

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 10, 2020

Joanna and John Burke
46 Kingwood Greens Dr
Kingwood, TX 77339

RE: Judicial Misconduct Complaint No. 05-20-90128

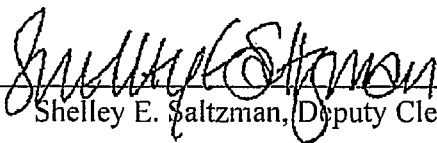
Dear Ms. and Mr. Burke:

Your complaint against Senior United States District Judge David Hittner has been dismissed.

Enclosed is a copy of the order. Procedures for filing a petition for review of the order are set out in Rule 18 of the enclosed Rules For Complaints of Judicial-Conduct and Judicial-Disability Proceedings.

We must receive any petition for review—captioned “Re: Judicial Misconduct Complaint No. 05-20-90128”—in the Clerk’s office by no later than December 22, 2020. See Rule 18(b).¹

Sincerely,
LYLE W. CAYCE
Clerk

By 
Shelley E. Saltzman, Deputy Clerk

Encls.

¹ You may submit the petition via regular mail or, pursuant to General Order 4 COVID-19, via email to pro_se@ca5.uscourts.gov with the Subject: Re Judicial Misconduct Complaint No. 05-20-90128.

FILED

November 10, 2020

Lyle W. Cayce
Clerk

Judicial Council for the Fifth Circuit

Complaint Number: 05-20-90128

IN RE:

The Complaint of Joanna Burke and John Burke Against
Senior United States District Judge David Hittner,
Southern District of Texas,
Under the Judicial Improvements Act of 2002.

ORDER

Pro se litigants Joanna Burke and John Burke [“the Burkes”] have filed a complaint alleging misconduct by Senior United States District Judge David Hittner in *Burke v. Hopkins*, STX No. 4:18-cv-04543.

The Burkes, who describe themselves as “80+ year[s] old,” allege that Judge Hittner engaged in a “consistent pattern of bias” against them. For example, the judge:

— denied the Burkes’ motion for electronic filing privileges on February 13, 2020 and, on March 14, 2020, “refused an extension of time to allow the Burkes to amend their complaint when Joanna Burke was gravely ill in hospital,”¹ decisions which resulted in Mr.

¹ A review of the motion shows the Burkes told the court Mrs. Burke had been “very ill . . . with severe abdominal pain and continual vomiting” for several days, was too unwell to travel to see a physician, and “continues to recover using home rest.” *Burke v. Hopkins*, STX No. 4:18-cv-04543, Plaintiff’s Motion for Extension of Time, filed March 14, 2019 (Doc. 24), at 3.

Burke's having to disregard the Texas Governor's "stay at home" orders to drive to the courthouse on March 29 during "a worldwide plague" to "hand-deliver the documents ... while [Mrs.] Burke was in hospital on her own";

- overruled the Burkes' objection that Magistrate Judge Bray's Memorandum and Recommendations was "premature";
- failed to "start formal perjury, contempt or other disciplinary action" based on the Burkes' objection that defendant Mark Hopkins, an attorney, "twice pos[ed] premeditated lies" about them during a September 10, 2019 status conference before United States Magistrate Judge Peter J. Bray;
- took no action on their objection that to cover-up his improper and prejudicial conduct during the conference, Magistrate Judge Bray "doctored" the transcript and audio-recording and "significantly delayed" providing the Burkes with copies of those records;² and,
- canceled a scheduled March 19, 2020 status conference on March 17, and "sordidly exploited and abused his authority as a Judge for malicious and vindictive reasons" by entering final judgment in favor of the defendants on March 18, thereby "intentionally depriv[ing] [us] of [our] right to a fair hearing."

The Burkes submit that Judge Hittner's "uncivilized and unlawful" conduct "can only be described as heinous when targeted towards sick, disabled and elderly citizens before the court and in defiance of a pandemic."

To the extent that these allegations relate directly to the merits of decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertions of "willful misconduct" or bias appear entirely derivative of the merits-related charges, but to the

² The Burkes state that they intend to file a separate complaint against Magistrate Judge Bray.

extent the allegations are separate, they are wholly unsupported, and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as “lacking sufficient evidence to raise an inference that misconduct has occurred.”

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

This is the Burkes’ third merits-related and conclusory judicial misconduct complaint. The Burkes are WARNED that should they, together or separately, file a further merits-related, conclusory, frivolous, or repetitive complaint, their right to file complaints may be suspended and, unless they are able to show cause why they should not be barred from filing future complaints, the suspension will continue indefinitely. *See* Rule 10(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The complaint is DISMISSED.



