

COURT OF APPEALS STANDING COMMITTEE  
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms  
UL 4 and 5 of the Judicial Education and Conference Center, 2011  
Commerce Park Drive, Annapolis, Maryland on November 16, 2018.

Members present:

Hon. Alan M. Wilner, Chair

James E. Carbine, Esq.	Hon. Danielle M. Mosley
Sen. Robert G. Cassilly	Hon. Douglas R. M. Nazarian
Hon. John P. Davey	Hon. Paula A. Price
Mary Anne Day, Esq.	Scott D. Shellenberger, Esq.
Alvin I. Frederick, Esq.	Steven M. Sullivan, Esq.
Ms. Pamela Q. Harris	Del. Joseph F. Vallario, Jr.
Victor H. Laws, III, Esq.	Gregory K. Wells, Esq.
Bruce L. Marcus, Esq.	Hon. Dorothy J. Wilson
Donna Ellen McBride, Esq.	Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter  
Shantell K. Davenport, Esq., Assistant Reporter  
Hon. Glenn Harrell, Senior Judge, Court of Appeals  
Hon. John Morrissey, Chief Judge, District Court of Maryland  
Nicholas Iliff, Esq., Office of the Chief Judge, District Court  
Headquarters  
Hon. Michael Reed, Court of Special Appeals  
Hon. Alexander Wright, Court of Special Appeals  
Thomas B. Stahl, Esq., Spencer & Stahl, P.C.  
Derek Bayne, Esq., Commission on Judicial Disabilities  
Kendra Randall Jolivet, Esq., Commission on Judicial  
Disabilities  
Hon. Ronald Silkworth, Circuit Court for Anne Arundel County  
Hon. Laura Ripken, Circuit Court for Anne Arundel County  
Hon. Susan Hazlett, District Court of Maryland  
Kelley O'Connor, Government Relations and Public Affairs  
Suzanne Pelz, Esq., Government Relations and Public Affairs  
Hon. Steven Platt, Senior Judge, Circuit Court

Hon. Pamela J. White, Circuit Court for Baltimore City  
Hon. Kathleen Cox, Circuit Court for Baltimore County  
Hon. Robert A. Greenberg, Circuit Court for Montgomery County  
Lydia Lawless, Esq., Bar Counsel  
Rebecca Snyder, Esq., Executive Director, MDDC Press Association  
Heather Cobun, Esq., The Daily Record  
Kevin B. Collins, Esq., Covington & Burling, LLP.  
Alexander Trzeciak, Esq., Covington & Burling, LLP.  
Lauren Fetsch, Law Clerk, Circuit Court for Prince George's  
County  
Carl Snowden

The Chair convened the meeting. He said that he had a few preliminary comments to make for the record before the Committee begins its consideration of the Judicial Disabilities Rules.

The Chair said that all of the written comments that have been received by the Rules Committee Office have been distributed to the entire Committee. There is a lot of passion and some anger that has been exhibited with regard to the matters that are currently before the Committee. The Committee intends to deal with the issues in a respectful, objective, and professional manner. The Chair said that the Committee will not allow personal attacks or invective by anyone.

The Chair said that proposals that are before the Committee are drafted to show changes to the current Rules. The proposals include, except to the extent that they are amended, language that had been approved by the Committee in 2016 and that had been sent to the Court of Appeals in the 191<sup>st</sup> Report. The 2016 revisions were the product of extensive discussions with members of the Commission on Judicial Disabilities, the Inquiry Board,

and Investigative Counsel. With one exception, the Commission, Inquiry Board, and Investigative Counsel signed off on each of the proposed revisions in 2016. The changes that were recommended in 2016 were posted on the Maryland State Judiciary website both before they were considered by the Rules Committee and when they were submitted to the Court of Appeals. No comments were received on those proposals from anyone.

The Chair said that just prior to the Court's scheduled open meeting on the 191<sup>st</sup> Report, the Court had granted a writ of mandamus to consider procedural issues in Judge White's case that alleged due process concerns. In light of that, the Committee asked the Court to defer consideration of the 2016 recommendations until those issues could be resolved. The Court agreed.

The Chair observed that it was the broad reaction to Judge White's case and later Judge Reese's case that has produced the need for a much more extensive and inclusive study of the process for investigating and dealing with the complaints filed against judges. The Committee asked the Court, and it agreed, to remand the 2016 proposals to the Committee so that the Committee could study the newly raised concerns.

The Chair stated that the Committee conducted that study and worked with a broader spectrum of interested parties including judges and their representatives. As some of the

Reporter's notes indicate, the Committee has reviewed several sources including the ABA Model Rules for Judicial Discipline, Rules and statutes in other states, a Constitutional history of Article IV, Sections 4(a) and 4(b), best practices, studies by the American Judicature Society, by an institute connected with the University of Denver, and case law both in Maryland and elsewhere. The Committee has also been considering decisions from the Commissions in other states that are collected by the National Center for State Courts and posted periodically on the Judiciary's website.

The Chair said that the Attorneys and Judges Subcommittee held three lengthy meetings. The Subcommittee invited and heard from the current Chair of the Commission, three former Chairs of the Commission, the Vice-Chair and Executive Secretary of the Commission, the current and former Investigative Counsel, the Chair of the Inquiry Board, Judge White, Judge Reese, Judge Platt, counsel for Judge White and Judge Reese, the President of the Maryland Circuit Judges Association, attorneys from Covington & Burling LLP, which acted as counsel to the Maryland Circuit Judges Association, and representatives from the Maryland State Bar Association.

The Chair advised the Committee that the Subcommittee considered the written and oral presentations in two further meetings, each of which lasted over four hours. The Committee

is grateful to the Commission for pointing out incorrect internal cross-references. The Chair apologized for those errors, which arose, in part, from the fact that at the Subcommittee level, the 2016 proposals were used as the base so ground that already had been plowed would not need to be re-plowed. Now, the Committee needs to use the current Rules as the base for changes because that is what the Court of Appeals will be looking at. All of the cross-references had to be converted and reviewed as new drafts of the Rules emerged. Unfortunately, as the final edits were being made, one of the Committee's staff members resigned. So that resource was lost.

The Chair said that he and the Reporter have reviewed the Rules more than a dozen times but a few cross-references were missed. Those errors will be corrected by the Style Subcommittee.

The Chair stated that, subject to reasonable time limits and repetition, anyone who wishes to address the Committee will have the opportunity to do so. For those who have filed written comments, the Committee has them, has read them, and there is no need to repeat them. In accordance with longstanding Committee procedure, because the proposals that are before the Committee today were approved by the Subcommittee, it will take a successful motion to amend or reject the proposals. Without a successful motion, the proposals will simply be approved. The

Committee will start at the beginning and go Rule by Rule even though some of the Rules are interconnected.

The Chair invited the guests to make general comments that are not covered in a written comment or tied to any particular Rule.

Judge Silkworth, President of the Maryland Circuit Court Judges Association, addressed the Committee. He expressed a deep appreciation for the Committee's commitment to improving the Judicial Disabilities procedures. He said that the Maryland Circuit Court Judges Association represents current and senior Maryland judges. The Association is highly invested in the Judicial Disability procedures and many members have experienced the existing system first hand. Those experiences have demonstrated that, although the goals of the system are laudable, the way the system has been implemented in practice, whether intentionally or not, has not been in alignment with those goals. The result has been an overly antagonistic system that prioritizes, in the Association's view, punishment and blame.

Judge Silkworth said that the Commission was never intended to be so adversarial and the Association is hoping that the Rules changes will help encourage a more civil atmosphere with a focus on education and training. The goal of the Commission proceedings is the maintenance of the honor and dignity of the

Judiciary and the proper administration of justice, rather than the punishment of an individual judge.

Judge Silkworth stated that the Association's comments have been aimed to draw the Committee's attention to the ways in which the system can be improved through both the reframing of the Commission's role and the revision of specific Rules. It is especially critical to the members of the Association that the Commission's proceedings provide fairness, including providing judges with an opportunity to be heard by a neutral fact-finder and the opportunity to seek judicial review. The proposed Rules address these issues directly and provide for a more balanced proceeding that allows for the participation of the judge. It also was critical to the members that the role of a "reprimand" be clarified. The Committee has done a tremendous job setting out a straightforward Rule approach. The authority of the Commission to issue reprimands was never intended, in the Association's view, to be a unilateral, sweeping authority to issue public sanctions unreviewable by the Court of Appeals. The proposed Rules clarify that Commission-issued reprimands are intended to be minor violations and they are to remain, generally, confidential.

Judge Silkworth added that the Association already has submitted several comments and feels it is unnecessary to rehash or summarize its position. He said that a representative from

Covington is present to assist if the Committee has a particular issue or specific questions they would like to address. He said that the Association rests on the comments submitted and urges the Committee to present the proposed Rules to the Court of Appeals.

The Chair said that the Rules will be presented by Mr. Frederick who chairs the Attorneys and Judges Subcommittee.

Agenda Item 1. Consideration of proposed revisions to the Rules in Title 18, Chapter 400, Judicial Disabilities and Discipline.

Mr. Frederick presented Rules in Title 18, Chapter 400, Judicial Disabilities and Discipline (See Appendix 1).

Mr. Frederick said that the Attorneys and Judges Subcommittee had extraordinarily robust discussions on virtually every Rule. He said that he hopes everyone has had an opportunity to look at the Rules, Reporter's notes, and particularly the comments the Committee has received from various groups. He invited the Committee's attention to the Commission on Judicial Disabilities' comments, the Covington initial response, and the subsequent response. He said that he understands there are hard feelings involved with this issue. To say that there are extraordinarily staked-out interests that are at odds with one another is the ultimate understatement. However, the Subcommittee's goal was to strike a balance between all of the competing interests.



Mr. Frederick said that the underlying drive was to set forth a transparent system that would enable the Court to fairly consider the important issues raised by the various groups. There are certain issues that have arisen during the Subcommittee's meetings that also have been pointed out in reported opinions by the Court of Appeals. The goal is to provide fairness to those who are accused and a reasonable opportunity to demonstrate what the claims are. The Subcommittee believes it has done that.

Rule 18-401 contains the preamble of the Judicial Disabilities Rules. Mr. Frederick said that this Rule is new and was created to set the tone for anyone involved in judicial disability proceedings. The Reporter's note contains the explanation for the proposed Rule. This Rule is derived from the ABA Model Rules. The Committee has not received any comment regarding this Rule.

There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-402 contains the definitions. Mr. Frederick urged the Committee to carefully read the Reporter's note that accompanies this Rule. The Reporter's note sets forth what the Subcommittee was trying to accomplish. The Subcommittee was dealing with constitutionally defined circumstances. The Constitution provides that judges can be censured or

reprimanded, among other things. The Maryland Constitution expressly uses the words "censure" and "reprimand." The two terms seem to be listed as synonyms in Black's Law Dictionary and other dictionaries. However, that cannot be the case. If the terms were intended to be synonyms, the framers of the constitutional amendment would not have used two different words.

Mr. Frederick said that the current Rule makes reference to a public reprimand that is not subject to judicial review. There are a lot of people who are unhappy about that. The revisions to this Rule make a distinction between a private reprimand and a public censure. A "reprimand" under the revised Rule is defined as a private sanction imposed by the Commission. A procedure has been built into the Rules to provide judges with the ability to challenge reprimands. A "censure," on the other hand, is a formal public sanction that can be imposed only by the Court of Appeals.

Mr. Frederick pointed out that the definition for the term "impairment" is new. The Subcommittee was concerned that the current Rule envisions "impairment" as a permanent one. There can be such things as a non-permanent impairment. For example, a member of the bench could suffer a stroke, be hit by a car, or have an alcohol or drug dependency. Those conditions are capable of being remedied with time or the appropriate

professional intervention. The Subcommittee sought to temper the term "impairment" with a distinction between permanent and non-permanent.

The Chair said that there is an error in section (g) of the Rule. In the third line of that section, the word "impairment" was omitted. The Chair said that change would be made by the Style Subcommittee.

By consensus, the Committee approved the Rule as amended.

Rule 18-403 is new and covers a judge's right to an attorney. Mr. Frederick said that the Committee did not receive any comment on this Rule.

There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-404 covers service. Mr. Frederick said that this Rule is new and provides that after the initial service, all other documents will be sent electronically if agreed. He said having been involved in defending against judicial disability actions, he cannot imagine a situation where a judge would not agree to electronic service.

There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-405 involves *ex parte* communications. Mr. Frederick stated the Subcommittee heard a great deal of discussion and debate from individuals regarding the notion of

*ex parte* communications. It has to be recognized that there is going to be some *ex parte* communication that is necessary between Investigative Counsel and the Chair of the Commission. For example, if Investigative Counsel wants a subpoena or needs to ask for an extension, that requires communication with the Chair.

Mr. Frederick added that, on the other hand, there is a concern on behalf of the judges that there may be inappropriate *ex parte* communications. When the various groups came before the Subcommittee, they asked the Subcommittee to structure a Rule to define what *ex parte* communication is allowed. Rule 18-405 was created to address that issue. The Rule was not created to suggest that anything improper had occurred or that anyone had done anything out of the ordinary. The Rule is simply a response to the two competing sides. The Rule is intended, in some ways, to recognize the reality of the situation. The Committee note defines what inappropriate *ex parte* communication is. Mr. Frederick invited the Committee's attention to the Commission's comments and the comments from Covington.

The Chair added that Rule 18-405 is derived from ABA Model Rule as well as rules that have been adopted in Arizona, North Carolina, and Washington. This Rule had been recommended by the American Judicature Society. The Committee note is intended to provide the guidance that the Commission and Investigative

Counsel had requested. The goal is to delineate the kinds of *ex parte* communications that are inappropriate and to make clear that other *ex parte* communications are permitted because they are necessary for the Commission to properly function.

The Chair invited Judge White to address the Committee.

Judge White thanked the Chair and members of the Committee. She explained that her written comments dated July 4, 2018 and November 8, 2018 are focused on the several mistakes that were identified in the Court of Appeals opinions in her case in 2016 and 2017. She said that Rule 18-405, as proposed, should be appreciated in the context of the various proposed Rule revisions.

Judge White said that the Court addressed the significance of a late disclosure or non-disclosure of a secret memo that was prepared by Investigative Counsel on pages 90-91 of their 2017 opinion. The memo tracked Judge White's case from May of 2015 until the Commission published its decision in August of 2016. The Commission's decision quoted directly from the Investigative Counsel's secret memo. Judge White said that the first time she saw the memo was in July of 2017.

Judge White explained that she was given notice of two of the complaints against her on April 30, 2015. She proceeded, with the assistance of counsel, to prepare the pertinent file for the underlying case in the Circuit Court for Baltimore City.

At that time, the case file was in a bit of disarray as there were post-trial decisions that needed to be made by the trial judge. Nevertheless, with the extension of time allowed by the Commission, she handed-delivered about 30 pages of her response to the complaints along with 30 exhibits. Her response was delivered on the afternoon of May 18, 2015.

Judge White said the secret memo created by Investigative Counsel was dated May 19, 2015. The memo reported to the Board and the Commission that she should be reprimanded. She said that suggests that the ability of the Board or Investigative Counsel to investigate anything included in her response was limited. The memo accompanied the Board and Commission's attention to her complaint up until the Commission issued its decision. Judge White said that she never had the opportunity to view the memo or respond to it. She added that the Commission's most recent comment suggests that Investigative Counsel should be permitted to provide a report and recommendation to the Board or the Commission *ex parte*. She said that with her case, there was no expectation that the respondent judge should have the ability to read and respond to such a report and recommendation.

Judge White said that Investigative Counsel's secret memo was the basis for probable cause recommendations and probable cause findings by the Board and Commission, respectively. She

said that she believes it is important for the Committee to understand that the prohibition of *ex parte* communications by Investigative Counsel with the Board and the Commission is a critical aspect of the proposed new Rules.

The Chair invited questions from the Committee for Judge White.

Judge Greenberg asked to address the Committee. He said that he was a member of the Commission from 2000-2016. Since that time, he has been the Chair of the Judicial Inquiry Board. He expressed concern about Rule 18-405. He said the concern is not because he believes Investigative Counsel should be permitted to engage in *ex parte* communications; rather, he wants the Committee to understand the manner in which the Commission operates. He said that having reviewed the proposed Rules and listening to the comments, he has a concern that there is a misunderstanding as to how the process works.

Judge Greenberg explained that the Board and the Commission do not meet simultaneously. The Board members do not speak amongst themselves about pending cases. The normal protocol is that every month, the members of the Board get a thumb drive containing all of the pending cases for that month. The bulk of those cases will be dismissed. Occasionally, there will be a recommendation by Investigative Counsel to the Board about a particular disposition in a case.

Judge Greenberg said that he is concerned that Rule 18-405 is not specific enough to give the Board permission to challenge, question, or inquire further into a recommendation received from Investigative Counsel. When a particular complaint is made, whether it has any validity at all, the members of Investigative Counsel's office will sometimes listen for many hours to the audio tape of the proceedings. Based on that, Investigative Counsel will prepare a report, typically recommending dismissal of the case. However, when the report does not recommend a dismissal, it is important for the Board to ask questions of Investigative Counsel. Judge Greenberg said that he reads the Rule as prohibiting the Board from having such communications. He added that the Committee note says that there are administrative functions that anticipate some *ex parte* communications. He said that he does not see the Board's questioning of an investigative report as an administrative function.

The Chair said that the Rules provide for Investigative Counsel to make a report to the Board if it is going to recommend anything other than an outright dismissal. He added that if there is anything unclear in that report or ambiguous in any way, the Board can ask for an amended report to provide clarification. The goal of the Committee is to have a record of the communications. If the Board can bring Investigative



Counsel in privately to challenge or question the report, there is no record of that communication. Those communications are *ex parte*, and the judge does not become aware of the communications.

Judge Greenberg said that in order for the Board to properly discharge its functions, Board members need to be able to speak with Investigative Counsel. For example, there may be a case where a court file or docket entry was not provided to the Board in the materials. In that instance, the Board would need to ask Investigative Counsel if they have the missing document and why it was not provided to the Board.

The Chair inquired as to whether Investigative Counsel could submit the missing document as an amendment to the report. Judge Greenberg responded that he didn't understand why speaking to Investigative Counsel about a missing document, while *ex parte*, would be a part of the administrative function described in the Committee note.

The Chair said that the way he reads the Commission's response to Rule 18-405 indicates that they have not read the Committee note. The Committee note makes clear that there is no prohibition against *ex parte* communications that are required as administrative matters or for members to do their jobs. He said the only *ex parte* communications that are prohibited are "those that could reasonably leave the impression, intended or

unintended, of an attempt to influence the nature, scope, or conduct of an investigation.”

Judge Greenberg responded that he is not sure what is intended to be covered under the term “administrative.” He expressed concern that the Rule may prohibit him from asking Investigative Counsel important questions.

The Chair said that Rule 18-405 expressly provides for *ex parte* communications that are otherwise permitted by the Rules. The Rules provide that Investigative Counsel may provide reports to the Board. If there is anything unclear about the report, the Board can ask for a supplement to the report. There would then be a record. The problem the Court of Appeals discussed in one of the recent cases was that there was no record of the communications between the Board and Investigative Counsel. The Court could not tell what was said by whom and to whom. The Subcommittee was trying to prevent that issue from occurring again. The Chair reiterated that ABA has this Rule in its Model Rules and so do other states.

