

RULE 12 | SPECIAL COMMITTEE'S COMPOSITION

(a) Membership. Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. §363, the special committee must be selected from the judges serving on the subject judge's court.

(b) Presiding Officer. When appointing the special committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) Bankruptcy Judge or Magistrate Judge as Adviser. If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the special committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. §300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a special-committee member.

(d) Provision of Documents. The chief judge must certify to each other member of the special committee and to any adviser copies of the complaint and statement of facts, in whole or relevant part, and any other relevant documents on file.

(e) Continuing Qualification of Special-Committee Member. A member of a special committee may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. §171.

(f) Inability of Special-Committee Member to Complete Service. If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) Voting. All actions by a special committee must be by vote of a majority of all members of the committee.

Commentary

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

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question the size of a special committee is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so. Rule 12(a) acknowledges the common practice of including senior judges in the membership of a special committee.

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

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge. Subsection (c) also provides that the adviser will have all the privileges of a member of the special committee except a vote. The adviser, therefore, may participate in all deliberations of the special committee, question witnesses at hearings, and write a separate statement to accompany the committee's report to the judicial council.

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

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

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