Priscilla R. Owen
Chief United States Circuit Judge

____ November 8 ____, 2020

JUDICIAL CONFERENCE OF THE UNITED STATES

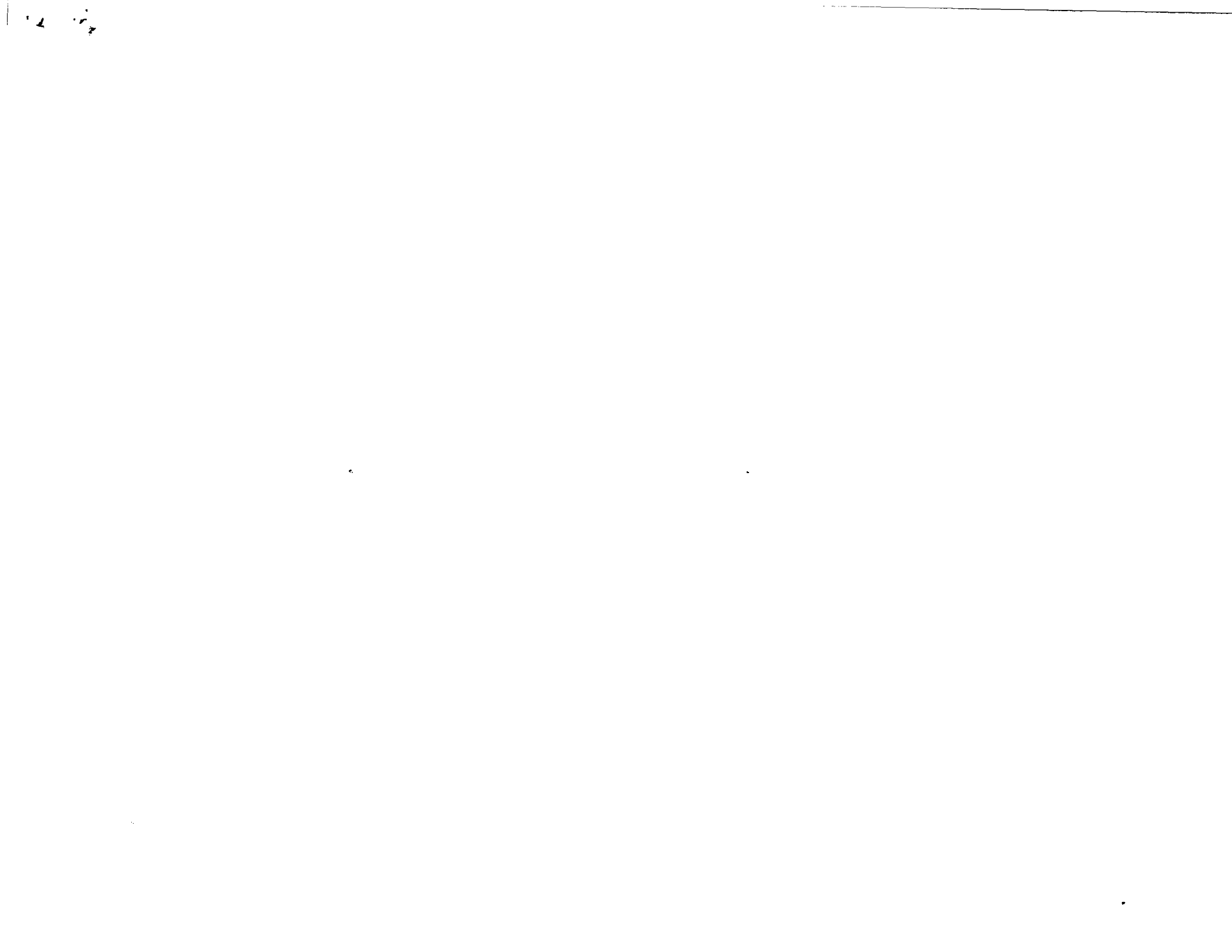
JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

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

(without commentary)

Including Fifth Circuit Rules, Fifth Circuit Comments and, Fifth Circuit Procedures

A copy of the Rules and Procedures, including the commentary as promulgated by the Judicial Conference of the United States, may be obtained free of charge from the Clerk at the United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130, or found at:
[http://www.ca5.uscourts.gov/docs/default-source/default-document-library/jud conduct and disability 308 app b rev-1 0.pdf?sfvrsn=2](http://www.ca5.uscourts.gov/docs/default-source/default-document-library/jud%20conduct%20and%20disability%20308%20app%20b%20rev-1%200.pdf?sfvrsn=2)



RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

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Rules for Judicial-Conduct and Judicial-Disability Proceedings

Preface

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

Fifth Circuit Rule 19 is taken from preexisting local Rule 7; it is not inconsistent with the rules promulgated by the Judicial Conference of the United States and remains in force as a result of the reaffirmation by the Judicial Council on May 4, 2008, of the order delegating petitions for review to five-judge panels. See rule 2(a).

The Fifth Circuit Comments and Procedures are adapted from the preexisting local rules not in conflict with the rules promulgated by the Judicial Conference of the United States. They are intended to provide additional information that may be useful to persons wishing to file complaints.

The former Fifth Circuit Rules Governing Complaints of Judicial Misconduct or Disability will hereinafter be cited as follows: 5th Cir. R. ____.

Delegations of authority approved by the Judicial Council are also appended to the respective rules to which they pertain.