Judge Greenberg said that his problem is that there is another Rule that conflicts with Rule 18-405. The Rule says that Investigative Counsel has to conduct an investigation and provide recommendations to the Board. He inquired as to whether the Board would be permitted to challenge or question the recommendation of Investigative Counsel without putting it in

writing. He added that the Board would be happy to do whatever is required.

The Chair said that if the Board is simply asking Investigative Counsel to clarify something that was included in the report, then it should be easy to ask for a supplemental report. He added that if the Board finds that what Investigative Counsel has sent them is not to the Board's satisfaction, then the Board should not go along with the recommendations.

Judge Greenberg responded that the Rule as drafted prohibits the Board from asking follow-up questions to Investigative Counsel without constantly making a record of each inquiry. The Chair commented that if a pleading was unclear, a trial court judge would never call counsel to ask counsel to include additional information in the pleading. He inquired as to how that scenario is different from the *ex parte* communications the Board wishes to have with Investigative Counsel.

Judge Greenberg responded that the Judicial Inquiry Board is akin to a grand jury. Investigative Counsel presents evidence to the Board and asks the Board to decide what to do with a particular case. Members of a grand jury would be permitted to ask a prosecutor questions. He reiterated that if the Board is only permitted to make written inquiries to

Investigative Counsel, then the Board will do that. However, the proposed Rule is unclear as to what is covered under "administrative functions."

The Chair thanked Judge Greenberg for his comments.

Mr. Carbine asked whether it would make sense to add language to the Rule that makes clear that "any communication needs to be in writing and added to the record."

Mr. Frederick responded that he thought that requirement was included in the Rule by implication. He added that the purpose of this Rule is to put everyone on a level playing field by creating a record. If the Board wants to inquire into Investigative Counsel's recommendation, the Board should invite the judge and the judge's attorney to participate.

The Chair said that the *ex parte* communication is not just between the Board or the Commission and Investigative Counsel. The Rule also prohibits *ex parte* communications with the judge or the judge's attorney.

Judge Greenberg said he understands that the Rule applies to everyone. However, he is concerned with how the Board is able to discharge its duties during the initial stage when all the Board has is the initial report and members of the Board may have questions about the report. In that regard, he said he wants to emphasize that the Board members are volunteers. It sometimes takes them hours to prepare for a meeting. Sometimes

all the Board members have is an initial report. He said that to suggest that the Board cannot follow up with appropriate questions, except by a written question and answer procedure, and possibly getting the judge involved, seems to defeat the purpose of the Rules.

Judge Greenberg explained that Investigative Counsel's function is to investigate and to make recommendations to the Board. He added that there are two levels to the process. Sometimes what the Board recommends may not be the same as what the Commission ultimately recommends. He added that there is a fundamental misconception that Investigative Counsel, the Board, and the Commission members sit around discussing the facts of the cases. He emphasized that is not the case.

Ms. McBride asked whether there is a difference between what the Rule terms as administrative functions versus substantive conversations between the Board and Investigative Counsel. The Chair said that an example of an administrative function would be the scheduling of meetings or hearings.

Judge Greenberg said that the Board and the Commission meet separately on different days. When the Board meets, the members sit around a table with their materials and they bring in Investigative Counsel to answer any questions the Board members may have about the materials. If Investigative Counsel asks for an extension of the investigation, the Board will inquire as to

why the extension is needed. Once the Board members exhaust their questions, of which there are usually few, Investigative Counsel leaves the room. On occasion, the Board will call Investigative Counsel back into the room to follow up on an issue or ask further questions about a report. He said that there never are substantive conversations about the cases.

The Chair responded substantive conversations about cases could occur, and that is what Rule 18-405 is intended to prevent.

Judge Price commented that there has been a lot of concern about Investigative Counsel being deposed during discovery. She said that she believes that requiring the Board and Investigative Counsel to have a written record of *ex parte* communications will prevent the need for a judge to have Investigative Counsel deposed. If everything is in writing and disclosed, there would be no need to subpoena Investigative Counsel.

Judge Greenberg said if the intent of the Rule is to require that *ex parte* communications between the Board and Investigative Counsel be put in writing, then that is understandable. However, the Rule needs to state that requirement clearly.

The Chair invited further questions for Judge Greenberg.

Judge Reed, current Chair of the Judicial Disabilities Commission, addressed the Committee. He expressed an appreciation for all of the Subcommittee's hard work. He said that the Commission's process is very similar to the Board's process. Investigative Counsel meets with the Commission and Commission members ask challenging questions about Investigative Counsel's report. The goal is for the Commission to dig deeper into the investigation to understand why certain things were included in the report. He said once the Commission is finished asking questions, Investigative Counsel leaves the room. The Commission then begins deliberating to decide what recommendations to make regarding the charges. If there are more questions, the Commission calls Investigative Counsel back into the meeting.

Judge Reed said that the Commission meetings are not audio recorded. However, the Commission does keep meeting minutes. He said that Investigative Counsel could leave the room and write down the substance of what was said during the Commission meeting. However, that would ultimately cause a considerable delay in the process. Several Court of Appeals opinions discuss the fact that the Judicial Disabilities process needs to move expeditiously. Judge Adkins, in particular, commented on the length of the Judicial Disabilities process in a recent opinion. The Commission tries to drive and move the case along to either

be dismissed or to allow the judge to make comments about the charges. He said this particular methodology of having every communication be in writing could certainly delay the Commission meetings, which are usually extensive and go long into the evenings.

The Chair clarified that the Commission receives reports from the Board, not from Investigative Counsel. Judge Reed answered in the affirmative. Judge Reed said that Investigative Counsel's report is included with the Board's report and recommendation to the Commission. Using both reports, the Commission members vigorously question Investigative Counsel on the investigation. He said that if the Commission finds significant issues with the reports or investigation, the Commission has extensive deliberations on those charges.

Ms. Jolivet, Executive Secretary to the Commission on Judicial Disabilities, addressed the Committee. Ms. Jolivet said there is a potential consequence that may affect judges if Investigative Counsel has to make to supplemental reports. She said that the Commission only meets once a month. One of the concerns expressed by the judges was that they were not receiving enough notice about what was happening in the proceedings. There may be a delay in the notice the judges receive.

The Chair invited further comments on Rule 18-405.



Judge Reed said that he wanted to make a correction to his previous statement to the Committee. He clarified that the Commission does not, in fact, receive a copy of Investigative Counsel's report. The Commission only receives a copy of the Board's report. However, Investigative Counsel is present at the beginning of the Commission's meeting for the purpose of answering any questions the Commission may have about the Board's report.

The Reporter asked for further clarification. She commented that the Commission is supposed to be provided only with information that is admissible into evidence. Is that what is occurring?

Ms. Jolivet answered in the affirmative. Investigative Counsel's report would be inadmissible if the matter were to go to a hearing. She said that is the reason why Investigative Counsel's report is not provided to the Commission. Only the Board reviews Investigative Counsel's report.

The Chair clarified that the judge's response is also provided to the Commission. Ms. Jolivet said that was correct.

Mr. Zollicoffer inquired as to whether Investigative Counsel's presence at the Commission meetings is to illuminate certain issues the Commission may have. Ms. Jolivet replied that Investigative Counsel is to answer questions the Commission members may have.

Ms. McBride commented that if Investigative Counsel responds to the Board or the Commission's questions in writing, that communication would still be *ex parte*. She said that she doesn't understand the distinction.

Ms. Jolivet responded that the Board has an obligation to monitor Investigative Counsel's investigation. She said that she believes it is appropriate for the Board to ask questions of Investigative Counsel in order to monitor the investigation appropriately.

The Chair explained that concern was expressed to the Subcommittee that certain conduct was occurring during the Commission's meetings with Investigative Counsel or afterward. He said he has no idea whether the concerns are valid. However, it was alleged that there were attempts by Commission members to influence what Investigative Counsel was going to recommend or the nature and quality of the investigation. The Subcommittee had no evidence of that conduct but the allegation was brought to its attention. Further, the Commission asked the Subcommittee for guidance on what communication is permissible and what is not. The Chair said that the Subcommittee tried to provide that guidance with Rule 18-405.

Mr. Laws asked at what point in the proceedings does the respondent or counsel for the respondent judge get involved in the process. He said the communications would be *ex parte* by

nature if the respondent judge is not involved during the Inquiry Board or during the Commission's meeting.

The Chair said that question gets into a subsequent Rule, that, in part, deals with the issue of whether the judge wants to be notified immediately upon the filing of a complaint. If the judge does wish to be notified, then the judge presumably would be a part of the proceedings. The judge can also decide to retain an attorney to engage with Investigative Counsel.

The Chair said that if a judge decides that the judge does not want notice of the filing of a complaint against him or her, the Rules require that Investigative Counsel notify the judge at some point prior to the completion of the investigation unless the complaint will be dismissed. That could be a week or a month prior to the completion of the investigation. At that point, the judge can become engaged while the matter is still with Investigative Counsel. He said that the Rules permit but do not require the Board to meet with the respondent judge when it is conducting its review of the case.

Judge Price asked how Investigative Counsel is permitted to be present at the Commission meetings to answer questions when the answers would contain hearsay or other inadmissible information that had been included in Investigative Counsel's report.

Ms. Jolivet responded that Investigative Counsel's report is not what is important to the Commission, but the investigation that was conducted. She said Investigative Counsel may have learned information as a result of the investigation. Judge Price asked wouldn't that information also be contained in the Board's report.

Ms. Jolivet said that sometimes that may be the case. However, as Judge Greenberg correctly stated, there may be audio recordings of a proceeding that had taken place over the course of several days. She said Commission may have a question about something that occurred during that proceeding, although that does not happen often.

Judge Price said that this is exactly where the transparency issue comes into play. If Investigative Counsel's report cannot be provided to the Commission, that calls into question Investigative Counsel's ability to respond to questions from the Commission, to which the answers may include information from Investigative Counsel's report.

Mr. Carbine asked whether Investigative Counsel's interactions with the Board and the Commission can be audio recorded. Judge Reed said that he agrees with Judge Greenberg's analogy of the Commission's process to grand jury proceedings. He said that everyone can agree that the grand jury process continues to work well in this country. In some instances,

grand jury proceedings are recorded. He said it is possible to record the Board and Commission meetings.

Mr. Frederick said that he has represented judges in Judicial Disability actions. What happens pragmatically is if a judge gets a notice that a complaint has been filed, the judge either responds or engages counsel to respond to the complaint on his or her behalf. Unless the judge or the judge's counsel is invited before the Board or the Commission, the next notice provided to the judge is a letter stating the disposition of the matter. He said using the Chair's previous court analogy, if the Board is like a grand jury, then the Commission is the petit jury. A defense attorney would not want the prosecutor having a conversation with the judge unless the defense attorney is provided an opportunity to respond. If the defense attorney is not permitted to do that, there is no level playing field.

Mr. Frederick said prior to the Judicial Disabilities process changing, there was "no grand jury." At that time, the Commission served as the petit jury and the grand jury. He added that Rule 18-405 is necessary to bring transparency and fundamental fairness.

Ms. McBride asked whether the Rule could be amended to make a distinction between the Board and the Commission. She said if the Board is like the grand jury, then it would make sense that there are *ex parte* communications between the Board and

Investigative Counsel. That is what happens in the context of criminal cases, and that is accepted practice.

Mr. Frederick said that the analogy of the Board and a grand jury is not a pure analogy. He said that *ex parte* communications between Investigative Counsel and the Board have an impact on the respondent judge in a way that is different from the context of a criminal grand jury. The respondent judge or the judge's attorney should at least have the opportunity to be present at the Board meetings to hear what questions are being asked of Investigative Counsel.

The Chair explained that there are four players that factor into this Rule. There is the Commission, trying to avoid *ex parte* communications with the Board members or vice versa. There are both the Board and the Commission, trying to avoid *ex parte* communications with Investigative Counsel or vice versa. Additionally, all three of those groups must avoid *ex parte* communications with the judge unless otherwise authorized or necessary. The Rule tries to deal with those four kinds of connections. He reiterated that the ABA has the same Rule, and the system has not collapsed elsewhere.

Mr. Carbine asked the Chair if it was appropriate to inquire as to whether there is a motion to reject or amend proposed Rule 18-405. He said that he has a sense that the Committee is in favor of the draft as proposed.

Judge Morrissey commented that the concern he has is with the use of the term "*ex parte*." He said that when he thinks of the term, it covers any communications between any of the individuals whether it is in writing or oral. He asked whether Investigative Counsel's report to the Board is considered *ex parte* since the judge is not present when the report is provided to the Board.

The Chair clarified that the Rule provides for Investigative Counsel's report because of the language "except as otherwise permitted by the Rules in this Chapter, directly or by necessary implication." So long as there is a Rule that provides for the *ex parte* communication, the communication is permitted.

The Chair invited any further discussion on Rule 18-405.

Judge Reed said that when looking at the Rule, he hopes the Committee will consider the entire body of work of the Commission. There is an assumption that there is perhaps nefarious information being passed between the members of the Commission and Investigative Counsel that ultimately leads to the prosecution and sanction of judges. However, the desire of the Commission to communicate with Investigative Counsel to challenge the Board's report is something that is positive for judges and leads to the result seen in a majority of the Commission's cases, which is a dismissal of the case. That is

because the Commission is able to ask probing questions. It is important that the Rules not lead to a situation where a report goes unchallenged.

The Chair invited further comments. He asked whether there was a motion from the Committee on Rule 18-405. There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-406 covers the standard of proof. Mr. Frederick said that this is the same standard that the current Rule provides. There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-407 deals with confidentiality. Mr. Frederick said that this Rule has been the subject of comments from the Commission and Covington. One of the questions that came up during discussions that is not addressed by this Rule is if a complainant or someone else goes public, does a judge have the ability to respond, either directly or through a surrogate, without being in jeopardy of a waiver of confidentiality. The Subcommittee has enabled the Commission to address issues in a limited context in drafting subsection (b)(2). However, the Rule does not provide for the judge's ability to similarly address those issues.

Mr. Frederick said that particularly since an election cycle has just finished and there were a number of contested elections, there was the thought that fundamental fairness to



all the candidates in an election would be to provide judges the ability to address any complaints that are made public. There have been a number of complaints made recently that relate to election conduct.

Mr. Frederick explained that if the complainant is an attorney or a judge, he or she cannot go public with their allegations because of being bound by the Rules. However, the confidentiality Rules are not going to prevent a private citizen from going public.

The Chair said that this is an issue that was raised by Covington. He asked the Committee if there is any comment or question regarding this issue.

Judge Price inquired as to whether there is a proposed recommendation to change the Rule to allow the judge to address complaints made public.

Mr. Collins addressed the Committee on behalf of Covington. He said that the idea was that, in fairness, a judge should be able to respond when a confidential complaint goes public if it is through no fault of the judge. This issue is particularly important during contested election cycles, with the judges being bound by confidentiality. Private citizens do not have to abide by the confidentiality Rules.

Mr. Marcus said adding a confidentiality exception for judges would create a slippery slope. In the nature of

contested elections, one of the dangers is that hyperbole is a part of the process. This issue arises when there are allegations made by private citizens who are not constrained by the Rules. He said that the Court of Appeals, in rulemaking, has not addressed the political realities of situations where a complainant goes public. However, there are other Rules that govern judicial conduct and how a judge presents his or herself to the public.

Mr. Marcus said that there are mechanisms available to judges who are concerned about the waiver issue. One mechanism would be committees that serve in many instances as advocates on behalf of judges. In the political context, if a judge were to get into the minutia as to what the allegations are as opposed to a statement clarifying that the complainant is wrong about the process, that is one thing. It is another thing to address the allegations point-by-point. He said that he is not sure a Rule governing speech during an election process is a good thing. However, there are a number of Constitutional provisions that discuss political speech.

The Chair said that there are limits in the Code of Judicial Conduct on what judges can do and cannot do with regard to political activities. Those Rules are relaxed when a judge appears on the ballot for an election.

Mr. Collins reiterated that a judge should be able to respond to allegations that are made public when that judge is up for election.

Mr. Marcus said that he is sensitive to the idea that judges should be able to defend themselves if allegations are made public and they are running for election. However, he said he is not of the position that the Committee should be involved in delineating political speech.

Mr. Collins said he agrees. However, once a complainant goes public with allegations, the confidentiality of that complaint has been breached.

Mr. Marcus asked Mr. Collins how his proposed exception would be done by Rule. Mr. Collins said that he did not prepare a proposed amendment. However, a limited exception could be carved out in the Rule to provide "that a judge may respond, in conformity with the other Rules, if there is a public disclosure made through no fault of the judge." He added that the judges are still bound by other Rules but to put them in situations where they are unable to respond would be unfair.

Mr. Sullivan commented that judges are typically in the position where they cannot respond to allegations made against them. For example, if there is a complaint about how the judge is handling a trial, the judge can not go out and say, "let me tell you how things are really going on in my chambers."

Mr. Collins said that there are certainly other Rules that govern what a judge may or may not discuss regarding a case. However, his concern is the allegations that call into question a judge's competence.

The Chair said that Rule 18-104.4 of the Code of Judicial Conduct draws a stark distinction between judges who are candidates for an election and judges who are not candidates for election. As to the latter, those judges cannot do anything in response to allegations made against them.

Mr. Frederick said that he had a few thoughts on this issue. He said his first thought is with regard to the Court of Appeals' reported decision in the *Attorney Grievance Commission v. Stanalonis*, 445 Md. 129 (2015). That case involved a situation where a lawyer was running for judicial office against a newly appointed judge. Mr. Stanalonis put out a statement that the opponent judge had never sentenced anyone to jail. As it turns out, that statement was true because the opponent judge had only been appointed to the bench a month prior. There was the issue of whether Mr. Stanalonis' statement violated the Code of Professional Conduct.

Mr. Frederick said the issue arose that if Mr. Stanalonis won the judicial election he would be subject to the Rules on Judicial Disabilities and if he lost it would be an issue for the Attorney Grievance Commission. Ultimately, the Court came

out and recognized freedom of speech with a wide spectrum of what is permitted. However, Judge Harrell noted in his dissenting opinion that in judicial elections, the actions of the candidates have to be tempered by the Rules.

Mr. Frederick said that his second thought is that in today's age, candidates have to make use of social media when campaigning. There is a way that someone other than the jurist could use social media to protect the judge against public allegations. He said having represented judges who have faced complaints during judicial elections, he would be horrified if his clients were allowed to make statements that were not carefully crafted. That situation would open lots of other doors. He added that he believes 18-407 was drafted the right way.

The Chair invited further comment about Rule 18-407. There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-408 covers costs. Mr. Frederick said that this Rule reminds him of a good settlement in a case because based on the comments received, it appears that everyone is unhappy with the proposal. The Commission provided criticism to the Rule and Covington provided a response. He said that the Subcommittee listened to the judges who felt that it was unfair that they could be responsible for a variety of costs. The proposed Rule

was modeled from the attorney discipline cost Rule, which recently came before the Subcommittee that was modified, approved by the Committee, and adopted by the Court of Appeals. On the other hand, the Commission believes it should not be responsible for paying anyone's costs. Some judges questioned why the Rule does not include attorney's fees. Attorney's fees are not included because under the American system, unless the parties contractually agree, the losing party is not responsible to pay the prevailing party's attorney fees.

Mr. Frederick said the Subcommittee believes Rule 18-408 is a reasonable and rational approach that should temper people from scorched earth policies. He added that there are four states that have adopted similar Rules. In Delaware, the court may direct that all costs be paid by the judge. In Minnesota, each side pays its own costs. The judge gets a transcript but everyone else has to pay for one. If a judge is removed from the bench, then that judge may be assessed the costs. In New Jersey, no costs are assessed unless they are ordered by the highest court of the state, for cause. The Subcommittee could not find a model for this Rule so it drafted its own version.

