

Rule 4

Inquiry by Chief Judge

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It seems clear under the statute that the chief judge is not required to act solely on the face of the complaint. The power to conclude a complaint proceeding on the basis that corrective action has been taken implies some power to determine whether the facts alleged are true. But the boundary line of that power—the point at which a chief judge invades the territory reserved for special committees—is unclear. Rule 4(b) addresses that issue 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,” and that the chief judge “will not undertake to make findings of fact about any matter that is reasonably in dispute.” Admittedly, this formulation may do little more than state the obvious, leaving the most difficult questions unanswered. Offered here, as commentary, are some suggestions to our fellow chief judges about the implementation of this principle. A number of examples, all but the first based on actual cases, illustrate the problem:

(1) The complainant alleges an impropriety and asserts that he knows of it because his voices told him. It would appear clearly appropriate to treat such a complaint as frivolous.

(2) The complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person whom the complainant is not free to identify. The judge or magistrate denies that the event occurred. In some instances similar to this, chief judges have dismissed the complaint, reasoning that there is nothing to fuel an investigation. The statutory basis for the dismissal does not seem strong, but the result seems eminently sensible unless one thinks (and we do not) that it is appropriate for a special committee to subpoena the complainant and insist on the identity of the source. On balance, it would appear that the complaint should be dismissed as frivolous in such a case.

(3) The complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge or magistrate denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge’s proper course of action may well turn on whether the source had any role in the allegedly improper conduct. If the complaint were based on a lawyer’s statement that he had had an improper ex parte contact with a judge, the lawyer’s denial of the impropriety might not be taken as wholly persuasive, and it

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seems appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and the disinterested party denied that the statement had been made, there would not appear to be any value in opening a formal investigation. In such a case, it would seem appropriate to dismiss the complaint as frivolous on the basis that there is no support for the allegation of misconduct.

(4) The complainant alleges an impropriety and alleges that he observed it and there were no other witnesses; the judge or magistrate denies that the event occurred. This situation presents the possibility of a simple credibility conflict. Unless the complainant's allegations are wholly implausible, it would appear that a special committee must be appointed because there is a factual question that is reasonably in dispute.

Grounds for Dismissal of Complaints

Rule 4(c)(4) 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 or Magistrate to Respond

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

Judges and magistrates, 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. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the judge or magistrate complained about to devote time to a defense. By stating that a special committee will not ordinarily be appointed unless an invitation to respond has been issued by the chief judge, the rule should encourage officials not to respond unnecessarily.

Notification to Complainant and Judge or Magistrate

Section 372(c)(3) 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. It appears that in most circuits it is the practice to prepare a formal order dispos-

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ing of the complaint and a separate memorandum of reasons. In such a case, both the order and the memorandum are provided to the complainant. Rule 4(f) would accept that practice. Rule 17, dealing with availability of information to the public, contemplates that the memorandum would be made public, usually without disclosing the names of the complainant or the judge or magistrate involved. If desired for administrative purposes, more identifying information can be included on the formal order.

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When complaints are disposed of by chief judges, the nature of the explanations provided to complainants varies considerably among the circuits. We believe that 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. That appears not to be a common practice today. 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 II

RULE 5. PETITION FOR WRIT OF HABEAS CORPUS

If the chief judge has not taken the proceedings, the judicial council may affirm the order or remand the matter to the chief judge. In exceptional cases

Petition to the Judicial Council

Section 372(c) provides that a chief judge may refer a complaint against a judge to the judicial council. The council may then, if necessary, refer the matter to the judicial council for review.

There is some concern that the judicial council would then, if necessary, refer the matter to the judicial council for review. Senator DeConcini, in a letter to the chief judge, said that "the judicial council . . . reviewing . . . the matter was used to describe the problem. . . . an order of a judge. . . . leaders indicated that the certiorari process

3. 126 Cong. Rec. 28,092-93.

4. *Id.* at 28,092-93 (Kastenmeier).

EX "D"