ARTICLE I. GENERAL PROVISIONS

1. Scope and Covered Judges

- (a) **Scope.** These Rules govern proceedings under the Judicial Conduct and Disability Act (Act), 28 U.S.C. §§ 351–364, to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.
- (b) **Covered Judge.** A covered judge is defined under the Act and is limited to judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

FIFTH CIRCUIT PROCEDURE 1

1. *Judges subject to the procedure.*

- (a) *The judicial misconduct and disability complaint procedure applies to judges of the United States courts of appeals, district and bankruptcy courts, and magistrate judges of the Fifth Circuit. The rules therefore apply to judges of the Court of Appeals for the Fifth Circuit, district, bankruptcy, and magistrate judges of federal courts within the states of Texas, Louisiana, and Mississippi. (Former 5th Cir. R. 1(C)(1))*
- (b) *Complaints against other federal court officials within the Fifth Circuit should be made to their supervisors. If the complaints cannot be resolved satisfactorily at lower levels, they may be referred to the chief judge of the employing court whose decision will be final, subject to review only as the judicial council may prescribe. (Former 5th Cir. R. 1(C)(2))*

2. Construction and Effect

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

3. General Definitions

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

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

- (b) **Circuit Clerk.** “Circuit clerk” means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.
- (c) **Complaint.** A “complaint” is:
 - (1) a document that, in accordance with Rule 6, is filed by, or on behalf of, any person, including a document filed by an organization; or
 - (2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 1(b), has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.
- (d) **Court of Appeals, District Court, and District Judge.** “Court of appeals,” “district court,” and “district judge,” where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.
- (e) **Judicial Council and Circuit.** “Judicial council” and “circuit,” where appropriate, include any courts designated in 28 U.S.C. § 363.
- (f) **Judicial Employee.** “Judicial Employee” includes judicial assistants, law clerks, and other court employees, including unpaid staff, such as interns, externs, and other volunteer employees.
- (g) **Magistrate Judge.** “Magistrate judge,” where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).
- (h) **Subject Judge.** “Subject judge” means a covered judge, as described in Rule 1(b), who is the subject of a complaint.

ARTICLE II. MISCONDUCT AND DISABILITY

4. Misconduct and Disability Definitions

- (a) **Misconduct Generally.** Cognizable Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Cognizable misconduct includes, but is not limited to, the following:
 - (1) **Violation of Specific Standards of Judicial Conduct.** Cognizable misconduct includes:
 - (A) using the judge’s office to obtain special treatment for friends or relatives;
 - (B) accepting bribes, gifts, or other personal favors related to the judicial office;
 - (C) engaging in improper ex parte communications with parties or counsel for one side in a case;
 - (D) engaging in partisan political activity or making inappropriately partisan statements;
 - (E) soliciting funds for organizations; or
 - (F) violating rules or standards pertaining to restrictions on outside income or knowingly violating requirements for financial disclosure.
 - (2) **Abusive or Harassing Behavior.** Cognizable misconduct includes:
 - (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault;
 - (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or

- (C) creating a hostile work environment for judicial employees.
- (3) **Discrimination.** Cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability;
 - (4) **Retaliation.** Cognizable misconduct includes retaliating against complainants, witnesses, judicial employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability;
 - (5) **Interference or Failure to Comply with the Complaint Process.** Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules; or
 - (6) **Failure to Report or Disclose.** Cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably likely to constitute judicial misconduct or disability.

A judge who receives such reliable information shall respect a request for confidentiality but shall nonetheless disclose the information to the relevant chief district judge or chief circuit judge, who shall also treat the information as confidential. Certain reliable information may be protected from disclosure by statute or rule. A judge's assurance of confidentiality must yield when there is reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary.

A person reporting information of misconduct or disability must be informed at the outset of a judge's responsibility to disclose such information to the relevant chief district judge or chief circuit judge.

Reliable information reasonably likely to constitute judicial misconduct or disability related to a chief circuit judge should be called to the attention of the next most-senior active circuit judge. Such information related to a chief district judge should be called to the attention of the chief circuit judge.

- (7) **Conduct Outside the Performance of Official Duties.** Cognizable misconduct includes conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.
- (b) **Conduct Not Constituting Cognizable Misconduct.**
- (1) **Allegations Related to the Merits of a Decision or Procedural Ruling.** Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse.

If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision.

- (2) Allegations About Delay. Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.
- (c) **Disability.** Disability is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.