The Chair invited comments on Rule 18-408.

Judge White said that she has an issue with the possibility of the Commission being characterized as a "prevailing party." She said as a former employment attorney, she finds it hard to

believe that the finder of fact and decision-maker could ever be characterized as a "prevailing party" for the purpose of recovering costs.

The Chair said that Judge White brought up an interesting point. He explained that the reality is that the Commission makes the decision and if the Commission's decision is anything other than a reprimand or a conditional diversion agreement, then the matter is transmitted to the Court of Appeals. He explained that one of the issues is what costs are included by the Rule. The way the Rule is structured, it only covers the costs of the Commission hearing. It does not include Investigative Counsel's costs. For example, deposition costs and witness fees for the purpose of the Commission hearing would be included.

The Chair said that in sending a report to the Court, the Commission is asking the Court to follow its recommendations. In that sense, the Commission is like an appellant. It is not an appeal, but the Commission is the entity that triggers the Court's proceedings with its report. The Chair said that looking at the costs of the Commission hearing and the costs associated with the Court of Appeals proceeding, he does not know what other term would be used to describe the Commission if the Court agrees with the Commission report and recommendations.

Judge White asked the Chair to clarify whether the limitation in the available costs to be recovered by the prevailing party is only that which arises on the appellate level.

The Chair said that presumably, the Court of Appeals would decide who the prevailing party is and what, if any, costs are appropriate. He said it would not be up to the Commission to determine costs. If the Court agrees with the Commission, then The Commission would be the prevailing party. If the Court agrees with the judge, then the judge is the prevailing party. The Court may say that it disagrees with one aspect of the Commission's recommendation and decide to impose a different sanction. That is up to the Court to determine.

Judge White thanked the Chair for clarifying.

Mr. Laws asked whether there was any consideration given to allowing the complainant to be a prevailing party. He said the complainant sets the whole thing in motion.

Mr. Frederick explained that the complainant is not a party to the Commission's proceedings. If the complaint passes muster, it is prosecuted by the Commission on Judicial Disabilities. In order to pass muster, the complaint must survive Investigative Counsel's investigation, the Board, then the Commission.



The Chair said that the Committee has several options with regard to Rule 18-408. One option is to reject the proposal and leave matters as they are currently. A second option is to approve the proposed draft. Another option is to approve the judges' proposed changes that were included in Covington's comments. The judges asked that the draft be changed to allow for a judge to recover costs but not the Commission.

Mr. Collins said that assuming the judge is not the prevailing party, an award of costs would be even more punitive. If a judge is sanctioned, that is a huge blow to the judge. To then assess costs against that judge would be like piling on to that judge. Mr. Collins added that he understands that the costs are limited to those that are reasonable and necessary. However, judges have no control over who the Commission decides to depose. The Commission is a state-funded agency. The Maryland Association of Circuit Judges believes that, in fairness, the costs should be allocated only against the Commission, and not against the judge.

The Chair said that, historically, in attorney grievance actions, costs have been assessed against the attorney but never against the Attorney Grievance Commission. He said to his knowledge, the Court has never assessed costs against either party in Judicial Disabilities actions. He said he spoke with Bessy Decker, Clerk of the Court of Appeals, who confirmed that.

There is currently no Rule that provides for the Court to assess costs.

Mr. Zollicoffer said that begs the question as to why a Rule is needed. He said that if a judge is subject to a Judicial Disabilities action and is ultimately sanctioned, for the Court to assess costs against that judge would be like rubbing salt in the wound. He questioned the need for the Rule.

The Chair said that the Committee has the option to reject the proposal if that is the Committee's pleasure.

Judge Price added that when the Subcommittee heard from all of the stakeholders, there was concern about unnecessary litigation and unnecessary depositions on both sides. She said that the Subcommittee thought Rule 18-408 would deter some of the unnecessary expenses on both sides because of the possibility that the losing party would have to pay for those costs.

Mr. Frederick commented that this Rule is very similar to the Rules in attorney grievance actions. He said some view the Rule as punitive, but it is par for the course.

Mr. Zollicoffer said that private attorneys do not have salary caps the way that judges do. Judges are state employees and have a set salary. Whereas private attorneys are free to make as much money as they wish. Mr. Frederick responded that

most of the attorneys that come before the Attorney Grievance Commission make half the salary that judges make.

The Chair invited comments on Rule 18-408.

Judge Nazarian moved to amend Rule 18-408 to allow for an award of costs in favor of the judge but to disallow an award of costs in favor of the Commission. The motion was seconded.

The Chair invited further discussion on the motion.

Mr. Carbine said that the Subcommittee did a good job explaining what costs are. He said he wonders if some tinkering could be done to the first paragraph. Mr. Carbine moved to amend the Rule to allow the Court of Appeals to decide whether to award costs, rather than to make the decision a presumptive one. The language "unless the Court of Appeals orders otherwise" makes the determination mandatory. He said that his motion is to leave the decision up to the Court to decide if it wants to address an award of costs.

The Chair asked Mr. Carbine whether under his motion he would allow the Court to award costs either to the judge or to the Commission. Mr. Carbine responded in the negative. He said that he tends to favor Judge Nazarian's approach to the Rule. He added that he is concerned with the idea that the government is bringing its weight to bear on the judge. The potential assessment of costs against a judge could dissuade a judge from

contesting the Commission's decision, even if the judge has a legitimate issue.

The Chair explained that a judge does not take the matter to the Court of Appeals, the Commission sends its recommendations to the Court. A judge may file exceptions to the Commission's recommendation. However, the Rules require the Commission to send its recommendation to the Court.

Mr. Carbine said that the costs of the Commission hearing are only an issue in contested cases. It is the opposition to the Commission that creates the costs.

Judge Nazarian said that Mr. Laws' comments were largely the point of his motion. His motion eliminates the chilling effect on the judge when deciding whether to contest the Commission's recommendations.

Mr. Carbine explained that the only difference between his motion and Judge Nazarian's motion is to remove the presumption that the Court must make a determination as to costs. He said it may not be a good idea to award costs to every judge who turns out to be a prevailing party. There will be some cases where an award of costs will be appropriate and other cases where it will not. The Committee should not be putting the Court of Appeals in a procedural straightjacket where the presumption is that it should award costs to the prevailing party.

The Chair said that the matter will only get to the Court of Appeals if the Commission has found sanctionable conduct or disability. He said those are the only two ways in which a Judicial Disabilities recommendation is going to get to the Court of Appeals.

Mr. Carbine said that he would rather see the Rule have more language indicating that the Court "may," rather than the Court "shall." He said that the language in the first sentence under section (a) should be permissive instead of mandatory.

Mr. Laws said he agrees with Mr. Carbine, but believes the Rule should cut both ways to allow the Court to assess costs against the Commission or the judge.

The Chair said that the Committee first needs to deal with Judge Nazarian's motion, then further consideration of other motions can be made. He asked if there were any other comments to Judge Nazarian's motion.

Senator Cassilly commented that during the Subcommittee meetings, he had been a pretty strong advocate that the Committee needs to protect the Judiciary. He said there are only two jobs in which people get up in the morning and paint big bullseyes on their chests. Those jobs are judges and police officers. The Committee has to protect judges so that they can go out each day and do their jobs. However, there is no other area of the law that provides only one party the opportunity to

recover costs. He said that either both parties should be able to recover costs or no party should be able to recover costs.

The Chair invited further comments on Judge Nazarian's motion. The motion failed with three members in favor.

The Chair asked if there were any other motions.

Mr. Carbine moved to amend the proposal to make the decision discretionary instead of mandatory. The motion was seconded. Mr. Zollicoffer clarified whether, under the motion, the costs could be awarded to either side. Mr. Carbine answered in the affirmative.

The Chair said that change could be made by the Style Subcommittee. The Rule would be amended to say that "the Court of Appeals may assess costs in favor of the prevailing party, and determine who the prevailing party is."

By consensus, the Committee approved the Rule as amended.

Rule 18-409 covers the use of allegations from a dismissed case. He said the Rule provides that if a complaint is dismissed without a letter of cautionary advice, the allegations made in the dismissed complaint cannot be used in a future disciplinary proceeding. However, if additional information becomes known to Investigative Counsel regarding a complaint that was dismissed before the filing of new charges, then the earlier allegations may be reinvestigated. Mr. Frederick said

that the Committee did not receive any comment with regard to this Rule.

There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-411 covers the Judicial Disabilities Commission. The Chair said that the Commission raised the issue of whether the numbering of this Rule is correct. The Chair explained that the numbering of this Rule is correct. When drafting Rules that have separate divisions, the Committee leaves space at the end of the prior division in case additional Rules need to be added later. He said that is why this Rule is numbered 18-411 and not 18-410.

Mr. Frederick said that Rule 18-411 is designed to have the Court of Appeals designate who serves as Chair and Vice Chair of the Commission from the list of individuals who have been appointed by the Governor. The Commission raised a comment about a separation of powers issue. There was a response to that comment from Covington on behalf of the Maryland Association of Circuit Judges.

Mr. Frederick explained that the current system where the Commission selects its own Chair and Vice Chair is the product of a Rule. There is nothing in the Constitution that provides for that power. The rulemaking decisions belong to the Court of Appeals. To rescind the current Rule or to adopt new Rule 18-

411 in no way infringes on the separation of powers. The Rule simply enables the Court of Appeals to decide who will serve as Chair and Vice Chair and sets forth that those members serve at the will of the Court.

The Chair said that there is an optional provision that addresses the quorum issue. The Rule currently provides that a majority of the members of the Commission constitute a quorum, provided that there is at least one judge, one lawyer, and one public member. He said that to the best of his knowledge there has never been a situation where the Committee has a lack of public members available to constitute a quorum. Conceivably that issue could arise but it has not happened yet.

The Chair said what has happened are some close calls on the proviso. He said there have been at least two, possibly three occasions where two judges have recused, leaving only one judge remaining on the Commission. However, if a situation arises where there are several recusals as well as some vacancies on the Commission, there may be instances where a quorum is impossible. In that situation, the Commission would not be able to take any action. One way to address that issue is to add a condition to the proviso that there must be one judge, lawyer, and a public member. Language has been added to the proviso to indicate "unless that is impossible due to vacancies or recusals."



The Chair said that there is still the issue of the constitutionally mandated status of the Commission. The Constitution lays out that there should be three judges, three lawyers, and five public members. If there are three judges who recuse, although they may be justified in doing so, it disturbs the balance of the Commission. There is no provision in the Constitution for the replacement of members of the Commission. Other states have such provisions in their Constitutions or statutes but Maryland does not. The only exception provided in Maryland's Constitution is for instances where the targeted judge is a member of the Commission. In that instance, the Constitution provides for the Governor to appoint a replacement member on the Commission.

The Chair explained that the Subcommittee was trying to figure out a way to deal with the imbalance of the Commission in the event of vacancies or recusals. Ultimately, the Subcommittee agreed that it is not clear that the Court of Appeals can constitutionally deal with that issue by Rule. The Constitution is very clear that the Governor makes appointments to the Commission with the advice and consent of the Senate. There is no provision for anyone else to make appointments, temporary or otherwise.

The Chair said what the Subcommittee came up with for discussion purposes and for consideration by the Court of

Appeals is an optional provision that provides for the special designation of a substitute member. The provision states that "if by reason of vacancies or recusals, the quorum in a particular proceeding would not include at least one judge, one attorney, and one public member, the Court of Appeals, with the written consent of the judge who is subject of the proceeding, may designate a judge, including a senior judge, an attorney, or a member of the public, as needed for the composition of a quorum in that proceeding, to serve as a substitute member of the Commission." The Chair added that the Constitutional grounds for adding that provision is unclear.

Ms. McBride said that there is an incentive for the respondent judge to decline consent to prevent the Commission from having a quorum.

The Chair responded that the judge may opt to do that. However, the other provision would kick in and the judge would be left with a panel that does not contain any judge. The same would be true if there were no attorney left on the panel or public member. He said that is why the Subcommittee proposed the optional provision.

Ms. McBride said that the optional provision would help the judge to have a more balanced panel.

Mr. Frederick added that the problem is that there are no constitutional grounds for the Committee to recommend this

provision in good faith. He said if everyone consents, then no one is asserting that the provision fails to pass constitutional muster. The Chair said that if the Court of Appeals adopts the optional provision, then it does pass constitutional muster.

Mr. Collins said that he would like to make the argument for the constitutionality of the optional provision. He said that the Constitution provides the Court of Appeals with plenary authority to implement Rules of procedure. He said this supplemental provision provides for a limited substitution of a Commission member. He said there is a problem if the Commission has to wait for a year before the governor appoints a replacement member.

The Chair said that this issue was raised in either the *White* case or the *Reese* case or both. There was an instance where two judges recused themselves. The complaint from the judges was that they wanted three judges on the panel. The Subcommittee was trying to address that issue and could not think of another way to do so. He said the question is whether the Committee is willing to send the optional provision to the Court to see what they are willing to do with it. He said that unless there is a motion to strike the provision from the proposed Rules, it will be sent to the Court for consideration.

The Chair invited comments about Rule 18-411. There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-412 deals with the Judicial Inquiry Board. Mr. Frederick said that Rule 18-412 mirrors Rule 18-411 in how the Court of Appeals will select who serves as the Chair and Vice Chair of the Board. He said the Board is the creation of the Court of Appeals. It is not mentioned in the Constitution.

There being no motion to amend or disapprove the Rule, it was approved.

Rule 18-421 involves the procedure upon receipt of a complaint. Mr. Frederick said there was a comment received from the Commission that is well taken. The Commission suggested that the notification under subsection (c)(2) also be provided to the Commission. The fifth line under that subsection would be changed to read "dismiss the matter and notify the complainant, the Board, and the Commission." Under the current proposal, the notification is provided only to the complainant and the Board. Mr. Frederick asked the Committee whether that change can be made by the Style Subcommittee.

By consensus, the Committee approved the Rule as amended.

Rule 18-422 covers Investigative Counsel's investigation. Mr. Frederick provided background on Rule 18-422. He said that prior to the *White* and *Reese* decisions, Investigative Counsel had the discretion whether to notify a judge that a complaint had been filed. There could be an investigation and the matter could be dismissed without the judge's knowledge. Part of the

thought process behind that policy was to avoid darkening a judge's day by sending a letter notifying him or her that a complaint had been filed when Investigative Counsel intended to dismiss the matter. As a matter of procedure, Investigative Counsel now notifies the judge of every complaint.

Mr. Frederick said that some judges want to know about every complaint filed against them and other judges do not. One particular issue that arose during the Subcommittee is the process by which a judge applies for a position on a higher court. The application for appointment to the appellate courts asks judges whether they have been the subject of a complaint to the Commission on Judicial Disabilities. A judge may be blindsided if he or she answers "no" on the application and Investigative Counsel subsequently provides a list of complaints that have been dismissed without the judge's knowledge.

Mr. Frederick said what usually happens in that instance is that Investigative Counsel will provide a letter indicating that the judge was not notified of the dismissed complaints. However, initially, a judge may feel as though he or she had been less than candid on the application. To address that issue, the Subcommittee drafted a provision that provides judges with the option to decide whether they want to receive notice when a complaint is filed against them. There would be a process by which all the sitting judges would be polled on

whether they would like to receive the initial notice pursuant to Rule 18-422 (a)(4). Newly appointed judges would be asked the same question at the time they are appointed.

Mr. Frederick said that the Committee did not receive any comments on the other provisions of Rule 18-422. He pointed out that there is an incorrect citation in the Rule, and correction of it will be made by the Style Subcommittee.

The Chair added that he does not foresee the new notification process costing the Commission any additional money.

Ms. Jolivet expressed a concern that the notice provision may conflict with the Committee's recommendation that judges be allowed to attend Inquiry Board meetings. She said that there may be a judge who opts not to be notified when a complaint is filed against them, who would then have to be notified of a Board meeting and the fact that his or her case is on the agenda.

The Chair responded that the current Rule and the proposed Rules require that a judge be notified prior to the conclusion of Investigative Counsel's investigation unless the complaint against the judge is dismissed. He said that if Investigative Counsel is going to recommend anything other than outright dismissal without a letter of cautionary advice, the judge will

be notified when Investigative Counsel nears the end of its investigation.

Ms. Jolivet said that it is possible that a complaint may come before the Board before Investigative Counsel has completed its preliminary investigation. In that instance, the judge would have to be notified of the Board's meeting even if the judge previously elected not to receive notice when a complaint is filed.

The Chair said the judge would get notice before the Board has anything to do. Ms. Jolivet said that is not necessarily the case but she understands the Committee's position.

The Chair invited further comments about Rule 18-422. By consensus the Committee approved the Rule, subject to correction of the citation by the Style Subcommittee.

Rule 18-423 covers the proceedings before the Board. Mr. Frederick said that there are a few incorrect cross-references that will be corrected by the Style Committee.

The Chair said that Covington submitted a comment asking that the time for the filing of a response under section (e) be expanded to 30 days rather than the proposed 15 days. Mr. Frederick said that Covington's request does not seem unreasonable. He added that the Commission raised the issue that it should have the option to dismiss a complaint with or without notice and with or without a letter of cautionary

advice. Mr. Frederick said that he agrees with that and an amendment under section (f)(3) of the Rule would be appropriate since the Commission has several dispositive options available, regardless of what the Board recommends.

Mr. Frederick called for a motion to modify Rule 18-423 sections (e) and (f)(3) to provide for the changes recommended by the Commission and Covington. The motion was made, seconded, and passed by a majority vote. By consensus, the Committee approved the Rule as amended.

Mr. Frederick said that the Commission made a comment regarding the provision in Rule 18-424 that deals with which presiding person would be able to grant an extension. One of the concerns expressed in the reported decisions is that there ought to be a written request for an extension and there must be a reason expressed for the request. The Subcommittee has taken care of that issue. The way the Rule would be written, it would be the Chair of the Commission who may grant a reasonable extension of time for the submission of the Board's report.

The Chair commented that he did not understand the Commission's comments on this Rule change. He said that current Rule 18-405 requires the entire Commission to agree to grant an extension. The Rule was changed to indicate that only the Chair needs to approve the grant of an extension.



Mr. Bayne, Assistant Investigative Counsel, addressed the Committee. He said grants of extensions of the investigation currently come from the Chair of the Board in his capacity to oversee the investigations. He said Investigative Counsel's concern with Rule 18-423 is that if the Chair of the Commission is involved in granting an extension, it might give the Chair information that may not otherwise be provided to the Chair. For example, there may be an uncooperative witness. There is also the issue of added time to the process. Instead of Investigative Counsel requesting an extension during the Board meetings, the request would have to go from the Chair of the Board to the Chair of the Commission and back down.

The Chair reiterated that the current Rule, as he reads it, requires the entire Commission to grant an extension of time for Investigative Counsel to complete the investigation. He said the sixth line of section (c) was amended to add that the "Chair of the" Commission would grant approval.

Mr. Bayne said that the Board also has the authority to issue an extension of time to complete an investigation.

The Chair clarified that the Board may send a matter back to Investigative Counsel to do further investigating. However, under the current Rule and the proposed Rules, the Board does not have the authority to grant Investigative Counsel an extension of time to complete its investigation. He said there

are two separate issues involved. One is the Commission or the Chair of the Commission's authority to grant Investigative Counsel an extension of time to file a report with the Board. The other is the Board's authority to send a matter back to Investigative Counsel to do further investigation, after having received Investigative Counsel's report.

