senate passage of the 1980 act, “the informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception. Only in the rare case will it be deemed necessary to invoke the formal statutory procedures and sanctions provided for in the act.”¹⁰ The National Commission on Judicial Discipline and Removal found that “[i]nformal approaches remain central to the system of self-regulation within the judiciary. . . . And a major benefit of the Act’s formal process has been to enhance the attractiveness of informal resolutions.” National Commission Report at 113.

RULE 21. AVAILABILITY OF RULES AND FORMS

These rules and copies of the complaint form prescribed by Rule 2 will be available without charge in the Office of the Clerk of the Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939 and in each office of the clerk of a district court or bankruptcy court within this circuit. They are also available on the internet at www.ce9.uscourts.gov.

RULE 22. EFFECTIVE DATE

(a) Effective Date. These rules are amended as of May 25, 2004. They shall apply to all complaints and complaint proceedings not finally concluded by May 25, 2004.

(b) Rule Making. The Rules Advisory Committee of the U.S. Court of Appeals for the Ninth Circuit shall study any proposed rules of the Judicial Council of the Ninth Circuit,

¹⁰ 126 Cong. Rec. 28,092 (1980).

pursuant to 28 U.S.C. § 2077(b). The Judicial Council may specify procedures to govern the Advisory Committee's study of proposed Council Rules.

A P P E N D I X

COMPLAINT FORM

Complaint of Judicial Misconduct and Disability

COMPLAINT FORM
JUDICIAL COUNCIL OF THE NINTH CIRCUIT
COMPLAINT OF JUDICIAL MISCONDUCT AND DISABILITY

*MAIL THIS FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, P.O. BOX 193939,
SAN FRANCISCO, CA 94119-3939. MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR
"JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.*

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED FOR FILING.

1. **Complainant's name:**

Address:

Daytime telephone: ()

2. **Name of judge complained about:**

Court:

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

Yes No

If "yes" give the following information about each lawsuit (use reverse side if there is more than one):

Court:

Docket Number:

Are (were) you a party or lawyer in the lawsuit? Party Lawyer Neither

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

Docket numbers of any appeals to the Ninth Circuit:

4. Have you filed any lawsuits against the judge? Yes No

If yes, give the following information about each lawsuit (use the reverse side if there is more than one):

Court:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

5. **Statement of Facts:** On separate sheets of paper, not larger than the paper this form is printed on, describe the facts and evidence that support your charges of misconduct or disability. *See* Rules 1(c) (proper grounds for a complaint; does not include merits of judges' decisions), 2(b) (content of the statement of facts) and 2(d) (attachment of supporting materials). Do not use more than 5 pages (5 sides). Most complaints do not require that much.
6. Please sign and date this form.

I declare under penalty of perjury that I have read rules 1 and 2 of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability, and the statements made in this complaint are true and correct to the best of my knowledge.

(Signature)

Executed on _____
(Date)