FIFTH CIRCUIT COMMENT 4

- 4.1 **Basis for Complaints.** *The law authorizes complaints against United States circuit, district, bankruptcy, and magistrate judges who have “engaged in conduct prejudicial to the effective and expeditious administration of business of the courts”, or who are “unable to discharge all the duties of office by reason of mental or physical disability.” The conduct to which the law is addressed does not include making wrong decisions—even very wrong decisions—for a complaint may be dismissed if it is “directly related to the merits of a decision or procedural ruling.” Disagreements with a judge’s rulings should be raised through the normal appellate review process because these judicial misconduct procedures are not a substitute for or supplement to a proper appeal under the Federal Rules of Appellate Procedure. “Mental or physical disability” may include temporary conditions as well as permanent disability. (Former 5th Cir. R. 1(B))*
- 4.2 **Limitations on use of the judicial misconduct procedures.** *The complaint procedures are not intended to provide a means of reviewing a judge’s decision or ruling in a case. The judicial council of the circuit, the body which takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that. More specifically, the complaint procedures may not be ordinarily used to:*
1. *Have a judge disqualified or recused from a case;*
 2. *Transfer a pending case from one judge or court to another;*
 3. *Compel a judge to make a ruling on a particular motion in a case;*
 4. *Have money damages awarded;*
 5. *Obtain release from custody.*

(Former 5th Cir. R. 1(E))

ARTICLE III. INITIATION OF COMPLAINT

5. Identification of Complaint

- (a) **Identification.** When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that

misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

- (b) **Submission Not Fully Complying with Rule 6.** A legible submission in substantial but not full compliance with Rule 6 must be considered as possible grounds for the identification of a complaint under Rule 5(a).

6. Filing of Complaint

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

FIFTH CIRCUIT PROCEDURE 6

6. *Filing of Complaint*

- (a) *Adoption/incorporation of complaint or other document. All allegations must be set forth in the concise statement of facts. Allegations made in exhibits or attachments will not be considered. A complaint that simply states that it adopts, or incorporates the facts*

- or statements of, another complaint, pleading, brief, or other document does not meet the requirements of Rule 6 and will not be accepted for filing.
- (b) **Clarity of allegations.** *The allegations in the statement of facts must be readily intelligible. The Clerk will return complaints in which the allegations are unintelligible.*
 - (c) **Legal argument.** *To the extent that a complainant wishes to incorporate any legal argument in the statement of facts, the submission cannot exceed the five-page limit for the statement of facts.*
 - (d) **Page limit.** *The statement of facts should be limited to five single-sided and double-spaced pages on 8.5x11 inch paper, whether typed or handwritten. Font size must be at least 12pt. If a complainant believes that more than five pages are necessary for a “concise statement” of facts, the complainant may submit a proposed statement of facts to the Clerk, who will determine whether the over-length complaint will be accepted for filing as submitted. If the Clerk determines that the complaint should not be filed as submitted, the complainant will be given an opportunity to reduce the statement of facts to five pages.*
 - (e) **Signature.** *The complaint must be signed with a “wet” or “blue” signature. If there are multiple complainants, each complainant must sign the complaint.*
 - (f) **Exhibits.** *Allegations made in exhibits or attachments to the complaint will not be considered. Documents referred to in the statement of facts may be filed with the complaint. Only documentation that is required to support the specific facts alleged should be submitted – excess or irrelevant documentation will be returned to the complainant only if the complainant provides a self-addressed envelope bearing sufficient postage.*
 - (g) **Supplements.** *Once a complaint is filed, it may not be supplemented by additional statements or documents except to correct inaccuracies in the original complaint. Supplements submitted after the complaint is filed will be returned to the complainant if they do not comply with this section.*
 - (h) **Number of copies.** *Only an original of the complaint should be filed. (Former 5th Cir. R 2(E))*

FIFTH CIRCUIT COMMENT 6

- 6.1 Complainant’s Address and Signature; Verification.** *If any of the requirements of Rule 6(d) are not met and the complaint is reviewed under Rule 5(b), the complainant will not be entitled to notice of any decision of the Chief Judge.*

7. Where to Initiate Complaint

- (a) **Where to File.** Except as provided in (b),
 - (1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

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

FIFTH CIRCUIT PROCEDURE 7

- 7. *Where to file.* Complaints should be sent to the Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. The envelope should be marked “Complaint of Misconduct” or “Complaint of Disability.” The name of the judge complained about should not appear on the envelope. (Former 5th Cir.R. 2(H))

8. Action by Circuit Clerk

- (a) **Receipt of Complaint.** Upon receiving a complaint against a judge filed under Rule 6 or identified under Rule 5, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability, and acknowledge the complaint’s receipt.
- (b) **Distribution of Copies.** The circuit clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or, where the chief judge is disqualified from considering a complaint, to the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 6 or identified under Rule 5 to each subject judge. The circuit clerk must retain the original complaint. Any further distribution should be as provided by local rule.
- (c) **Complaint Against Noncovered Person.** If the circuit clerk receives a complaint about a person not holding an office described in Rule 1(b), the clerk must not accept the complaint under these Rules.
- (d) **Complaint Against Judge and Another Noncovered Person.** If the circuit clerk receives a complaint about a judge described in Rule 1(b) and a person not holding an office described in Rule 1(b), the clerk must accept the complaint under these Rules only with regard to the judge and must so inform the complainant.

FIFTH CIRCUIT PROCEDURE 8

8. Action by Circuit Clerk

- (a) *Abatement.* If a complaint raises issues which are also raised in pending litigation, the circuit clerk will advise the complainant that the complaint shall be (or is being) held in

abeyance pending disposition of the litigation, including appeals, and that the complainant must advise the clerk in writing of the disposition of the litigation.