There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-425 covers the dismissal of a complaint. Mr. Frederick said this is the first Rule under Division 4, which involves dispositions other than the filing of charges. The Committee note to Rule 18-402 generally describes the process covered under Rule 18-425. Mr. Frederick added that no one to his knowledge has filed a comment about this Rule.

There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-426 covers conditional diversion agreements. Mr. Frederick said that the Subcommittee tried to model Rule 18-426 and the terminology contained in the Rule after the system that has been in effect for quite a while now under the attorney disciplinary procedures. Subsection (a)(1) defines a situation where, "if appropriate, the Commission concludes that any alleged sanctionable conduct was not so serious, offensive, or repeated as to justify the filing of charges, or if charges

already had been filed, the imposition of any immediate discipline, and that the appropriate disposition is for the judge to undergo specific treatment, participate in one or more specified educational or therapeutic programs, issue an apology to the complainant, or take specific corrective or remedial action." He said the notion of this provision is to provide an opportunity for a judge who has slipped but has not otherwise fallen, to resurrect him or herself without any discipline.

The Chair said Rule 18-426 is the device used to deal with situations where a judge may suffer from an impairment. There have been cases where this Rule would have been useful. There may be a situation where a judge is suffering from emotional stress that may need to be dealt with by receiving therapy or an addiction that needs to be treated. He said those impairments may cause a judge to display sanctionable conduct. However, the Commission may decide that a conditional diversion agreement is more appropriate to address the issue.

Mr. Frederick said that the Commission raised an issue about the language in section (b), which states "the Commission shall direct Investigative Counsel or some other person to monitor the compliance with the conditions of the agreement and may direct the judge to document compliance." The Commission's viewpoint was that it is inappropriate for Investigative Counsel to monitor a judge's compliance.

Mr. Frederick pointed out that the Rule provides for the Commission to designate the person responsible for monitoring compliance. He said the Rule is drafted in such a manner to allow a wide berth for the Commission to select the appropriate monitor. It may be that the judge suffered from a stroke. In that situation, it may be appropriate for a medical professional to monitor the judge, as opposed to Investigative Counsel. The Rule was drafted to provide options to the Commission in making that decision, with the agreement of the judge.

The Chair said that if the Commission does not want to appoint Investigative Counsel to monitor a judge, the Commission does not have to. If the Commission decides to appoint someone else to monitor the judge, then the Commission would have to consider the circumstances of that case. He added that the Commission would have to consider how to maintain confidentiality in appointing someone other than Investigative Counsel.

There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-427 covers the procedures for reprimands. Mr. Frederick said that there are several changes that need to be made by the Style Subcommittee. He said the first change that needs to be made is in the second line of section (a). That line should read, "after an investigation, by Investigative

Counsel, and an opportunity for a hearing." He said there also needs to be a change made in subsection (b)(2). Covington suggested that the time in that section be changed from 15 days to 30 days.

Mr. Frederick explained that Rule 18-427 is part and parcel of the Reporter's note contained in Rule 18-402. This Rule gives the judge some options in receiving a reprimand. One option is for the judge to agree to the recommendation that the judge receives a reprimand. Another option that will result in the judge receiving a reprimand is if the judge fails to timely respond to Investigative Counsel's recommendation. On the other hand, the judge may agree with Investigative Counsel's statement of facts but disagrees with the conclusion that his or her actions give rise to sanctionable conduct. In that instance, the judge would have the opportunity to have a hearing before the Commission. If the Commission ultimately decides that a reprimand is appropriate, then the matter will remain confidential.

Mr. Frederick said the other scenario is that a judge may disagree with the underlying facts and the recommendation. In that case, the judge would be subject to a possible censure because the matter would be decided by the Court of Appeals.

The Chair said that the long Reporter's note following Rule 18-402 raises the conundrum that was presented to the

Subcommittee. The Subcommittee agreed that a reprimand should be private because the public reprimands are essentially censures. He said the concern from the judges was that by not having to consent to a private reprimand, the judges would lose the ability to have a hearing if they disagreed with the reprimand. The Subcommittee tried to address that concern by providing the four options contained in Rule 18-427.

The Chair said that the issue was also raised regarding when an erroneous ruling on law becomes sanctionable conduct. He said other States have tried to address that issue. There is at least one State that sets forth a best practice as to when an error of law becomes sanctionable conduct. The Subcommittee considered adding something similar in the Rules but ultimately decided against it.

The Chair invited comments about Rule 18-427. There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-428 covers retirement as a disposition. Mr. Frederick said that there is an incorrect citation in the Rule that will be corrected by the Style Subcommittee. By consensus, the Committee approved the Rule, subject to correction of the citation by the Style Subcommittee.

Rule 18-431 involves the filing of charges. Mr. Frederick said that this Rule contains the same incorrect citation

contained in Rule 18-428. Again, that citation will be corrected by the Style Subcommittee. By consensus, the Committee approved the Rule, subject to correction of the citation by the Style Subcommittee.

Rule 18-432 covers the basic rights of the judges. There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-433 involves the discovery process. Mr. Frederick said that the Commission made several comments about this Rule. He agreed that one of the comments is well-taken. The Subcommittee had focused on some issues that had been raised in the *White* and *Reese* cases. Particularly, there had been difficulties alleged by the judges in getting discovery responses from the Commission. In fairness, the discovery process ought to be reciprocal. Mr. Frederick proposed to amend subsection (a)(3) to read, "Investigative Counsel and the judge have the obligation to respond to discovery requests."

Mr. Frederick said that the goal is to see the discovery process proceed in an orderly manner. He said there's nothing worse than a discovery dispute that has no merit. The Subcommittee tried to build into the Rule the requirement that any exonerating material that Investigative Counsel comes across has to be provided to the judge. One question that was raised was whether Investigative Counsel would have to scour the earth

to look for exonerating evidence to comply with the Rule. The answer is "no." Investigative Counsel is only required to provide exonerating information that she is aware of. Mr. Frederick said that provision is predicated on the *Brady* case.

Mr. Frederick said that a change needs to be made at the end of section (b). The last line of that section should be changed to read, "record of Investigative Counsel as of the date of inspection." He said a change also needs to be made in section (c). Language should be added to the fourth line to read, "or other evidence of which Investigative Counsel is aware."

Judge Price asked whether "Investigative Counsel" is defined elsewhere in the Rule so that provision regarding disclosure of exculpatory evidence would include assistant Investigative Counsel. The Chair responded in the affirmative.

The Chair said that Covington submitted a comment on section (d). Mr. Frederick explained that Covington wanted to stagger the disclosure of witnesses and asked that the Rule provide that the Commission be the first side to disclose its witnesses since it has the burden of proof. Then the judge would have the ability to see what witnesses the Commission has prior to disclosing his or her own witnesses. He said that Covington's comments are well-taken and the Committee may want to consider providing that the disclosure be staggered by Rule.



Right now that decision would be made by the presiding officer who would be the Chair of the Commission unless he or she has recused.

The Chair asked what the timeframe for the judge to provide disclosure to the Commission would be. Mr. Frederick said that he would ask for 5 days to respond in attorney disciplinary cases. He added that the judge would similarly not need a lot of time to respond once the judge knows who Investigative Counsel intends to call.

Mr. Frederick said that those changes could be made by the Style Subcommittee with the full consent of the Committee. By consensus, the Committee approved the Rule as amended.

Rule 18-434 covers the hearing on the charges. The Chair said that during the subcommittee meetings the judges brought up the issue that the Commission has not allowed the judges to provide expert witness testimony. He said that the reason why the Commission disallowed the expert testimony was not clear to him. The judges recommended that the Rule be changed to provide a judge to present expert testimony.

The Chair said that it is unclear what testimony the expert would provide other than to address the standard of care. The Subcommittee did some research and discovered that the issue had been litigated in at least five States. The supreme courts in those States concluded that expert testimony is permissible in

judicial disciplinary proceedings but it is discretionary for the Commission to decide whether to allow it. The States also concluded that it is not an abuse of discretion to disallow expert testimony on the ultimate issues of whether the judge violated the Code of Judicial Conduct and whether discipline is appropriate.

The Chair said that the Subcommittee rejected the judges' proposal to change the Rule to require that judges be permitted to provide expert testimony. He said now the suggestion is to make the allowance of expert testimony presumptive. He said there are some problems with that suggestion. For one, the Rules in Title 5 Chapter 700 on whether to allow expert testimony provide that the decision is purely discretionary with the court.

Judge Price commented that the difference between a trial court's decision to allow or disallow expert testimony and the Commission's decision on the same issue is that the trial court is a judge and the Commission is not entirely composed of judges.

The Chair explained that the second issue involves the question of what is the standard of care for judges. He said that one standard of care is set forth by the Code of Judicial Conduct. However, there is a subsidiary standard of care that has been litigated. Judge Watts discussed that standard of care

in the Reese case opinion. Judge Watts did not have to discuss the standard of care at length because she ultimately decided that Judge Reese did not act below the standard of care. However, Judge Watts cited a case from New Jersey that discussed when an erroneous legal decision morphs into sanctionable conduct.

The Chair said that courts around the country have looked at different factors in determining whether a judge's error of law is sanctionable. Some of the factors to be considered are whether the decision was willful, egregious, repetitious, or in bad faith. One court considered what a "reasonable judge" would think about in making a decision. The Chair said that the State courts are everywhere on this issue. He added that whatever the standard of care is in a particular State, it is an issue of substantive law, not procedure. The Rules do not determine substantive law.

The Chair stated that the third problem is that an expert's opinion cannot assist the Commission in determining the weight and credibility to give to other witnesses. He said it is likely more confusing to lay members of the Commission to have dueling experts testify to the actions of a judge in a particular case. He said that is why the Subcommittee decided to leave the issue to the Court of Appeals to decide in a

judicial context whether the Commission has abused its discretion in disallowing a judge to provide expert testimony.

There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-435 deals with the Commission's findings and action. Mr. Frederick said that of a comment raised by the Daily Record and the media had not been considered by the Subcommittee. The Daily Record indicated that a reporter recently had difficulty obtaining access to audio recordings or transcripts of a Commission hearing. The reporter was told that he or she would have to pay.

Mr. Frederick said that issue was not considered by the Subcommittee because it was unknown to the Subcommittee during the drafting of the Rules. He said that is certainly a valid concern because proceedings before the Commission are matters of public record once charges are filed. Any member of the public may attend the Commission hearings.

The Chair said that is one issue with respect to the media. He invited Ms. Snyder to address the Committee.

Ms. Snyder, Executive Director for the Maryland-Delaware-DC Press Association, addressed the Committee. She said that she wanted to clarify what access the public has to transcripts and audio recordings of the Commission proceedings. She explained that there was one incident recently where a reporter had an

issue gaining access to transcripts and audio recordings of the proceedings. There was another occasion where a reporter was asked to pay transcript fees. Ms. Snyder said that she wanted to bring those issues to the Committee's attention and to gain clarity on what public access means.

The Chair clarified that Ms. Snyder's concern was that the reporter simply wanted to look at the transcript or have access to audio recordings, rather than to have copies made of either. Ms. Snyder answered in the affirmative. She said that ordinarily when something is a matter of public record, the public is permitted to attend the hearing, inspect the record, or review audio recordings of the proceedings.

Judge Price commented that court proceedings are open to the public as well. However, if a member of the public wants a copy of a transcript or audio recording of a court proceeding, that person would be required to pay for it.

The Chair said this brings up an issue that has not been raised. In court, members of the public are entitled to pay for copies of audio recorded proceedings. He said that Ms. Snyder and the Daily Record is not asking for copies of audio recordings or transcripts of Commission hearings. They are simply asking that those records be made available to them to review.

Ms. Snyder said that the cost for a transcript of one day of a Commission's hearing is \$1,000. She said that cost is certainly more than what a reporter or member of the public would be able to pay. However, if there is a transcript of the Commission hearing, the public should have access to review it. She added that she is not asking the Commission to create a record that it does not have.

Mr. Frederick said let's assume there is no transcript but there is an audio recording of the hearing. He asked Ms. Snyder if she would have a problem with just listening to the audio recording. Ms. Snyder answered that she would not have a problem with that.

Ms. Snyder said that her concern is that there are logistical issues with the Commission making the record of its hearings available to the public. She said a reporter was told that there was a limited time frame available to listen to over 60 hours of audio recordings. She said that there should be a mutually convenient time for both the public and the Commission to have access to recordings or transcripts of Commission hearings.

Mr. Frederick clarified that Ms. Snyder was fine with listening to the audio recordings so long as she is provided with a reasonable opportunity to do so. Ms. Snyder agreed.

The Chair said that Covington raised the issue that they want the Rules to provide that the Commission provide the judge with a copy of the transcript at no cost. The current Rule requires the Commission to make a copy of the transcript available to the judge at the judge's expense.

Mr. Frederick said that other than the bolded print included in the Committee's material, everything else was approved by the Committee in 2016. When those recommendations went to the Court of Appeals, the Court sent the Rules back because of the issuance of its opinion in the *White* case and subsequently in the *Reese* case. He added that that the "impairment" language contained in Rule 18-435 was unanimously agreed to by the Subcommittee.

The Chair reiterated that the Subcommittee did not have the media's request at that time. Mr. Frederick said that it seems that the media has the same right as the judge does under Rule 18-435 subsection (e)(3). He said that if the media wants a copy of the transcript or audio recording, they would be required to pay for it.

Ms. Snyder asked that if the transcript already exists, why would someone buy a copy of it. Mr. Frederick said there are some instances where a transcript may not exist. He said the transcript is not created until the entire hearing is complete and the Commission becomes aware that the judge is not going to

agree with the Commission's decision. He said the ordering of a transcript is the final step when a Judicial Disabilities matter is transmitted to the Court of Appeals.

Ms. Snyder clarified that if a transcript exists, members of the public have a right to access the transcript. If a transcript does not exist, then the public would have access to any audio recordings of the hearing. However, if a member of the public wants to create a transcript or obtain copies of a transcript or audio recording, that person would have to pay for it.

The Chair said there may be one caveat on this issue. He said that if the issue involves a judge's disability or impairment, the Commission's proceedings would be closed. The only proceedings that are open to the public are those that involve sanctionable conduct.

Ms. Snyder suggested that audio recordings of those proceedings could be redacted in some way. Mr. Frederick responded that the Committee has no control over the private service that transcribes the hearing. He said the Commission hearings are not recorded by court reporters. The Commission hires its own servicer to record and transcribe the hearings.

The Chair suggested that the Committee not deal with the issue of audio recordings of the Commission's hearings at this time. He said the current Rule requires the Commission to have



a transcript made if the matter is going to be sent to the Court of Appeals.

Ms. Snyder urged the Committee to encourage openness from the Commission rather than restricted access to audio and transcripts of Commission hearings.

The Reporter commented that she is not sure of the Commission's current practice. She said that Ms. Snyder appears to be contemplating a situation similar to that in the District Court, where a constant recording of the proceedings is made. Members of the public may pay a fee to obtain a CD copy of District Court proceedings.

The Reporter said she believes that a different procedure takes place during Commission hearings. The Commission uses a private court reporting service. If the court reporter uses a back-up audio recording to assist him or her in preparing a transcript, then that recording would belong to the private court reporter. That recording also is not an official record of the proceedings.

The Chair asked the members of the Commission whether that was the case. Ms. Jolivet said that there is an audio recording made of the Commission hearing, but that a lot of times, the recording is made to assist the private court reporter in making a transcript. She said there are times when the Commission receives copies of the audio recordings. The audio recordings

are not official records. It is the transcript that becomes the official record of the Commission hearings.

Judge Hazlett addressed the Committee. She said that she presided over the Commission hearing that was held here at the Judicial College Education and Conference Center. She said that the Commission hired a transcriptionist who was recording the hearing and taking notes of the hearing. The Commission has no control over what the transcriptionist charges to create a transcript or how quickly a transcript can be prepared. She said the Commission does not have immediate access to the audio recordings.

Ms. Jolivet said that with regard to the incident where a reporter had an issue gaining access to an audio recording of a Commission hearing, the Commission did provide that reporter with available dates during which the reporter could listen to the audio. She said that subsequent to receiving the letter from the Daily Record and the press, the Commission decided to wait before the issue was brought to the Rules Committee before granting further access to that audio recording.

Judge Reed said that many litigators know that the information recorded by transcriptionists is proprietary. He said that there is a lot of money that is made by private transcription services. The Commission is not a liberty to take their proprietary material and give it to anyone who wants

access to it. He said that, ordinarily, when the hearing is held at a courthouse, there is a recording made. That recording is available within minutes from the end of the hearing session. However, Commission hearings do not always take place in a courtroom. In those instances, the Commission has to bring in private transcribers.

Judge Reed said the other issue he wanted to talk about is the logistics of making audio recordings accessible. He said that the Commission's office is located at a secured site that is not typically available to members of the public. The Commission has a P.O. Box for security purposes. He said the Commission wants to maintain its security so the Commission is not at liberty to invite the press or members of the public to its main location. He said the Commission's staff is constantly engaged with the Commission's work. A staff member would have to be available to provide access to the audio recording.

The Chair asked whether Judge Reed was suggesting that the Commission faces logistical problems in letting someone listen to audio recordings of a hearing.

Judge Reed said that the Commission is dealing with multiple layers of issues in trying to permit access to audio recordings. He said there is an issue of where the press would listen to the recordings. It would not be in the Daily Record's office, nor would it be at the Commission's secure facility. He

said that he considered making his chambers available to those who want to review audio recordings. However, that would mean that he would have to sit there during the review. He said his chambers does not have staff available to oversee such access. He said the Commission tries to be fair. If they grant access to the Daily Record, then they would also have to permit access to the New York Times or any other press.

Mr. Frederick said that he is confident that the New York Times is not interested in Commission hearings.

Judge Reed said that he understood. However, the Commission does have legitimate concerns about granting access to the media and the public, especially prior to the conclusion of the Commission's hearings.

The Chair invited further comment on Rule 18-435.

Mr. Collins said that the Maryland Association of Circuit Judges' view on this issue is that if there is a recording or transcript available to the Commission, then a copy should be made available to the judge at no cost.

There being no motion to amend or disapprove of the proposed Rule, it was approved.

Rule 18-436 involves the filing of charges and proceedings before the Commission. Mr. Frederick said that subsection (a)(1) will be deleted because that provision already is in the

Rule. He said the sections that follow subsection (a)(1) will be renumbered by the Style Committee.

By consensus, the Committee approved the Rule as amended.

Rule 18-437 covers the filing of proceedings in the Court of Appeals. Mr. Frederick said the Committee did not receive any comments about this Rule.

There being no motion to amend or disapprove the proposed Rule, it was approved.

Rule 18-438 covers the suspension of execution of discipline. Mr. Frederick said that this Rule addresses the issue previously discussed where the Commission selects a person to monitor the judge's compliance with terms of the Court's order or agreement with the Commission.

The Chair said that as a style matter, a change needs to be made to subsection (b)(2). In the fourth line of that subsection, the term "Investigative Counsel" should be changed to "the monitor."

Mr. Frederick said with the assent of the Committee, that change can be made by the Style Subcommittee. By consensus, the Committee approved the Rule as amended.