- (b) *Distribution of copies. The Clerk may send copies of complaints to subject judges electronically.*

9. Time for Filing or Identifying Complaint

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

10. Abuse of Complaint Procedure

- (a) **Abusive Complaints.** A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, the judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.
- (b) **Orchestrated Complaints.** When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept additional complaints. The circuit clerk must send a copy of any such order to anyone whose complaint was not accepted.

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

In Re: Delegation to Chief Circuit Judge, or acting Judge Pursuant to rule 25(f) of the Rules For Judicial-Conduct and Judicial-Disability Proceedings

Before: JONES, Chief Judge, and Judges SMITH, KING, DAVIS, BARKSDALE, DENNIS, CLEMENT, OWEN, ELROD, SOUTHWICK, VANCE, BRADY, MELANCON, BIGGERS, GUIROLA, CUMMINGS, HEAD, HEARTFIELD, and BIERY.

DELEGATION

In order to effectuate Rule 10(a) of the Rules for Judicial-Conduct and Judicial Disability Proceedings (made effective April 10, 2008) , the Judicial Council hereby delegates the following authority to the chief circuit judge or judge acting for the chief judge pursuant to rule 25(f)

When a complainant has filed repetitive, harassing or frivolous complaints, or has otherwise abused the complaint procedure, the order dismissing the complaint under Rule 11 (c) may include a provision suspending the right of the complainant to file further complaints without written permission from the chief judge or judge acting for him or her.

A complainant upon whom such a suspension is imposed may show cause, through a petition for review submitted pursuant to Rule 18, why his or her right to file further complaints should not be so limited. If, under Rule 19 (b) (1), the order of the chief judge is affirmed, the suspension shall become a permanent restriction prohibiting the filing of complaints, subject to its own terms and to the power of the Judicial Council under Rule 10(a) to revise or withdraw any prohibition, restriction or condition previously imposed.

FOR THE COUNCIL:

May 4, 2008

/s/Edith H. Jones

ARTICLE IV. REVIEW OF COMPLAINT BY CHIEF JUDGE

11. Chief Judge's Review

- (a) **Purpose of Chief Judge's Review.** When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25, in which case the most-senior active circuit judge not disqualified will review the complaint. If a complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing a complaint, the chief judge must determine whether it should be:
- (1) dismissed;
 - (2) concluded on the ground that voluntary corrective action has been taken;
 - (3) concluded because intervening events have made action on the complaint no longer necessary; or
 - (4) referred to a special committee.
- (b) **Chief Judge's Inquiry.** In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report.
- (c) **Dismissal.**
- (1) **Permissible grounds.** A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

- (A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office;
 - (B) is directly related to the merits of a decision or procedural ruling;
 - (C) is frivolous;
 - (D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;
 - (E) is based on allegations that are incapable of being established through investigation;
 - (F) has been filed in the wrong circuit under Rule 7; or
 - (G) is otherwise not appropriate for consideration under the Act.
- (2) Impermissible grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.
- (d) **Corrective Action.** The chief judge may conclude a complaint proceeding in whole or in part if:
- (1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6; or
 - (2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.
- (e) **Intervening Events.** The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge.
- (f) **Appointment of Special Committee.** If some or all of a complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.
- (g) **Notice of Chief Judge's Action; Petition for Review.**
- (1) When chief judge appoints special committee. If the chief judge appoints a special committee, the chief judge must notify the complainant and the subject judge that the matter has been referred to a committee, notify the complainant of a complainant's rights under Rule 16, and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Committee on Judicial Conduct and Disability.
 - (2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the

name of the complainant or of the subject judge. The order and memoranda incorporated by reference in the order must be promptly sent to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.

- (3) Right to petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and the subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If the chief judge so disposes of a complaint that was identified under Rule 5 or filed by its subject judge, the chief judge must transmit the order and memoranda incorporated by reference in the order to the judicial council for review in accordance with Rule 19. In the event of such a transmission, the subject judge may make a written submission to the judicial council but will have no further right of review except as allowed under Rule 21(b)(1)(B). When a disposition is to be reviewed by the judicial council, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the council.
- (h) **Public Availability of Chief Judge's Decision.** The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

FIFTH CIRCUIT PROCEDURE 11

- 11. *Notice of Chief Judge's Action; Petition for Review.* The Clerk may send all communications to the subject judge required by this Rule electronically.

ARTICLE V. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

12. Special Committee's Composition

- (a) **Membership.** Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the special committee must be selected from the judges serving on the subject judge's court.
- (b) **Presiding Officer.** When appointing the special committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.
- (c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the special committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa 12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a special-committee member.

- (d) **Provision of Documents.** The chief judge must certify to each other member of the special committee and to any adviser copies of the complaint and statement of facts, in whole or relevant part, and any other relevant documents on file.
- (e) **Continuing Qualification of Special-Committee Member.** A member of a special committee may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.
- (f) **Inability of Special-Committee Member to Complete Service.** If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.
- (g) **Voting.** All actions by a special committee must be by vote of a majority of all members of the committee.

13. Conduct of Special-Committee Investigation

- (a) **Extent and Methods of Special-Committee Investigation.** A special committee should determine the appropriate extent and methods of its investigation in light of the allegations in the complaint and the committee's preliminary inquiry. In investigating the alleged misconduct or disability, the special committee should take steps to determine the full scope of the potential misconduct or disability, including whether a pattern of misconduct or a broader disability exists. The investigation may include use of appropriate experts or other professionals. If, in the course of the investigation, the special committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the specific pending complaint, the committee must refer the new matter to the chief judge for a determination of whether action under Rule 5 or Rule 11 is necessary before the committee's investigation is expanded to include the new matter.
- (b) **Criminal Conduct.** If the special committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The special committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.
- (c) **Staff.** The special committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judiciary or may hire special staff through the Director of the Administrative Office of the United States Courts.
- (d) **Delegation of Subpoena Power; Contempt.** The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

14. Conduct of Special-Committee Hearings

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

15. Subject Judge's Rights

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

FIFTH CIRCUIT PROCEDURE 15

15. *Notice; Special-Committee Report.* The Clerk may send all written notice to the subject judge required by this Rule, and the Special-Committee Report, electronically.

16. Complainant's Rights in Investigation

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

17. Special-Committee Report

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

ARTICLE VI. REVIEW BY JUDICIAL COUNCIL

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

- (a) **Petition for Review.** After the chief judge issues an order under Rule 11(c), (d), or (e), the complainant or the subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.
- (b) **When to File; Form; Where to File.** A petition for review must be filed in the office of the circuit clerk within 42 days after the date of the chief judge's order. The petition for review should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The petition for review should be typewritten or otherwise legible. It should begin with

“I hereby petition the judicial council for review of . . . “ and state the reasons why the petition should be granted. It must be signed.

- (c) **Receipt and Distribution of Petition.** A circuit clerk who receives a petition for review filed in accordance with this Rule must:
- (1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;
 - (2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:
 - (A) copies of the complaint;
 - (B) all materials obtained by the chief judge in connection with the inquiry;
 - (C) the chief judge’s order disposing of the complaint;
 - (D) any memorandum in support of the chief judge’s order;
 - (E) the petition for review; and
 - (F) an appropriate ballot; and
 - (3) send the petition for review to the Committee on Judicial Conduct and Disability. Unless the Committee on Judicial Conduct and Disability requests them, the circuit clerk will not send copies of the materials obtained by the chief judge.
- (d) **Untimely Petition.** The circuit clerk must refuse to accept a petition that is received after the time allowed in (b).
- (e) **Timely Petition Not in Proper Form.** When the circuit clerk receives a petition for review filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the circuit clerk must acknowledge its receipt, call the filer’s attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within the original time allowed for filing the petition or within 21 days after the date on which a notice of the deficiencies was sent to the complainant, whichever is later. If the deficiencies are corrected within the time allowed, the circuit clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the circuit clerk must reject the petition.

FIFTH CIRCUIT PROCEDURE 18

18. Petitions for Review

- (a) *Substance.* *Petitions may but need not include supporting argument. Review by the Judicial Council is limited to facts set forth in the complaint, and supplemental allegations and information will not be considered.*
- (b) *Page Limit.* *Petitions should not exceed five single-sided and double-spaced pages on 8.5x11 inch paper, whether typed or handwritten, and should not include attachments. Font size must be at least 12pt.*
- (c) *Supplements.* *Once a petition is filed, it may not be supplemented by additional statements or documents except to correct inaccuracies in the original petition. Supplements submitted after the petition is filed will be returned to the complainant if they do not comply with this section.*

- (d) *Extensions.* Extensions to the time to file a petition for review will be considered only in the most compelling circumstances.
- (e) *Where to file.* Petitions should be sent to the Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. The envelope should be marked "Misconduct Petition" or "Disability Petition." The name of the judge complained about should not appear on the envelope. (Former 5th Cir. R. 5 (H))
- (f) *Receipt and Distribution of Petition.* The Clerk may send a petition for review filed by the complainant to the subject judge electronically, and may send the materials required by Rule 18(c)(2) to the judicial council or its relevant panel electronically.

19. Judicial-Council Disposition of Petition for Review

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

FIFTH CIRCUIT PROCEDURE 19

19. *Judicial-Council Disposition of Petition for Review. The Clerk may send all communications to the subject judge, to the judicial council or its panel, and to the chief judge required by this Rule electronically.*

FIFTH CIRCUIT RULE 19

19. *Review by the judicial council. The judicial council may, consistent with 28 U. S. C. § 352 (d), delegate the review process to rotating panels drawn at random with power to act on behalf of the full council. (Former 5th Cir. R. 7)*

Order of the Judicial Council effectuating Rule 19:

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

In Re: ASSIGNMENT OF APPELLATE REVIEW PANELS
 (As Revised and Readopted)

Before: STEWART, Chief Judge; OWEN, JOLLY, DENNIS, ELROD, SOUTHWICK,
 GRAVES, HIGGINSON, COSTA, LEMELLE, DICK, HICKS, BROWN, OZERDEN,
 GODBEY, ROSENTHAL, CLARK, AND MARTINEZ

RESOLUTION

BE IT RESOLVED that Judicial Council review of orders of the chief judge of the circuit dismissing complaints under 28 U.S.C. § 351 et seq. shall be processed as follows:

The members of the Judicial Council, excluding the chief judge of the circuit and the circuit judge next senior in service, shall be assigned by random selection to three panels, each composed of five judges, at least two of whom shall be district judges. The two remaining members will function as backup in the event of absence or recusal of any panel member.