Rule 18-441 covers cases of alleged apparent disability or impairment. Mr. Frederick said that the Committee received a Comment from the Commission regarding this Rule. The Commission would like the Rule to indicate that Investigative Counsel makes

"recommendations" rather than "findings." He said that the Commission's comment is well-founded.

The Reporter asked for clarification as to which section in Rule 18-441 is proposed to be changed. The Chair said that the second line under subsection (b)(1) will be changed to read, "impairment, or by an inquiry into such a status commenced by Investigative Counsel."

Mr. Frederick asked for the Committee's assent to make those changes by the Style Subcommittee. By consensus, the Committee approved the Rule as amended.

Rule 18-442 covers interim suspension or administrative leave upon indictment. Mr. Frederick said this Rule is not controversial in any way.

There being no motion to amend or disapprove the proposed Rule, it was approved.

There being no further business before the Committee, the Chair adjourned the meeting.

# **APPENDIX 1**

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

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MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-401. PREAMBLE; FUNCTION OF THIS CHAPTER

(a) Code of Judicial Conduct

The Code of Judicial Conduct, set forth in Chapter 100 of this Title, directs that judges maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. The purpose of the Code is to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct.

The Code makes clear that, although it is binding and enforceable, not every transgression will result in the imposition of discipline, that the imposition of discipline should be determined through a reasonable and reasoned application of the Rules and depend upon such factors as the seriousness of the transgression, the facts and circumstances at the time, any pattern of improper activity, whether there have been previous violations, and the effect of the misconduct on the judicial system and others.

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Cross reference: See Rule 18-100.4.

(b) Function of This Chapter

(1) The Commission on Judicial Disabilities was created by the Maryland Constitution to maintain public confidence in the integrity, independence, and impartiality of judges and the judicial system by:

(A) enforcing standards of judicial conduct;

(B) assisting the Judiciary in maintaining the necessary balance between independence and accountability;

(C) assuring the public that the Judiciary does not condone misconduct by judges;

(D) creating a greater public awareness of what constitutes proper and improper judicial conduct;

(E) providing a forum for receiving and investigating citizen complaints against judges;

(F) determining whether a judge has committed sanctionable conduct or is disabled **or impaired** and, if so, imposing or recommending an appropriate remedy;

(G) assisting judges who have committed minor and perhaps unintended violations to appreciate that fact so as to avoid a repetition of it; and

(H) protecting judges from false, unfounded, and inaccurate accusations that can damage their reputations.

(2) In carrying out their respective functions under this Chapter, Investigative Counsel, the Board, and the Commission should keep in mind each of these purposes and principles, as should all judges.

Source: This Rule in new.

REPORTER'S NOTE

This Rule is new. It is derived in part from the Preamble to the American Bar Association Model Rules for Judicial Disciplinary Enforcement (ABA Model Rules) and in part from the 1999 *Handbook for Members of Judicial Conduct Commissions* composed for the American Judicature Society by Cynthia Gray. It is intended to articulate the overall function of the Judicial Disabilities Commission and provide general guidance for judges, Investigative Counsel, the Judicial Inquiry Board, and the Commission in carrying out that function in a fair and effective manner.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule ~~18-401~~ 18-402. ~~COMMISSION ON JUDICIAL DISABILITIES~~  
DEFINITIONS

~~In this Chapter~~ The following definitions apply in this  
Chapter except as ~~expressly~~ otherwise expressly provided or as  
necessary implication requires:

(a) Address of Record

"Address of record" means a judge's current home address  
or another address designated in writing by the judge.

Cross reference: See Rule ~~18-409~~ 18-417 (a)(1) concerning  
confidentiality of a judge's home address.

(b) Board

"Board" means the Judicial Inquiry Board appointed  
pursuant to Rule 18-403.

(c) Censure

"Censure" means a formal public sanction by the Court of  
Appeals based on a finding that the judge committed sanctionable  
conduct that justifies more than a reprimand but was not so  
egregious as to justify suspension or removal.



~~(e)~~(d) Charges

"Charges" means the charges filed with the Commission by Investigative Counsel pursuant to Rule ~~18-407~~ 18-425.

~~(d)~~(e) Commission

"Commission" means the Commission on Judicial Disabilities created by Art. IV, §4A of the Maryland Constitution.

~~(e)~~(f) Commission Record

"Commission record" means all documents pertaining to the judge who is the subject of charges that are filed with the Commission or made available to any member of the Commission and the record of all proceedings conducted by the Commission with respect to that judge.

Cross reference: See Rule 18-402 (d).

~~(f)~~(g) Complainant

"Complainant" means a person who has filed a complaint, and in Rule 18-421 (a), "complainant" also includes a person who has filed a written allegation of misconduct by or disability of a judge that is not under oath or supported by an affidavit.

~~(g)~~(h) Complaint

"Complaint" means a written communication under oath or supported by an affidavit alleging that a judge has a disability **or impairment** or has committed sanctionable conduct.

Committee note: The complainant may comply with the affidavit requirement of this section by signing a statement in the following form: "I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief." It is not required that the complainant appear before a notary public.

~~(h)~~(i) Disability

"Disability" means a mental or physical disability that ~~seriously~~ significantly interferes with the performance of a judge's duties and is, or is likely to become, permanent.

~~(i)~~ ~~Formal Complaint~~

~~"Formal Complaint" means a written communication under affidavit signed by the complainant, alleging facts indicating that a judge has a disability or has committed sanctionable conduct.~~

~~Committee note: The complainant may comply with the affidavit requirement of this section by signing a statement in the following form: "I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief." It is not required that the complainant appear before a notary public.~~

(j) Impairment; Impaired

"Impairment" or "impaired" means a mental or physical condition, including an addiction, that has significantly interfered with the performance of a judge's duties but may be remediable and, if remedied, is not likely to become permanent.

~~(j)~~(k) Judge

"Judge" means (1) a judge of the Court of Appeals, the

Court of Special Appeals, a circuit court, the District Court, or an orphans' court, and (2) includes a senior judge ~~during any period that the senior judge has been approved to sit.~~

Cross reference: See Md. Const., Art. 4, §3A and Code, Courts Article, §1-302.

(1) Reprimand

"Reprimand" means an informal private sanction imposed by the Commission pursuant to Rule 18-427 for sanctionable conduct that does not justify either dismissal of a complaint or censure, suspension or removal.

~~(k)~~ (m) Sanctionable Conduct

(1) "Sanctionable conduct" means misconduct while in office, the persistent failure by a judge to perform the duties of the judge's office, or conduct prejudicial to the proper administration of justice. A judge's violation of any of the provisions of the Maryland Code of Judicial Conduct promulgated by Title 18, Chapter 100 may constitute sanctionable conduct.

(2) Unless the conduct is occasioned by fraud or corrupt motive or raises a substantial question as to the judge's fitness for office, "sanctionable conduct" does not include:

(A) making an erroneous finding of fact, reaching an incorrect legal conclusion, or misapplying the law; or

(B) failure to decide a matter ~~matters~~ in a timely fashion unless such failure is habitual.

Committee note: Sanctionable conduct does not include a judge's simply making wrong legally erroneous decisions ~~—even very wrong decisions—~~ in particular cases.

Cross reference: Md. Const., Art. IV, §4B (b)(1). For powers of the Commission in regard to any investigation or proceeding under §4B of Article IV of the Constitution, see Code, Courts Article, §§13-401 through 13-403.

Source: This Rule is derived from former Rule 16-803 (2016).

REPORTER'S NOTE

This Rule is derived from former Rule 18-401 but includes **three** new definitions - of "censure," **impairment; impaired** and "reprimand." The definitions of "censure" and "reprimand" are derived, in part, from the Arizona judicial discipline Rules and, along with other proposed changes, are intended to address concerns that have been raised regarding private and public reprimands and their relationship to a censure.

**These new definitions introduce two major recommendations proposed by the Committee - creating a new intermediate category of Commission jurisdiction, that of a judge's "impairment," and deleting the authority of the Commission to issue public reprimands.**

**A definition of "Impairment; Impaired" is added to the Rule as section (j). Currently, the Commission may consider only two kinds of complaints about a judge - that the judge committed sanctionable conduct, for which certain sanctions are permissible, or that the judge is disabled. Language in Md. Constitution, Art. IV, § 4B defines disability as a condition that is likely to be permanent and for which permanent retirement is the appropriate disposition. Cases have arisen, however, in which a judge may be suffering from a physical, mental, or addictive condition that significantly interferes with the judge's ability to discharge his or her judicial duties which, in turn, may generate a complaint of sanctionable conduct, but which**

may be treatable and, if properly treated, will not likely become permanent and thus not constitute a disability within the meaning of Art, IV, § 4B. The Committee believes it important to take account of this gap and, principally through the device of a conditional diversion agreement, provide a reasonable and effective remedy that will get the judge the help he or she needs without imposing punitive sanctions and yet protect the public.

Definitions of "Censure" and "Reprimand" are added to the Rule as sections (c) and (l), respectively. Art. IV, § 4B(a)(2) of the Md. Constitution authorizes the Commission, upon a finding that a judge has committed sanctionable conduct, to "issue a reprimand" to the judge or to recommend to the Court of Appeals that it "censure" that judge. Neither term is defined in the Constitution or in the two implementing statutes. See Code, Courts Art. §§ 13-401 through 13-403. Current Rule 18-406(b) permits the Commission, after an investigation but before any charges are filed, to issue a *private* reprimand, provided the judge effectively consents to it by waiving his/her right to challenge it. Rule 18-407(j) permits the Commission, after charges and a hearing, to issue a *public* reprimand, for which there is no direct review by the Court of Appeals, or to recommend to the Court a censure which only the Court can issue and, by the filing of exceptions, the judge can challenge. See *In the Matter of the Honorable Pamela J. White*, 451 Md. 630 (2018).

Concerns have been expressed regarding the distinction, if any, between a public reprimand and a censure. Definitionally, there seems to be no real distinction between them. *Black's Law Dictionary* (8<sup>th</sup> ed.) defines the noun form of "censure" as "an official reprimand or condemnation" and the verb form as "to reprimand." Both are public; both constitute discipline based on a finding of sanctionable conduct. The only apparent distinction is that the Commission is empowered to issue a public reprimand on its own volition and, if it does so, there is no direct right of review in the Court of Appeals. *White, supra*. If the Commission recommends a censure, the judge may file exceptions and is entitled to a hearing on those exceptions. See Md. Const., Art. IV, § 4B(b)(1). It well may be that, if the Commission recommends a censure and the Court finds sanctionable conduct, it may itself issue a public reprimand rather than a censure. Section 4B(1) permits the Court, upon a finding of

misconduct, to "censure or otherwise discipline the judge (emphasis added), which conceivably could include a reprimand.

Prior to 1974, the Commission had no power to issue any sanction against a judge. Its only authority, apart from investigating complaints, was to recommend to the Court of Appeals the removal or retirement of a judge. Following the Court's decision in *In re Diener and Broccolino*, 268 Md. 659 (1973), the Legislature proposed, and the People ratified a Constitutional amendment that gave the Commission the power to issue a reprimand and to recommend to the Court a censure. See 1974 Md. Laws, Ch. 886. The Legislature did not retain its committee files at that time, so, other than the Senate and House Journals, which are of no assistance in this regard, there is no direct archival history as what the intended distinction was between a public reprimand and a censure, other than who could issue them.

Some guidance, however, is provided by proceedings of the Maryland State Bar Association at its January 1974 annual meeting that occurred just before the 1974 Legislative Session. MSBA had created a Special Committee on Judicial Selection and Tenure, which made a Report to that meeting regarding the proposed Constitutional Amendment. The Committee was a knowledgeable and politically astute one. Among its members were John H. Briscoe, the Speaker of the House of Delegates; William S. James, the President of the Senate; and John C. Eldridge, then the Governor's Chief Legislative Officer. In its Report, the Committee stated:

"The proposal would empower the Commission on Judicial Disabilities to reprimand a judge. The Constitution currently authorizes the Commission only to make recommendations for disciplinary action to the Court of Appeals. The Committee believes it important for the Commission itself to have the power to reprimand a judge and that this power should be formally granted. The Commission has had some complaints about the conduct of judges which amounted to minor lapses in proper judicial demeanor. A formal record of the investigation of incidents such as these should, we feel, be maintained by the Commission for appropriate use in a recommendation to the Court of Appeals if a judge continues to be involved in minor infractions.

Examples of such minor infractions are lateness in opening court with consequent inconvenience to witnesses, juries and counsel and occasional caustic remarks to witnesses or parties. Such conduct repeated often enough certainly would justify disciplinary action by the Court of Appeals; but the first instance would not."

See *Md. State Bar Association Transactions*, Vol. 79, No. 1 (Jan. 3-5, 1974), pages 34-35.

With respect to censure, the Committee advised:

"The proposal would specifically empower the Commission to recommend to the Court of Appeals that a judge be censured, in addition to the present power to recommend that he be removed or retired. This change seems wise in view of the closely divided Court in the recent decision in [*In re Diener and Broccolino*] holding that the Commission has the power to recommend that a judge be censured, even though the Commission is not explicitly granted this power by the Constitution."

*Id.* A Resolution approving support of the proposed amendment was adopted. *Id.* at 145.

At the time, there was no provision for dismissal of a complaint accompanied by a warning or letter of cautionary advice. That was not added until 1995. The conception in 1974 seemed to be that a reprimand would be private and not in the nature of actual discipline. That changed. Current Rule 18-406(b) makes clear that a private reprimand, though private, does constitute discipline. The "one free bite" for which the private reprimand was initially intended, is now achieved through a dismissal accompanied by a warning (or letter of cautionary advice) or through a deferred discipline agreement (conditional diversion agreement), neither of which constitutes discipline.

In order to preserve the initial intent that a reprimand be private, however, the Rules Committee recommends that the authority of the Commission to issue on its own a public reprimand, which exists only by Rule 18-407(j), be repealed and that, with two exceptions, all reprimands issued by the Commission be private and not subject to disclosure by the Commission.

One exception is in current Rule 18-409(b)(3), which allows the Commission, upon request, to disclose to the Court of Appeals or the Chief Judge of that Court information regarding any completed proceeding that did not result in dismissal, including a reprimand. That was added at the Court's request, as it may bear on decisions whether to recall a retired judge, whether to designate a judge as an administrative judge, or consider the judge for some other appointment. The other exception is in current Rule 18-409 (proposed Rule 18-407), permitting the Commission to disclose to judicial nominating commissions and appointing authorities information regarding completed proceedings that did not result in dismissal of the complaint.

There is one other issue that the Committee believes needs to be addressed. At present, a private reprimand cannot be issued unless the judge effectively consents to it. The Committee will be recommending as part of new Rule 18-427 the elimination of that condition. The Constitution permits the Commission to issue a reprimand without the judge's consent, and that authority should not be fettered by a Rule. Eliminating the requirement of consent, however, could leave the judge powerless to object to the reprimand and to present argument against it, either before the Commission or the Court of Appeals. That was at issue in both the *White* and *Reese* cases.

The dilemma is how to provide an opportunity to challenge a proposed reprimand and still have it (and proceedings leading up to it) remain private. Art. IV, § 4B(3) provides that all proceedings, testimony, and evidence before the Commission shall be confidential and privileged, except as provided by rule of the Court of Appeals. Current Rule 18-409(a)(3) provides that, after the filing of a response to charges alleging sanctionable conduct, the charges and all subsequent proceedings shall be open to the public.

As will be seen in proposed new Rule 18-427, the Committee proposes to give a judge three options when presented with a proposed (private) reprimand: (1) make no response or affirmatively waive any right to oppose it, in which event the Commission may proceed to issue the reprimand; (2) agree not to contest the facts underlying the recommendation but request an on-the-record but nonpublic hearing before the Commission on whether, upon those facts, a reprimand is an appropriate disposition, or (3) contest the facts underlying the



recommendation, in which event, absent some other agreed resolution, charges would be filed, the matter would be referred to the Inquiry Board, and, upon the Board's Report, a full public evidentiary hearing would be conducted by the Commission. The first two options would preserve the privacy of the reprimand, if one is issued; the second would allow the judge to contest whether, on the facts alleged, a reprimand is an appropriate sanction. Under the third option, if the Commission finds that the judge has committed sanctionable conduct essentially as alleged, it may recommend to the Court of Appeals that the judge be censured. The judge would then have the full right to a hearing before the Commission and review by the Court of Appeals, but the minimum sanction, if one is imposed, would be a censure rather than a reprimand.

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DIVISION 1. GENERAL PROVISIONS

Rule 18-403. RIGHT TO ATTORNEY

Subject to Rule 18-422, a judge against whom a complaint has been filed is entitled to retain and have the assistance of an attorney at every stage of proceedings under the Rules in this Chapter.

Cross reference: Rule 18-422 specifies when Investigative Counsel is required to notify the judge of the filing of a complaint.

Source: This Rule is new.

REPORTER'S NOTE

This Rule, providing the right of a judge to an attorney in disciplinary proceedings, is new. It is derived from ABA Model Rule 9. The cross-reference calls attention to the fact that, if a judge does not request immediate notice of the opening of a file by Investigative Counsel pursuant to Rule 18-422, the judge may not be informed that a complaint has been filed until near the end of Investigative Counsel's investigation and would not likely have the actual assistance of an attorney until that time.

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DIVISION 1. GENERAL PROVISIONS

Rule 18-404. SERVICE OF DOCUMENTS

Charges filed against the judge shall be served on the judge at the judge's address of record by certified mail, restricted delivery, and by first class mail. Unless otherwise directed by a Rule in this Chapter or agreed to in writing between the serving party and the party to be served, all other documents to be served on the judge, Investigative Counsel, the Board, or the Commission shall be served electronically at an address furnished by each of them to the other.

Cross reference: See Rule 18-422 (b)(4).

Source: This Rule is new.

REPORTER'S NOTE

Current Rule 18-407(b) permits charges to be served on the judge by any means reasonably calculated to give to give actual notice. A comment from the Maryland Circuit Judges Association recommended the change reflected in the first sentence. In conformance with the rapidly increasing movement to electronic transmissions, through MDEC, the attorney information system, the filing of financial disclosure reports by judges, tax returns, etc., there is no reason why, unless otherwise agreed to, the

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service of documents by judges, Investigative Counsel, the Board, or the Commission also should not be electronic.

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DIVISION 1. GENERAL PROVISIONS

Rule 18-405. EX PARTE COMMUNICATIONS

Except as otherwise permitted by the Rules in this Chapter, directly or by necessary implication, members of the Commission, the Executive Secretary to the Commission, and members of the Board shall not engage in ex parte communications with Investigative Counsel, a judge against whom a complaint has been filed, or an attorney for that judge, that pertain to the substance of a complaint against that judge.

Committee note: The Rules in this Chapter give the Chairs of the Commission and the Board certain administrative functions that anticipate some ex parte communications with Investigative Counsel. The intent of this Rule is not to preclude those kinds of ex parte communications but only those that reasonably could leave the impression, intended or unintended, of an attempt to influence the nature, scope, or conduct of an investigation by Investigative Counsel, a recommendation by Investigative Counsel, or a proceeding or decision by the Commission or the Board. Commission and Board members should be guided by relevant provisions of Rule 18-202.9. This Rule also is not intended to preclude general supervision of Investigative Counsel, who is appointed by and serves at the pleasure of the Commission.

Source: This Rule is new and is based in part on ABA Model Rule 10.