The panels shall be known as Appellate Review Panels and shall be separately identified. Panel assignments will be made annually, effective January 1 of each year.

Each panel shall perform the review functions for four consecutive calendar months, and may do so by communicating in person, by telephone, and/or by electronic and postal mail.

Panels are empowered to act on behalf of and in the name of the Judicial Council to affirm an appealed order, or to return the matter to the chief judge for further inquiry pursuant to Rule 19(b)(2), provided at least four members agree to such disposition and no panelist suggests full Council review. All other matters are to be referred to the full Council for disposition, together with any recommendation(s) the panel may deem appropriate.

FOR THE COUNCIL:

Date: May 8, 2017

/s/Carl E. Stewart

20. Judicial-Council Action Following Appointment of Special Committee

- (a) **Subject Judge's Rights.** Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The subject judge must also be given an opportunity to present argument, personally or through counsel, written or oral, as determined by the judicial council. The subject judge must not otherwise communicate with judicial council members about the matter.
- (b) **Judicial-Council Action.**
- (1) Discretionary actions. Subject to the subject judge's rights set forth in subsection (a), the judicial council may:
- (A) dismiss the complaint because:
- (i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;
- (ii) the complaint is directly related to the merits of a decision or procedural ruling;
- (iii) the facts on which the complaint is based have not been established; or
- (iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351–364.
- (B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.
- (C) refer the complaint to the Judicial Conference with the judicial council's recommendations for action.
- (D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:
- (i) censuring or reprimanding the subject judge, either by private communication or by public announcement;
- (ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;
- (iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of

- removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa–12(c)(2);
 - (iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);
 - (v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length of service requirements be waived;
 - (vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed; and
 - (vii) in the case of a circuit chief judge or district chief judge, finding that the judge is temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge in accordance with 28 U.S.C. § 45(d) or § 136(e).
- (E) take any combination of actions described in (b)(1)(A)–(D) of this Rule that is within its power.
- (2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:
- (A) might constitute ground for impeachment; or
 - (B) in the interest of justice, is not amenable to resolution by the judicial council.
- (c) **Inadequate Basis for Decision.** If the judicial council finds that a special committee’s report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council’s conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.
- (d) **Judicial-Council Vote.** Judicial-council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the judicial council.
- (e) **Recommendation for Fee Reimbursement.** If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office use funds appropriated to the judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys’ fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).
- (f) **Judicial-Council Order.** Judicial-council action must be by written order. Unless the judicial council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. Such a memorandum may incorporate all or

part of any underlying special-committee report. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. The order and memoranda incorporated by reference in the order must be provided to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b). If the complaint was identified under Rule 5 or filed by its subject judge, the judicial council must transmit the order and memoranda incorporated by reference in the order to the Committee on Judicial Conduct and Disability for review in accordance with Rule 21. In the event of such a transmission, the subject judge may make a written submission to the Committee on Judicial Conduct and Disability but will have no further right of review.

FIFTH CIRCUIT PROCEDURE 20

20. *Judicial-Council Action Following Appointment of Special Committee. The Clerk may send all communications to the subject judge, to the judicial council or its panel, to the special committee, and to the chief judge required by this Rule electronically.*

ARTICLE VII. REVIEW BY COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

21. Committee on Judicial Conduct and Disability

- (a) **Committee Review.** The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its review of judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion. Its disposition of petitions for review is ordinarily final. The Judicial Conference may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.
- (b) **Reviewable Matters.**
- (1) Upon petition. A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:
 - (A) Rule 20(b)(1)(A), (B), (D), or (E); or
 - (B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order.
 - (2) Upon Committee's initiative. At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

- (c) **Committee Vote.** Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review related to that subject judge. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. Those members hearing the petition for review should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only six members are qualified to consider a petition for review, the Chief Justice shall select an additional judge to join the qualified members to consider the petition. If four or fewer members are qualified to consider a petition for review, the Chief Justice shall select a panel of five judges, including the qualified Committee members, to consider it.
- (d) **Additional Investigation.** Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.
- (e) **Oral Argument; Personal Appearance.** There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions.
- (f) **Committee Decision.** A Committee decision under this Rule must be transmitted promptly to the Judicial Conference. Other distribution will be by the Administrative Office at the direction of the Committee chair.
- (g) **Finality.** All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