REPORTER'S NOTE

This Rule is new and is based in part on ABA Model Rule 10. Complaints have been made about alleged improper *ex parte* communications between Commission or Inquiry Board members or employees and Investigative Counsel or judges, which the Commission and Investigative Counsel have denied. The Committee has no direct knowledge of whether such communications have occurred but believes it useful to provide some guidance in that regard through this Rule. The Committee note recognizes that some *ex parte* communications may be necessary and permissible.

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DIVISION 1. GENERAL PROVISIONS

Rule 18-406. STANDARD OF PROOF

The burden shall be on Investigative Counsel to prove charges of sanctionable conduct or disability by clear and convincing evidence.

Source: This Rule is based on former Rule 18-407 (j) and ABA Model Rule 7.

REPORTER'S NOTE

Clear and convincing evidence is the current standard of proof with respect to whether the judge has a disability or has committed sanctionable conduct. See Rule 18-407 (j). That statement has simply been moved to a General Provision Rule.

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DIVISION 1. GENERAL PROVISIONS

RULE ~~18-409~~ 18-407. ~~PUBLIC ACCESS~~ CONFIDENTIALITY

(a) Generally

Except as otherwise expressly provided by these Rules, proceedings and information relating to a complaint or charges shall be open to the public or confidential and not open to the public, as follows:

(1) ~~Address of Record~~ Judge's Address and Identifying Information

The judge's current home address and personal identifying information not otherwise public shall remain confidential at all stages of proceedings under these Rules. Any other address of record shall be open to the public if the charges and proceedings are open to the public.

(2) Complaints; and Investigations; Disposition Without Charges

Except as otherwise required by Rules 18-425, 18-426, and 18-427, All all proceedings under Rules ~~18-404 and 18-405~~ 18-421, 18-428, and 18-441 shall be confidential.



(3) Upon Resignation, Voluntary Retirement, Filing of a Response, or Expiration of the Time for Filing a Response

~~After the filing of a response to charges~~ Charges alleging sanctionable conduct, ~~whether or not joined with charges of disability, or expiration of the time for filing a response, the charges~~ and all subsequent proceedings before the Commission on ~~them~~ those charges shall be open to the public upon the first to occur of (A) the resignation or voluntary retirement of the judge, (B) the filing of a response by the judge to the charges, or (C) expiration of the time for filing a response. ~~If the charges allege only that the judge has a disability, the charges~~ Charges alleging disability or impairment and all proceedings before the Commission on them shall be confidential.

(4) Work Product, Proceedings, and Deliberations

Except to the extent admitted into evidence before the Commission, the following matters shall be confidential: (A) Investigative counsel's work product; (B) proceedings before the Board, including any peer review proceeding; (C) any materials reviewed by the Board during its proceedings that were not submitted to the Commission; (D) deliberations of the Board and Commission; and (E) records of the Board's and Commission's deliberations. ~~and records not admitted into evidence before the~~

~~Commission, the Commission's deliberations, and records of the Commission's deliberations shall be confidential.~~

(5) Proceedings in the Court of Appeals

Unless otherwise ordered by the Court of Appeals, the record of Commission proceedings filed with that Court and any proceedings before that Court on charges of sanctionable conduct shall be open to the public. The record of Commission proceedings filed with that Court and any proceedings before that Court on charges of disability or impairment shall be confidential. An order of retirement by the Court shall be public.

(b) Permitted Release of Information by Commission

(1) Written Waiver

The Commission may release confidential information upon a written waiver by the judge.

(2) Explanatory Statement

The Commission may issue a brief explanatory statement necessary to correct any inaccurate or misleading information from any source about the Commission's process or procedures ~~public misperception about actual or possible proceedings before the Commission.~~

(3) To Chief Judge of Court of Appeals

(A) Upon request by the Chief Judge of the Court of Appeals  
~~or the Chief Judge of that Court,~~ the Commission shall disclose  
to the ~~Court or~~ Chief Judge:

~~(A) information about any completed proceeding that did not  
result in dismissal, including reprimands and deferred discipline  
agreements; and~~

(i) whether a complaint is pending against the judge who  
is the subject of the request; and

(ii) the disposition of each complaint that has been  
filed against the judge within the preceding five years.

~~(B) the fact that a complaint is pending.~~

(B) The Chief Judge may disclose this information to the  
incumbent judges of the Court of Appeals in connection with the  
exercise of any administrative matter over which the Court has  
jurisdiction. Each judge who receives information pursuant to  
subsection (b)(3) of this Rule shall maintain the applicable  
level of confidentiality of the information otherwise required by  
the Rules in this Chapter.

(4) Information Involving Criminal Activity, Health, and  
Safety

The Commission may provide (A) information involving  
criminal activity, including information requested by subpoena  
from a grand jury, to applicable law enforcement and prosecuting

officials, and (B) information regarding health and safety concerns to applicable health agencies and law enforcement officials, and to any individual who is the subject of or may be affected by any such health or safety concern.

(5) Finding of Disability **or Impairment**

The Commission may disclose any disposition imposed against a judge related to charges of disability **or impairment** to the applicable administrative judge or Chief Judge of the disabled **or impaired** judge's court or, if the disabled **or impaired** judge is a recalled senior judge, to the Court of Appeals.

~~(4)~~(6) Nominations; Appointments; Approvals

(A) Permitted Disclosures

Upon a written application made by a judicial nominating commission, a Bar Admission authority, the President of the United States, the Governor of a state, territory, district, or possession of the United States, or a committee of the General Assembly of Maryland or of the United States Senate which asserts that the applicant is considering the nomination, appointment, confirmation, or approval of a judge or former judge, the Commission shall disclose to the applicant:

(i) Information about any completed proceedings that did not result either in dismissal of the complaint or in a

conditional diversion agreement that has been satisfied ~~7~~  
~~including reprimands and deferred discipline agreements; and~~

(ii) ~~The mere fact that~~ Whether a ~~formal~~ complaint  
against the judge is pending.

Committee note: A reprimand issued by the Commission is disclosed under subsection (b)(6)(A)(i). An unsatisfied conditional diversion agreement is disclosed under subsection (b)(6)(A)(ii) as a pending complaint against the judge.

(B) Restrictions

Unless the judge waives the restrictions set forth in  
this subsection, when ~~When~~ the Commission furnishes information  
to an applicant under this section, the Commission shall furnish  
only one copy of the material, ~~and it~~ which shall be furnished  
under seal. As a condition to receiving the material, the  
applicant shall agree that (i) the applicant will not ~~to~~ copy the  
material or permit it to be copied; (ii) ~~that~~ when inspection of  
the material has been completed, the applicant will ~~shall~~ seal  
and return the material to the Commission; and (iii) the  
applicant will not ~~to~~ disclose the contents of the material or  
any information contained in it to anyone other than another  
member ~~of~~ or the applicant.

(C) Copy to Judge

The Commission shall send the judge a copy of all  
documents disclosed under this subsection.

Cross reference: For the powers of the Commission in an investigation or proceeding under Md. Const., Article IV, § 4B, see Code, Courts Article, §§ 13-401 through 13-403, ~~402, and 403~~.

(c) Statistical Report

The Commission may include in a publicly available statistical report the number of complaints received, investigations undertaken, and dispositions made within each category of disposition during a fiscal or calendar year, provided that, if a disposition has not been made public, the identity of the judge involved is not disclosed or readily discernible.

Source: This Rule is in part derived from former Rule 18-409 (2018) and is in part new 16-810 (2016).

REPORTER'S NOTE

This Rule is derived from current Rule 18-409. Several style, clarifying, and cross-reference amendments are made. At the request of some judges, in addition to the judge's home address, other personal identifying information regarding a judge that is not otherwise public would remain confidential. Some of the new provisions were approved by the Rules Committee in 2016 and included in the Committee's 191<sup>st</sup> Report to the Court of Appeals.

Two substantive recommendations were considered by the Committee: (1) whether the Commission should disclose private reprimands and conditional diversion agreements to judicial nominating commissions or appointing authorities and (2) whether a Rule should preclude such nominating commissions or appointing authorities from requesting that information.

The second issue is the easier one. Although the Court of

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Appeals, which currently approves the application forms used by the Maryland nominating commissions could delete from the forms any question regarding reprimands and conditional diversion agreements, it would be unable to prohibit the nominating commissions, the Governor, or any Federal official or body from asking an applicant about them, or about any letters of cautionary advice that had been issued by the Commission. Though private, reprimands do constitute discipline based on a finding of sanctionable conduct, and that may be of legitimate interest to nominating commissions and appointing authorities in deciding whether to recommend or appoint (or re-appoint) the judge.

The first issue - whether the Commission should disclose that information - is a policy one. The disclosure that currently is permitted is a limited one that is subject to protective conditions to avoid any further dissemination of the information. If the Commission is precluded from supplying that information, there would be no practical way for a nominating commission or appointing authority to verify a negative response given by the applicant judge.

The current Rule does not permit the Commission to disclose complaints that have been dismissed, and that would include dismissals accompanied by a letter of cautionary advice.

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DIVISION 1. GENERAL PROVISIONS

Rule 18-408. COSTS

(a) Generally

Unless the Court of Appeals orders otherwise, the prevailing party in proceedings under this Chapter is entitled to reasonable and necessary costs. The Court shall determine who is the prevailing party and, by order, may allocate costs among the parties.

(b) Costs defined

Costs include:

(1) court costs;

(2) reasonable and necessary fees and expenses paid to an expert witness who testified in a proceeding before the Commission pursuant to Rule 18-413;

(3) reasonable and necessary travel expenses of a witness who (A) is not an expert witness, and (B) who testified in a proceeding before the Commission pursuant to Rule 18-425;

(4) reasonable and necessary costs of a transcript or proceedings before the Commission pursuant to Rule 18-425;



(5) reasonable and necessary fees and expenses paid to a court reporter or reporting service for attendance at a deposition and for preparing a transcript, audio recording, or audio-video recording of the deposition;

(6) reasonable and necessary costs of a physical or mental examination and written report ordered pursuant to Rule 18-441 (f)(1)(B); and

(7) other reasonable and necessary expenses, excluding attorneys' fees, incurred in prosecuting or defending against charges filed in proceedings before the Commission pursuant to Rule 18-425.

Source: This Rule is new.

REPORTER'S NOTE

This Rule is new. There is no provision for the assessment of costs in the current Rules governing the Commission on Judicial Disabilities, and, unlike in Attorney Grievance cases, the Court of Appeals has not been assessing costs in judicial disability cases. Comments were received from judges regarding the cost of defending against complaints. Most of the comments dealt with attorneys' fees, but they included concerns about deposition and transcript costs and witness expenses as well. This Rule permits the Court to assess the costs incurred in proceedings before the Commission, other than attorneys' fees.

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DIVISION 1. GENERAL PROVISIONS

Rule 18-409. USE OF ALLEGATIONS FROM DISMISSED CASE

If a complaint has been dismissed without a letter of cautionary advice, allegations made in the complaint may not be used in any disciplinary proceeding against the judge, either as a judge or as an attorney. If additional information becomes known to Investigative Counsel regarding a complaint that was dismissed before the filing of charges, the earlier allegations may be reinvestigated.

Source: This Rule is new and is derived in part from ABA Model Rule 18.

REPORTER'S NOTE

This Rule is new and was derived, in part, from ABA Model Rule 18. It precludes allegations made in a complaint that has been dismissed outright from being used in subsequent disciplinary proceedings against the judge but permits those allegations to be reinvestigated if the complaint had been dismissed before charges were filed and additional information becomes known to Investigative Counsel.

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DIVISION 2. STRUCTURE

RULE ~~18-402~~ 18-411. JUDICIAL DISABILITIES COMMISSION

(a) Chair and Vice Chair

The Court of Appeals shall designate a judicial member to serve as a Chair of the Commission ~~The Commission shall select one of its members to serve as Chair and another of the judicial members~~ to serve as Vice Chair ~~for such terms as the Commission shall determine~~. The Vice Chair shall perform the duties of the Chair whenever the Chair is disqualified or otherwise unable to act. The Chair and Vice Chair shall serve in those capacities at the pleasure of the Court.

(b) Compensation

A member of the Commission may not receive compensation for serving in that capacity but is entitled to reimbursement for expenses reasonably incurred in the performance of official duties in accordance with standard State travel regulations.

~~(b)(c)~~ Interested Member Recusal

A member of the Commission shall not participate as a member in any discussion, disposition, or proceeding in which (1)

the member is a complainant, (2) the member's disability or sanctionable conduct is in issue, (3) the member's impartiality might reasonably be questioned, (4) the member has personal knowledge of disputed evidentiary facts involved in the proceeding, or (5) the recusal of a judicial member would otherwise be required by the Maryland Code of Judicial Conduct.

Cross reference: See Md. Const., Article IV, § 4B (a), providing that the Governor shall appoint a substitute member of the Commission for the purpose of a proceeding against a member of the Commission.

~~(e)~~(d) Executive Secretary

(1) Appointment; Compensation

The Commission may select an attorney as Executive Secretary. The Executive Secretary shall serve at the pleasure of the Commission, ~~advise and assist the Commission, have other administrative powers and duties assigned by the Commission,~~ and receive the compensation set forth in the budget of the Commission.

(2) Duties

The Executive Secretary shall (A) receive documents that are filed with the Commission and maintain the records of the Commission, (B) prepare the agenda of meetings of the Commission and before each meeting send to each Commission member a copy of the agenda and meeting materials, (3) serve as attorney

to the Commission, (4) serve as liaison to the Board and to Investigative Counsel, and (5) have such other administrative powers and duties assigned by the Commission, other than duties committed to Investigative Counsel by these Rules.

~~(d)~~(e) Investigative Counsel; Assistants

(1) Appointment; Compensation

Subject to approval by the Court of Appeals, the The Commission shall appoint an attorney with substantial trial experience and familiarity with these Rules and the Code of Judicial Conduct as Investigative Counsel. Before appointing Investigative Counsel, the Commission shall notify bar associations and the general public of the vacancy and shall consider any recommendations that are timely submitted. Investigative Counsel shall serve at the pleasure of the Commission and shall receive the compensation set forth in the budget of the Commission.

(2) Duties

Investigative Counsel shall have the powers and duties set forth in ~~these~~ the Rules in this chapter and shall report and make recommendations to the Board and the Commission as required under these Rules or directed by the Commission. All reports and

recommendations shall be in writing and maintained as a record of Investigative Counsel and the recipient.

(3) Additional Attorneys and Staff

As the need arises and to the extent funds are available in the Commission's budget, the Commission may appoint additional attorneys or other persons, other than its Executive Secretary, to assist Investigative Counsel. Investigative Counsel shall keep an accurate record of the time and expenses of additional persons employed and ensure that the cost does not exceed the amount allocated by the Commission.

~~(e)~~(f) Quorum

(1) Generally

The presence of a majority of the members of the Commission constitutes a quorum for the transaction of business, provided that at least one judge, one ~~lawyer~~ attorney, and one public member are present unless, by reason of vacancies or recusals, the presence of at least one judge, one attorney, and one public member is not possible. At a hearing on charges held pursuant to Rule ~~18-407 (i)~~ 18-425, a Commission member is present only if the member is physically present ~~in person~~. Under all other circumstances, a member may be physically present in person or by telephone, ~~or~~ video, or other electronic conferencing. Other than adjournment of a meeting for lack of a

quorum, no action may be taken by the Commission without the concurrence of a majority of members of the Commission.

OPTIONAL ADDITIONAL PROVISION

(2) Special Designation of Substitute Member

If, by reason of vacancies or recusals, the quorum in a particular proceeding would not include at least one judge, one attorney, and one public member, the Court of Appeals, with the written consent of the judge who is the subject of the proceeding, may designate a judge, including a senior judge, an attorney, or a member of the public, as needed, for the composition of a quorum in that proceeding, to serve as a substitute member of the Commission.

(g) General Powers of Commission

In accordance with Maryland Constitution, Article IV, §4B and Code, Courts Article, §13-401 through 13-403, and in addition to any other powers provided in the Rules in this Chapter, the Commission may:

(1) administer oaths and affirmations;

(2) issue subpoenas and compel the attendance of witnesses and the production of evidence;

(3) require persons to testify and produce evidence by granting them immunity from prosecution or from penalty or

forfeiture; and

(4) in case of contumacy by any person or refusal to obey a subpoena issued by the Commission, invoke the aid of the circuit court for the county where the person resides or carries on a business.

~~(f)~~(h) ~~Record~~ Records

The Commission shall keep a record of all documents filed with the Commission and all proceedings conducted by the Commission concerning a judge, subject to a retention schedule approved by the Chief Judge of the Court of Appeals. The Executive Secretary of the Commission shall attend the Commission meetings and keep minutes of those meetings in the form that the Commission requires, subject to the retention schedule approved by the Chief Judge of the Court of Appeals.

~~(g)~~(i) Annual Report

Not later than September 1 of each year, The the Commission shall submit an annual report to the Court of Appeals, not later than September 1, regarding its operations. The Report shall include and including statistical data with respect to complaints received and processed, but shall not include material declared confidential under Rule 18-407 subject to the provisions of Rule 18-409.

~~(h)~~(j) Request for Home Address

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Upon request by the Commission or the Chair of the Commission, the Administrative Office of the Courts shall supply to the Commission the current home address of each judge.

Cross reference: See Rules ~~18-401~~ 18-402 (a) and ~~18-409~~ 18-407 (a)(1).

Source: This Rule is derived from former Rule 18-402 (2018) ~~16-804 (2016)~~.

REPORTER'S NOTE

This Rule is derived from current Rule 18-402 but contains several important changes. The current Rule provides for the Chair and Vice-Chair of the Commission to be designated by the Commission members for such terms as they determine. Although historically, with one exception, the Chair has been the judicial member from the Court of Special Appeals, the current Rule would allow a public or attorney member to be designated as Chair. The Committee proposes that those designations be made by the Court of Appeals from among the judicial members of the Commission and that the designees serve in those capacities at the pleasure of the Court. A new § (b) precluding compensation for Commission members but requiring that they be reimbursed for reasonable expenses incurred in performing their official duties merely copies a provision to that effect in Art. IV, § 4B(g) of the Constitution.

Section (d), dealing with the Executive Secretary, is amended to set forth the duties of that official in greater detail. The language is taken from Rule 19-702(e), which deals with the Executive Secretary to the Attorney Grievance Commission, except for the addition of the express limitation that the Executive Secretary may not be assigned duties committed to Investigative Counsel by these Rules.

The amendment in § (e) makes the appointment of Investigative Counsel subject to approval by the Court of Appeals and requires, as a qualification for appointment, that the individual have substantial trial experience and a familiarity

with the Code of Judicial Conduct and the CJD Rules. Investigative Counsel serves a function similar to that of Bar Counsel, whose appointment is subject to approval by the Court of Appeals. Comments were received stressing the importance that Investigative Counsel, in evaluating citizen complaints, have some understanding of the stresses that judges, particularly trial judges, encounter on a regular basis, and the Committee believes that prior substantial trial experience will provide that appreciation. Subsection (e)(2) requires that all reports and recommendations from Investigative Counsel be in writing and that they be maintained as a record of Investigative Counsel and the recipient.

Section (f) addresses a significant problem that can arise when there are either vacancies or recusals. Except when a judicial member of the Commission is the subject of a complaint, there is no provision in the Constitution for the appointment of replacement or substitute members in the event of a vacancy or recusal. Such a vacancy or recusal disturbs the status balance on the Commission (3 judges, 3 attorneys, 5 public members) and may preclude a quorum under § (f). The current Rule provides that the presence of a "majority of the members of the Commission" constitutes a quorum for the transaction of business, *provided that* at least one judge, one lawyer, and one public member are present.

The Committee is unaware that there has been a problem of fewer than a majority of the members being available. Situations have arisen, however, in which two judges have recused, and, by reason of vacancies or recusals, the prospect exists for there to be no incumbent judges able to participate, in which event there would be no quorum and no ability of the Commission to act. That same problem could exist if there were no attorneys or public members available. To deal with that problem, the Committee proposes to add to the requirement that at least one member of each group be present the caveat "unless by reason of vacancies or recusals, the presence of at least one judge, one attorney, and one public member is not possible."

That would resolve the quorum issue, but not in the best manner, either for the judge or for the public. The broader issue of having fewer than the full complement of members in each class is not so easy to resolve. The Constitution provides for

all members to be appointed by the Governor, subject to Senate confirmation.

The Committee considered proposing a provision that would allow the Court of Appeals, *with the consent of the judge*, to designate a judge, attorney, or public member (as needed) to serve as a substitute member for that proceeding only. The Constitutional authority for such a provision is questionable, however, and, if possible at all, would have to rest on the Constitutional authority in Art. IV, § 4B for the Court to "prescribe by rule the means to implement and enforce the powers of the Commission and the practice and procedure before the Commission" and the consent of the judge. The Committee has chosen to present the issue to the Court for its consideration through an optional addition to section (f).

Section (g) restates the general powers of the Commission provided in the Constitution and statute. Section (h) provides that the retention schedule for Commission records be approved by the Chief Judge of the Court of Appeals. That provision appears also with respect to Investigative Counsel and Inquiry Board records.

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DIVISION 2. STRUCTURE

RULE ~~18-403~~ 18-412. JUDICIAL INQUIRY BOARD

(a) Creation and Composition

The ~~Commission~~ Court of Appeals shall appoint a Judicial Inquiry Board consisting of two judges, two attorneys, and three public members who are not attorneys or judges. No member of the Commission may serve on the Board.

(b) Compensation

A member of the Board may not receive compensation for serving in that capacity but is entitled to reimbursement for expenses reasonably incurred in the performance of official duties in accordance with standard State travel regulations.

(c) Chair and Vice Chair

The ~~Chair of the Commission~~ Court of Appeals shall designate a judicial member of the Board ~~who is a lawyer or judge~~ to serve as Chair of the Board and the other judicial member to serve as Vice Chair. The Vice Chair shall perform the duties of the Chair whenever the Chair is disqualified or otherwise unable to act.

(d) Recusal, Removal, or Replacement

(1) A member of the Board may not participate as a member in any discussion or recommendation in which (A) the member is a complainant, (B) the member's disability, **impairment**, or sanctionable conduct is in issue, (C) the member's partiality reasonably might be questioned, (D) the member has personal knowledge of disputed material evidentiary facts involved in the discussion or recommendation, or (E) the recusal of a judicial member otherwise would be required by the Maryland Code of Judicial Conduct.

(2) The ~~Commission~~ Court of Appeals ~~by majority vote~~ may remove or replace members of the Board at any time, and may temporarily replace a member of the Board with a former member of the Board or Commission for purposes of maintaining a quorum.

(e) Quorum

The presence of a majority of the members of the Board constitutes a quorum for the transaction of business, so long as at least one judge, one ~~lawyer~~ attorney, and one public member are present. A member of the Board may be physically present in person or present by telephone, ~~or~~ video, or other electronic conferencing. Other than adjournment of a meeting for lack of a

quorum, no action may be taken by the Board without the concurrence of a majority of the members of the Board.

~~(f) Powers and Duties~~

~~The powers and duties of the Board are set forth in Rules 18-404 and 18-405.~~

~~(g)~~(f) Record Records

Subject to a retention schedule approved by the Chief Judge of the Court of Appeals, the Board shall keep a record of all documents filed with the Board and all proceedings conducted by the Board concerning a judge. The Executive Secretary of the Commission shall attend the Board meetings and keep ~~a record~~ minutes of those meetings in the form that the Commission requires, subject to the approved retention schedule.

Source: This Rule is derived from former Rule 18-403 (2018) ~~16-804.1 (2016)~~.

REPORTER'S NOTE

This Rule is derived from current Rule 18-403. It provides that the Court of Appeals, rather than the Commission, would appoint the members of the Judicial Inquiry Board and designate the Chair and Vice-Chair of that Board. The Board was created by the Court - there is no provision for it in the Constitution or statutes - and the Court should determine its members and presiding officers. The purpose of the Board was to remove the Commission from involvement in the investigatory function, and that is better achieved, at least in perception if not in reality, by having the Board independently appointed by the Court. Section (f), consistently with recommended changes regarding the retention of Commission and Investigatory Counsel

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records, requires that the retention schedule for Board records be determined by the Chief Judge of the Court of Appeals.

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DIVISION 3. ADMINISTRATIVE PROCEDURE

RULE ~~18-404~~ 18-421. COMPLAINTS; PROCEDURE ON RECEIPT ~~PRELIMINARY~~  
~~INVESTIGATIONS~~

(a) ~~Complaints~~ Referral to Investigative Counsel

The Commission shall refer ~~All~~ all complaints and other written allegations of disability, **impairment**, or misconduct against a judge shall be sent to Investigative Counsel.

(b) Complaint that Fails to Allege Disability, **Impairment**, or Sanctionable Conduct

If Investigative Counsel concludes that a complaint which, liberally construed, fails to allege facts which, if true, would constitute a disability, **impairment**, or sanctionable conduct, Investigative Counsel shall (1) dismiss the complaint, and (2) notify the Complainant and the Commission, in writing, that the complaint was filed and dismissed and the reasons for the dismissal.

Committee note: Section (b) of this Rule does not preclude Investigative Counsel from communicating with the complainant or making an inquiry under section (f) of this Rule in order to clarify general or ambiguous allegations that may suggest a disability, **impairment**, or sanctionable conduct. Outright

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dismissal is justified when the complaint, on its face, complains only of conduct that clearly does not constitute a disability, impairment, or sanctionable conduct.

(c) Written Allegation of Disability, **Impairment**, or Sanctionable Conduct Not Under Oath

~~Upon receiving a complaint that does not qualify as a formal complaint but indicates that a judge may have a disability or have committed sanctionable conduct, Investigative Counsel shall, if possible:~~

(1) Except as provided by section (f) of this Rule, the Commission may not act upon a written allegation of disability, **impairment**, or misconduct, unless it is a complaint. If a written allegation, liberally construed, alleges facts indicating that a judge may have a disability **or impairment** or may have committed sanctionable conduct but is not under oath or supported by an affidavit, Investigative Counsel, if possible, shall (1) inform the complainant of the right to file a formal complaint;  
~~(2) inform the complainant that a formal complaint must be supported by affidavit and provide the complainant with the appropriate form of affidavit; and (3) (A) inform the complainant that the Commission acts only upon complaints under oath or supported by an affidavit, (B) provide the complainant with an appropriate form of affidavit, and (C) inform the complainant that unless a ~~formal~~ complaint under oath or supported by an~~

affidavit is filed within 30 days after the date of the notice, ~~Investigative Counsel is not required to take action and the~~ complaint matter may be dismissed.

(2) If, after Investigative Counsel has given the notice provided for in subsection (c)(1) of this Rule or has been unable to do so, the complainant fails to file a timely complaint under oath or supported by an affidavit, Investigative Counsel may dismiss the matter and notify the complainant and the Board, in writing, that a written allegation of disability, **impairment**, or misconduct was filed and dismissed and the reasons for the dismissal.

(d) Stale Complaints

(1) Subject to subsection (d)(3), if a complaint alleges acts or omissions that all occurred more than three years prior to the date the complaint was filed, Investigative Counsel, after notice to the judge, may make a recommendation to the Board whether, in light of the staleness, there is good cause to investigate the complaint.

(2) If the Board concludes that there is no good cause for any further investigation, it shall direct that the complaint be dismissed. If the Board concludes otherwise, it shall direct Investigative Counsel to proceed in accordance with sections (b) and (c) of this Rule. In making that determination, the Board

shall weigh any prejudice to the judge against the seriousness of the conduct alleged in the complaint.

(3) Subsections (d)(1) and (d)(2) of this Rule do not apply to complaints that allege criminal conduct which, upon conviction, would subject the judge to imprisonment for more than eighteen months.

Committee note: In contrast to dismissal of a complaint under Rule 18-405, which requires action by the Commission, Investigative Counsel may dismiss an allegation of disability or sanctionable conduct under this Rule when, for the reasons noted, the allegation fails to constitute a complaint. Subject to section (c) of this Rule, if there is no cognizable complaint, there is no basis for conducting an investigation.

~~(b)(e) Formal Complaints~~ Opening File on Receipt of Complaint

Subject to section (f) of this Rule, Investigative Counsel shall ~~number and~~ open a numbered file on each ~~formal~~ properly filed complaint ~~received~~ and promptly in writing (1) acknowledge receipt of the complaint and (2) explain to the complainant the procedure for investigating and processing the complaint.

~~(c) Dismissal by Investigative Counsel~~

~~If Investigative Counsel concludes that the complaint does not allege facts that, if true, would constitute a disability or sanctionable conduct and that there are no reasonable grounds for a preliminary investigation, Investigative Counsel shall dismiss the complaint. If a complainant does not file a formal complaint within the time stated in section (a) of this Rule, Investigative~~

~~Counsel may dismiss the complaint. Upon dismissing a complaint, Investigative Counsel shall notify the complainant and the Commission that the complaint has been dismissed. If the judge has learned of the complaint and has requested notification, Investigative Counsel shall also notify the judge that the complaint has been dismissed.~~

~~(d)~~(f) Inquiry

Upon receiving information from any source indicating that a judge may have a disability or impairment or may have committed sanctionable conduct, Investigative Counsel may open a file and make an inquiry. An inquiry may include obtaining additional information from ~~the~~ a complainant and any potential witnesses, reviewing public records, obtaining transcripts of court proceedings, and communicating informally with the judge. Following the inquiry, Investigative Counsel shall (1) close the file and dismiss any complaint in conformity with ~~section (e)~~ subsection (a)(2) of this Rule or (2) proceed as if a ~~formal~~ complaint had been properly filed and undertake ~~a preliminary~~ an investigation in accordance with ~~section (e) of this Rule~~ 18-405.

~~(e)~~ Preliminary Investigation

~~(1) If a complaint is not dismissed in accordance with section (c) or (d) of this Rule, Investigative Counsel shall conduct a preliminary investigation to determine whether there~~

~~are reasonable grounds to believe that the judge may have a disability or may have committed sanctionable conduct. Investigative Counsel shall promptly inform the Board or Commission that the preliminary investigation is being undertaken.~~

~~(2) Upon application by Investigative Counsel and for good cause, the Chair of the Commission may authorize Investigative Counsel to issue a subpoena to obtain evidence during a preliminary investigation.~~

~~(3) During a preliminary investigation, Investigative Counsel may recommend to the Board or Commission that the complaint be dismissed without notifying the judge that a preliminary investigation has been undertaken.~~

~~(4) Unless directed otherwise by the Board or Commission for good cause, Investigative Counsel shall notify the judge before the conclusion of the preliminary investigation (A) that Investigative Counsel has undertaken a preliminary investigation into whether the judge has a disability or has committed sanctionable conduct; (B) whether the preliminary investigation was undertaken on Investigative Counsel's initiative or on a complaint; (C) if the investigation was undertaken on a complaint, of the name of the person who filed the complaint and the contents of the complaint; (D) of the nature of the~~

~~disability or sanctionable conduct under investigation; and (E) of the judge's rights under subsection (e)(5) of this Rule. The notice shall be given by first class mail or by certified mail requesting "Restricted Delivery show to whom, date, address of delivery" addressed to the judge at the judge's address of record.~~

~~(5) Except when Investigative Counsel has recommended that the complaint be dismissed without notifying the judge and the Board or Commission has accepted the recommendation, before the conclusion of the preliminary investigation, Investigative Counsel shall afford the judge a reasonable opportunity to present, in person or in writing, such information as the judge chooses.~~

~~(6) Investigative Counsel shall complete a preliminary investigation within 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90 day period and for good cause, the Board shall extend the time for completing the preliminary investigation for an additional 30 day period. For failure to comply with the time requirements of this section, the Commission may dismiss any complaint and terminate the investigation.~~

~~(f) Recommendation by Investigative Counsel~~

~~Upon completion of a preliminary investigation, Investigative Counsel shall report to the Board the results of the investigation in the form that the Commission requires. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation, with or without a warning, (2) entering into a private reprimand or a deferred discipline agreement, (3) authorization of a further investigation, or (4) the filing of charges.~~

~~(g) Monitoring and Review by Board~~

~~The Board shall monitor investigations by, and review the reports and recommendations of, Investigative Counsel.~~

~~(h) Authorization of Further Investigation~~

~~The Board may authorize a further investigation to be conducted pursuant to Rule 18-405.~~

~~(i) Informal Meeting With Judge~~

~~The Board may meet informally with the judge for the purpose of discussing an appropriate disposition.~~

~~(j) Board's Report to Commission~~

~~(1) Contents~~

~~Upon receiving Investigative Counsel's final report and recommendation concerning a further investigation or a preliminary investigation if no further investigation was conducted and subject to subsection (j)(2) of this Rule, the~~

~~Board shall submit to the Commission a report that includes one of the following recommendations: (A) dismissal of any complaint and termination of the investigation with or without a warning; (B) entering into a private reprimand or deferred discipline agreement; or (C) upon a determination of probable cause, the filing of charges, unless the Board determines that there is a basis for private disposition under the standards of Rule 18-406. The Board may not recommend a dismissal with a warning, a private reprimand, or a deferred discipline agreement unless the respondent judge has consented to this remedy.~~

~~(2) Limitation on Contents of Report~~

~~The information transmitted by the Board to the Commission shall be limited to a proffer of evidence that the Board has determined would be likely to be admitted at a plenary hearing. The Chair of the Board may consult with the Chair of the Commission in making the determination as to what information is transmitted to the Commission.~~

~~(3) Time for Submission of Report~~

~~Unless the time is extended by the Chair of the Commission, the Board shall transmit the report to the Commission within 45 days after the date the Board receives Investigative Counsel's report and recommendation. Upon written request by the Chair of the Board, the Chair of the Commission may grant one 30-~~



~~day extension of time for transmission of the report. If the Board does not issue its report within the time allowed, the Chair of the Commission and Investigative Counsel shall conform the report and recommendation of Investigative Counsel to the requirements of subsection (j)(2) of this Rule and refer the matter to the Commission, which may proceed, using the report and recommendation of Investigative Counsel.~~

~~(4) Copy to Investigative Counsel and Judge~~

~~Upon receiving the report and recommendation, the Commission promptly shall transmit a copy of it to Investigative Counsel and to the judge.~~

~~(k) Filing of Objections~~

~~Investigative Counsel and the judge shall file with the Commission any objections to the report and recommendation within 15 days of the date the Commission transmitted the report and recommendation unless Investigative Counsel, the judge, and the Chair of the Commission agree to an extension of the time for filing an objection.~~

~~(l) Action by Commission~~

~~The Commission shall review the report and recommendation and any timely filed objections. Upon written request by the judge, with a copy provided to Investigative Counsel, the Commission may permit the judge to appear before the Commission~~

~~on terms and conditions established by the Commission. Unless the Commission authorizes further investigation in accordance with Rule 18-405, disposition by the Commission shall be in accordance with Rule 18-406 or 18-407 (a), as appropriate.~~

Source: This Rule is derived from former Rule 18-404 (a) through (d) 16-805 (2016).

REPORTER'S NOTE

This Rule and Rules 18-422 and 18-423 break apart current Rule 18-404. This Rule deals with complaints - what constitutes a cognizable complaint. Rule 18-422 deals with the investigation by Investigative Counsel and her/his Report to the Board. Rule 18-423 deals with proceedings before the Board and review of its Report by the Commission.

This Rule carries forth the changes approved by the Rules Committee in 2016 that were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. Section (d), dealing with stale complaints, is new. It is derived in part from a Massachusetts judicial discipline Rule. It does not set forth a statute of limitations but, unless the complaint alleges the commission of a serious crime by the judge, allows the Board to consider and balance the nature and severity of the alleged misconduct along with any prejudice to the judge from an inordinate delay in presenting the complaint in determining whether Investigative Counsel should proceed with an investigation.

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DIVISION 3. ADMINISTRATIVE PROCEDURE

RULE 18-422. INVESTIGATION BY INVESTIGATIVE COUNSEL

(a) Conduct of Investigation

(1) Duty to Conduct; Notice to Board and Commission

If a complaint is not dismissed in accordance with Rule 18-421, Investigative Counsel shall conduct an investigation to determine whether there are reasonable grounds to believe that the judge may have a disability or impairment or may have committed sanctionable conduct. Investigative Counsel shall inform the Board and the Commission promptly that the investigation is being undertaken.

(2) Subpoena

Upon application by Investigative Counsel and for good cause, the Chair of the Commission may authorize the issuance of a subpoena to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a time and place specified in the subpoena.

Cross reference: See Code, Courts Article, §§13-401 - 403.

(3) Grant of Immunity

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Upon application by Investigative Counsel and for good cause, the Commission may grant immunity to any person from prosecution, or from any penalty or forfeiture, for or on account of any transaction, matter, or thing concerning which that person testifies or produces evidence, documentary or otherwise.

Cross reference: See Md. Constitution, Art. IV §4B (a)(1)(ii) and Code, Courts Article, §13-403.

Committee note: The need for a grant of immunity in order to compel the production of evidence may arise at any stage. Placing a reference to it here is not intended to preclude an application to the Commission in a later stage of the proceeding.

(4) Notice to Judge

(A) Judges may request the Commission to inform them in writing immediately upon the opening of a file pertaining to them pursuant to Rule 18-421(b) or (f). The request shall be in writing. If such a request is received, Investigative Counsel shall comply with that request unless the Commission authorizes a delay in providing the notice upon a finding that there is a reasonable possibility that immediate notice may jeopardize an investigation by Investigative Counsel or cause harm to any person. The notice shall comply with subsection (4)(B) and be given in accordance with subsection (4)(C) and, if the file was opened based on a complaint, shall be accompanied by a copy of the complaint.

(B) Except as provided in subsection (a)(4)(D) of this

Rule, before the conclusion of the investigation, Investigative Counsel shall notify the judge, in writing, that (i) Investigative Counsel has undertaken an investigation into whether the judge has a disability **or impairment** or has committed sanctionable conduct; (ii) whether the investigation was undertaken on Investigative Counsel's initiative or on a complaint; (iii) if the investigation was undertaken on a complaint, the name of the person who filed the complaint and the contents of the complaint; (iv) the nature of the alleged disability, **impairment**, or sanctionable conduct under investigation; and (v) the judge's rights under subsection (a)(5) of this Rule.

(C) The notice shall be given by first class mail or by certified mail requesting "Restricted Delivery - show to whom, date, address of delivery" and shall be addressed to the judge at the judge's address of record.

(D) Subject to subsection (4)(A), notice shall not be given under this Rule if (i) Investigative Counsel determines, prior to the conclusion of the investigation, that the recommendation of Investigative Counsel will be dismissal of the complaint without a letter of cautionary advice, or (ii) as to other recommended dispositions, the Commission or Board, for good cause, directs a temporary delay of providing notice and includes in its directive

a mechanism for providing the judge reasonable opportunity to present information to the Board.