22. Procedures for Review

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

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

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

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

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

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

ARTICLE VIII. MISCELLANEOUS RULES

23. Confidentiality

- (a) **Confidentiality Generally.** Confidentiality under these Rules is intended to protect the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules.
- (b) **Confidentiality in the Complaint Process.**
 - (1) **General Rule.** The consideration of a complaint by a chief judge, a special committee, a judicial council, or the Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be publicly disclosed by any judge or judicial employee, or by any person who records or transcribes testimony except as allowed by these Rules. A chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability.
 - (2) **Files.** All files related to a complaint must be separately maintained with appropriate security precautions to ensure confidentiality.
 - (3) **Disclosure in Decisions.** Except as otherwise provided in Rule 24, written decisions of a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of a council or the Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.
 - (4) **Availability to Judicial Conference.** On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee on Judicial Conduct and Disability to records of proceedings under the Act at the site where the records are kept.
 - (5) **Availability to District Court.** If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

- (6) Impeachment Proceedings. If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.
- (7) Subject Judge's Consent. If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted under these Rules, not be revealed.
- (8) Disclosure in Special Circumstances. The Judicial Conference, its Committee on Judicial Conduct and Disability, a judicial council, or a chief judge may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. For example, disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.
- (9) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.
- (10) Assistance and Consultation. Nothing in this Rule prohibits a chief judge, a special committee, a judicial council, or the Judicial Conference or its Committee on Judicial Conduct and Disability, in the performance of any function authorized under the Act or these Rules, from seeking the help of qualified staff or experts or from consulting other judges who may be helpful regarding the performance of that function.
- (c) **Disclosure of Misconduct and Disability.** Nothing in these Rules and Commentary concerning the confidentiality of the complaint process, or in the Code of Conduct for Judicial Employees concerning the use or disclosure of confidential information received in the course of official duties, prevents a judicial employee from reporting or disclosing misconduct or disability.

24. Public Availability of Decisions

- (a) **General Rule; Specific Cases.** When final action has been taken on a complaint and it is no longer subject to review as of right, all orders entered by the chief judge and judicial council, including memoranda incorporated by reference in those orders and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:
 - (1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials generally should not disclose the name of the subject judge without his or her consent.

- (2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.
 - (3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.
 - (4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any remedial action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.
 - (5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge or the judicial council orders disclosure.
- (b) **Manner of Making Public.** The orders described in (a) must be made public by placing the orders on the court's public website and by placing them in a publicly accessible file in the office of the circuit clerk. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Committee on Judicial Conduct and Disability will make available on the judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.
- (c) **Orders of Committee on Judicial Conduct and Disability.** Orders of the Committee on Judicial Conduct and Disability constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the circuit clerk of the relevant court of appeals. The Committee on Judicial Conduct and Disability will also make such orders available on the judiciary's website, www.uscourts.gov. When authorized by the Committee on Judicial Conduct and Disability, other orders related to complaint proceedings will similarly be made available.
- (d) **Complaints Referred to Judicial Conference.** If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

25. Disqualification

- (a) **General Rule.** Any judge is disqualified from participating in any proceeding under these Rules if the judge concludes that circumstances warrant disqualification. If a complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.
- (b) **Subject Judge.** A subject judge, including a chief judge, is disqualified from considering a complaint except to the extent that these Rules provide for participation by a subject judge.
- (c) **Chief Judge Disqualified from Considering Petition for Review of Chief Judge's Order.** If a petition for review of the chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council's consideration of the petition.

- (d) **Member of Special Committee Not Disqualified.** A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee’s report.
- (e) **Subject Judge’s Disqualification After Appointment of Special Committee.** Upon appointment of a special committee, the subject judge is disqualified from participating in the identification or consideration of any complaint, related or unrelated to the pending matter, under the Act or these Rules. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.
- (f) **Substitute for Disqualified Chief Judge.** If the chief judge is disqualified from performing duties that the Act and these Rules assign to a chief judge (including where a complaint is filed against a chief judge), those duties must be assigned to the most senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council.
- (g) **Judicial-Council Action When Multiple Judges Disqualified.** Notwithstanding any other provision in these Rules to the contrary,
 - (1) a member of the judicial council who is a subject judge may participate in its disposition if:
 - (A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;
 - (B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or those judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 4(b); and
 - (C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.
 - (2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).
- (h) **Disqualification of Members of Committee on Judicial Conduct and Disability.** No member of the Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair minded participation.

26. Transfer to Another Judicial Council

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule

22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

27. Withdrawal of Complaint or Petition for Review

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

28. Availability of Rules and Forms

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

29. Effective Date

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

A P P E N D I X

COMPLAINT FORM

A two-page complaint form follows.

Judicial Council of the Fifth Judicial Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 4 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. Requests for copies of the rules should be directed to: Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. The rules are also available at www.ca5.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. Only an original of the complaint must be filed. Enclose the copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to: Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. **Do not put the name of any judge on the envelope.**

1. Name of Complainant:
Contact Address:

Daytime telephone: ()

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

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

Yes No

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

Court:

Case Number:

Docket number of any appeal to the 5th Circuit: _____

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

Party Lawyer Neither

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

4. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

5. **Declaration and signature:**

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

(Signature) _____ (Date) _____