(5) Opportunity of Judge to Respond

Upon the issuance of notice pursuant to subsection (a)(4) of this Rule, Investigative Counsel shall afford the judge a reasonable opportunity prior to concluding the investigation to present such information as the judge chooses and shall give due consideration to the judge's response before concluding the investigation.

(6) Time for Completion

Investigative Counsel shall complete an investigation within 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Board, with the approval of the Chair of the Commission, may extend the time for completing the investigation for a reasonable period. An order extending the time for good cause shall be in writing and shall articulate the basis of the good cause. For failure to comply with the time requirements of this section, the Commission may dismiss any complaint and terminate the investigation.

(b) Report and Recommendation by Investigative Counsel

(1) Duty to Make

Upon completion of an investigation, Investigative

Counsel shall make a report of the results of the investigation in the form that the Commission requires.

(2) Contents

Investigative Counsel shall include in the report or attach to it any response or other information provided by the judge pursuant to subsection (a)(5) of this Rule. The report shall include a statement that the investigation indicates probable sanctionable conduct, **probable impairment**, probable disability, ~~both, or neither~~ **any of them, or none of them**, together with one of the following recommendations, as appropriate:

(A) dismissal of any complaint, without a letter of cautionary advice;

(B) dismissal of any complaint, with a letter of cautionary advice;

(C) a conditional diversion agreement;

(D) a reprimand;

(E) the filing of charges; or

(F) retirement of the judge based upon a finding of disability.

(3) Recipient of Report

(A) If the recommendation is dismissal of the complaint without a letter of cautionary advice, the report and

recommendation shall be made to the Commission. Upon receipt of the recommendation, the Commission shall proceed in accordance with Rule 18-408 (a)(2).

(B) Otherwise, the report and recommendation shall be made to the Board.

Committee note: A complaint may be dismissed outright and without a letter of cautionary advice for various reasons, at different stages, and by different entities. Investigative Counsel may dismiss a claim on his or her own initiative, without opening a file, pursuant to Rule 18-421 (a). In that instance, no notice need be given to the judge unless the judge has requested notice. If Investigative Counsel opens a file pursuant to Rule 18-421 (b) and performs an investigation under this Rule, Investigative Counsel may recommend dismissal without a letter of cautionary advice because, as a factual matter, there is insufficient evidence of a disability, **impairment**, or sanctionable conduct. In that situation, if the Commission adopts the recommendation, there is no need for notice to the judge unless the judge has requested such notice. If the matter proceeds to the Board, the judge must receive notice, even if the ultimate decision is to dismiss the complaint.

(c) Records

Subject to a retention schedule approved by the Chief Judge of the Court of Appeals, Investigative Counsel shall keep a record of the investigation.

Source: This Rule is in part derived from former Rule 16-805 (e) and (f) (2016), in part from former Rule 18-404 (e) (2018), and is in part new.

REPORTER'S NOTE

This Rule carries forth the changes approved by the Rules Committee in 2016 that were included in the Committee's 191<sup>st</sup>

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Report to the Court of Appeals. Section (a)(4) is new and addresses a disagreement among judges whether the Commission should notify them immediately upon the docketing of a complaint. Some judges want that immediate notice; others do not. Subsection (d)(4) gives judges the option of requesting, in advance, and upon such a request receiving, immediate notice of any complaint that results in the opening of a file by Investigative Counsel. That would enable those judges to obtain counsel and engage with Investigative Counsel at the earliest stage. Judges who do not make such a request would receive notice prior to the conclusion of Investigative Counsel's investigation of a complaint.

Section (a)(6) is amended to require any extension of the time to complete an investigation to be in writing and to articulate the basis of good cause for the extension. The lack of an articulated basis was an issue in the *White* and *Reese* cases.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 3. ADMINISTRATIVE PROCEDURE

Rule 18-423. PROCEEDINGS BEFORE BOARD; REVIEW BY COMMISSION

(a) Review of Investigative Counsel's Report

The Board shall review the reports and recommendations made to the Board by Investigative Counsel.

(b) Informal Meeting with Judge; Peer Review

(1) Generally

The Board may meet informally with the judge.

(2) Peer Review

(A) As part of or in furtherance of that meeting, the Chair of the Board, with the consent of the judge, may convene a peer review panel consisting of not more than two judges who serve or have served on the same level of court upon which the judge sits to confer with the judge about the complaint and suggest options for the judge to consider. The judges may be incumbent judges or senior judges.

(B) The discussion may occur in person or by telephone or other electronic conferencing but shall remain informal and confidential. The peer review panel (i) shall have no authority

to make any findings or recommendations, other than to the judge;  
(ii) shall make no report to Investigative Counsel, the Board, or  
the Commission; and (iii) may not testify regarding the conference  
with the judge before the Commission or in any court proceeding.

Committee note: The peer review panel is not intended as either  
an arbitrator or a mediator but, as judicial colleagues, simply  
to provide an honest and neutral appraisal for the judge to  
consider.

(c) Further Investigation

The Board may direct Investigative Counsel to make a  
further investigation pursuant to Rule 18-424.

(d) Board's Report to Commission

(1) Contents

After considering Investigative Counsel's report and  
recommendation, the Board shall submit a report to the  
Commission. The Board shall include in its report the  
recommendation made to the Board by Investigative Counsel.  
Subject to subsection (d)(2) of this Rule, the report shall  
include one of the following recommendations:

(A) dismissal of any complaint, without a letter of  
cautionary advice pursuant to Rule 18-425 (a) and termination of  
any investigation;

(B) dismissal of any complaint, with a letter of cautionary  
advice pursuant to Rules 18-425 (b) or 18-436;

(C) a conditional diversion agreement pursuant to Rules 18-426 or 18-436;

(D) a reprimand pursuant to Rules 18-427 or 18-436;

(E) retirement of the judge pursuant to Rules 18-428 and 18-441; or

(F) upon a determination of probable cause that the judge has a disability **or impairment** or has committed sanctionable conduct, the filing of charges pursuant to Rule 18-431.

The information transmitted by the Board to the Commission shall be limited to a proffer of evidence that the Board has determined would likely be admitted at a plenary hearing before the Commission. The Chair of the Board may consult with the Chair of the Commission in determining the information to be transmitted to the Commission.

(2) Time for Submission of Report

(A) Generally

Unless the time is extended by the Chair of the Commission for good cause, the Board shall submit the report within 45 days after the date the Board received Investigative Counsel's report and recommendation.

(B) Extension

Upon a written request by the Chair of the Board, the Chair of the Commission may grant a reasonable extension of time

for submission of the report. An order extending the time shall be in writing and shall articulate the nature of the good cause.

(C) Failure to Submit Timely Report

If the Board fails to submit its report within the time allowed, the Chair of the Commission shall direct Investigative Counsel to create and submit a report that conforms to the requirements of subsections (d)(1) and (2) of this Rule, subject to Rule 18-417, and refer the matter to the Commission, which may proceed, using the report as submitted by Investigative Counsel in accordance with this provision.

(D) Copy to Investigative Counsel and Judge

Upon receiving the report and recommendation, the Commission promptly shall transmit a copy of it, including any appendices or memoranda attached to it, to Investigative Counsel and to the judge.

(e) Filing of Response

Investigative Counsel and the judge may file with the Commission a written response to the Board's report and recommendation. Unless the Chair of the Commission, Investigative Counsel, and the judge agree to an extension, any response shall be filed within 15 days after the date the Commission transmitted copies of the report and recommendation to Investigative Counsel and the judge.

(f) Action by Commission on Board Report and Recommendation

(1) Review

The Commission shall review the report and recommendation and any timely filed responses.

(2) Appearance by Judge

Upon written request by the judge, with a copy to Investigative Counsel, the Commission may permit the judge to appear before the Commission on reasonable terms and conditions established by the Commission.

Committee note: This review and any appearance by the judge is not an evidentiary hearing. That is provided for in Rule 18-434 after charges have been filed. It is only for the Commission to determine whether to direct that charges be filed against the judge or some other action set forth in subsection (f)(4) should be taken.

(3) Disposition

Upon its review of the report and recommendation and any timely filed responses and consideration of any evidence or statement by the judge pursuant to subsection (f)(2) of this Rule, the Commission shall:

(A) direct Investigative Counsel to conduct a further investigation pursuant to Rule 18-424;

(B) remand the matter to the Board for further consideration and direct the Board to file a supplemental report within a specified period of time;

(C) enter a disposition pursuant to Rule 18-426, 18-427, or 18-428;

(D) enter an appropriate disposition to which the judge has filed a written consent in accordance with the Rules in this Chapter, including a disposition under 18-435; or

(E) direct Investigative Counsel to file charges pursuant to Rule 18-431.

Source: This Rule is derived in part from former Rule 16-805 (h) through (l) (2016) and is in part new.

REPORTER'S NOTE

This Rule carries forth the changes approved by the Rules Committee in 2016 that were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. Subsection (d)(2)(D) adds the requirement that appendices and memoranda attached to the Board's Report to the Commission be sent to Investigative Counsel and the judge. The Committee believes that, although the judge is not entitled to have access to material that constitutes Investigative Counsel's attorney work product or that is protected by a protective order, all other information submitted to the Commission bearing on a decision whether to proceed with the filing of charges should be available to the judge.

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 3. ADMINISTRATIVE PROCEDURE

RULE ~~18-405~~ 18-424. FURTHER INVESTIGATION

(a) Notice to Judge

Upon ~~approval of a~~ directive for a further investigation by the Board pursuant to Rule 18-423 (c) or by the Commission pursuant to Rule 18-423 (f)(3), Investigative Counsel promptly shall (A) provide the notice and opportunity to respond required by Rule 18-422 (a)(4) and (5) if such notice and opportunity have not already been provided, and (B) notify the judge at the judge's address of record ~~(1)~~ that the Board or Commission has ~~authorized the~~ directed a further investigation~~7~~. ~~(2) of the specific nature of the disability or sanctionable conduct under investigation, and (3) that the judge may file a written response within 30 days of the date on the notice. The notice shall be given (1) by first class mail to the judge's address of record, or (2) if previously authorized by the judge, by first class mail to an attorney designated by the judge. The Board or Commission, for good cause, may defer the giving of notice, but notice must~~



~~be given not less than 30 days before Investigative Counsel makes a recommendation as to disposition.~~

(b) Subpoenas

(1) Issuance

Upon application by Investigative Counsel and for good cause, the Chair of the Commission may authorize ~~Investigative Counsel to issue~~ the issuance of a subpoena to compel the ~~attendance of witnesses and the production of~~ person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a time and place specified in the subpoena.

(2) Notice to Judge

Promptly after service of the subpoena and in addition to any other notice required by law, Investigative Counsel shall provide to the judge ~~under investigation~~ a copy of the subpoena and notice of the service of the subpoena. The notice to the judge shall be sent by first class mail to the judge's address of record or, if previously authorized by the judge, ~~by first class mail to an attorney designated by the judge~~ by any other reasonable method.

~~(2)~~(3) Motion for Protective Order

The judge, a person named in the subpoena, or a person named or depicted in an item specified in the subpoena ~~or the~~

~~person served with the subpoena~~ may file a motion for a protective order pursuant to Rule 2-510 (e). The motion shall be filed in the circuit court for the county in which the subpoena was served or, if the judge under investigation ~~is a judge serving~~ serves on that ~~circuit~~ court, another circuit court designated by the Commission. The court may enter any order permitted by Rule 2-510 (e).

(4) Failure to Comply

Upon a failure to comply with a subpoena issued pursuant to this Rule, the court, on motion of Investigative Counsel, may compel compliance with the subpoena as provided in Rule 18-411 (g).

~~(3)~~(5) Confidentiality

(A) Subpoena

To the extent practicable, a subpoena shall not divulge the name of the judge under investigation.

(B) Court Files and Records

Files and records of the court pertaining to any motion filed with respect to a subpoena shall be sealed and shall be open to inspection only upon order of the Court of Appeals.

(C) Hearings

Hearings before the circuit court on any motion filed with respect to a subpoena shall be on the record and shall be

conducted out of the presence of all ~~persons~~ individuals except those whose presence is necessary.

Cross reference: See Code, Courts Article, §§ 13-401--403.

(c) Time for Completion of Investigation

Investigative Counsel shall complete a further investigation within ~~60 days after it is authorized~~ the time specified by the Board or Commission. Upon application by Investigative Counsel made within ~~the 60 day~~ that period and served by first class mail upon the judge or ~~counsel~~ the judge's attorney of record, the Chair of the Commission, for good cause, may extend the time for completing the further investigation for a specified reasonable time. An order extending the time for good cause shall be in writing and shall articulate the basis of the good cause. The Commission may dismiss the complaint and terminate the investigation for failure to ~~comply with the time requirements of this section~~ complete the investigation within the time allowed.

(d) Report and Recommendation by Investigative Counsel

(1) Duty to Make

Within the time for completing a the further investigation, Investigative Counsel shall make a report of the results of the investigation to the Board or ~~the~~ Commission,

whichever authorized the further investigation, in the form that  
the Commission requires.

(2) Contents

Unless the material already has been provided,  
Investigative Counsel shall include in the report or attach to it  
any response or other information provided by the judge pursuant  
to section (a) of this Rule or Rule 18-422 (a)(5). The report  
shall include a statement that the investigation indicates  
probable disability, **probable impairment**, probable sanctionable  
conduct, ~~both, or neither~~ **any of them, or none of them**, together  
with one of the following recommendations:

~~(1)~~(A) dismissal of any complaint and termination of the  
investigation, with or without a warning, letter of cautionary  
advice;

~~(2)~~(B) dismissal of any complaint, with a letter of  
cautionary advice;

(C) a conditional diversion agreement;

(D) entering into a private reprimand;

(E) or a deferred discipline agreement, or ~~(3)~~ the filing  
of charges; or

(F) retirement of the judge based upon a finding of  
disability.

Source: This Rule is in part new and in part derived from former Rule 18-405 (2018)~~16-806 (2016)~~.

REPORTER'S NOTE

This Rule carries forth the changes approved by the Rules Committee in 2016 that were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. Section (b)(2) adds a requirement that a copy of the subpoena be sent to the judge. As with provisions in other Rules dealing with time extensions, section (c) requires that an extension be in writing and articulate the basis of good cause for the extension.

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CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

RULE ~~18-406~~ 18-425. ~~DISPOSITION WITHOUT PROCEEDINGS ON CHARGES~~

DISMISSAL OF COMPLAINT

(a) ~~Dismissal~~ Without Letter of Cautionary Advice

~~(1) Evidence Fails to Show Disability or Sanctionable Conduct.~~

~~The Commission shall dismiss a complaint if~~ If, after an investigation by Investigative Counsel, ~~it~~ the Commission concludes that the evidence fails to show that the judge has a disability or impairment or has committed sanctionable conduct,~~,-~~ ~~The Commission~~ it shall dismiss the complaint without a letter of cautionary advice and notify the judge and each complainant of the dismissal complainant, the judge, and the Board.

(b) With Letter of Cautionary Advice

(1) When Appropriate

~~(2) Sanctionable Conduct Not Likely to be Repeated.~~ If the Commission determines that any sanctionable conduct that may have been committed by the judge will be sufficiently addressed by the issuance of a ~~warning~~ letter of cautionary advice, the Commission

may accompany a dismissal with ~~a warning against future sanctionable conduct~~ such a letter. ~~The contents of the warning are private and confidential, but the Commission has the option of notifying the complainant of the fact that a warning was given to the judge.~~

Committee note: A letter of cautionary advice may be appropriate where (1) the judge's conduct was inappropriate and perhaps marginally sanctionable or (2) if sanctionable, was not particularly serious, was not intended to be harmful, was not repetitious, may have been the product of a momentary lapse in judgment or the judge being unaware that the conduct was not appropriate, and does not justify discipline. The letter is intended to be remedial in nature, so that the judge will be careful not to repeat that or similar conduct.

(2) Notice to Judge

~~At least 30 days before a warning is issued, the The Commission shall ~~mail to~~ notify the judge a notice that states (A) the date on which it intends to issue the warning, (B) the content of the warning, and (C) whether the complainant is to be notified of the warning dismissal with cautionary advice. Before the intended date of issuance of the warning, the judge may reject the warning by filing a written rejection with the Commission. If the warning is not rejected, the Commission shall issue it on or after the date stated in the initial notice to the judge. If the warning is rejected, it shall not be issued, the proceeding shall resume as if no warning had been proposed, and~~

~~the fact that a warning was proposed or rejected may not be admitted into evidence.~~

~~Committee note: A warning by the Commission under this section is not a reprimand and does not constitute discipline.~~

~~(b) Private Reprimand~~

~~(1) The Commission may issue a private reprimand to the judge if, after an investigation:~~

~~(A) the Commission concludes that the judge has committed sanctionable conduct that warrants some form of discipline;~~

~~(B) the Commission further concludes that the sanctionable conduct was not so serious, offensive, or repeated as to warrant formal proceedings and that a private reprimand is the appropriate disposition under the circumstances; and~~

~~(C) the judge, in writing on a copy of the reprimand retained by the Commission, (i) waives the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals and the right to challenge the findings that serve as the basis for the private reprimand, and (ii) agrees that the reprimand may be admitted in any subsequent disciplinary proceeding against the judge to the extent that it is relevant to the charges at issue or the sanction to be imposed.~~

~~(2) Upon the issuance of a private reprimand, the Commission shall notify the complainant of that disposition.~~



(3) Confidentiality

The existence and contents of the letter are private and confidential, except that the Commission and Investigative Counsel shall retain a copy of it and may consider it if relevant in any subsequent proceeding against the judge. The Commission shall notify the complainant that the complaint was brought to the judge's attention and that the Commission concluded that no public action against the judge was taken.

(4) Not a Form of Discipline

A letter of cautionary advice is not a reprimand and does not constitute a form of discipline.

~~(c) Deferred Discipline Agreement~~

~~(1) The Commission and the judge may enter into a deferred discipline agreement if, after an investigation:~~

~~(A) The Commission concludes that the alleged sanctionable conduct was not so serious, offensive, or repeated as to warrant formal proceedings and that the appropriate disposition is for the judge to undergo specific treatment, participate in one or more specified educational programs, issue an apology to the complainant, or take other specific corrective or remedial action; and~~

~~(B) The judge, in the agreement, (i) agrees to the specified conditions, (ii) waives the right to a hearing before~~

~~the Commission and subsequent proceedings before the Court of Appeals, and (iii) agrees that the deferred discipline agreement may be revoked for noncompliance in accordance with the provisions of subsection (c)(2) of this Rule.~~

~~(2) The Commission shall direct Investigative Counsel to monitor compliance with the conditions of the agreement and may direct the judge to document compliance. Investigative Counsel shall give written notice to the judge of the nature of any alleged failure to comply with a condition of the agreement. If after affording the judge at least 15 days to respond to the notice, the Commission finds that the judge has failed to satisfy a material condition of the agreement, the Commission may revoke the agreement and proceed with any other disposition authorized by these rules.~~

~~(3) The Commission shall notify the complainant that the complaint has resulted in an agreement with the judge for corrective or remedial action. Unless the judge consents in writing, the terms of the agreement shall remain confidential and not be disclosed to the complainant or any other person. An agreement under this section does not constitute discipline or a finding that sanctionable conduct was committed.~~

~~(4) Upon notification by Investigative Counsel that the judge has satisfied all conditions of the agreement, the Commission shall terminate the proceedings.~~

Source: This Rule is derived in part from former Rule 16-807 (2016) and Rule 18-406 sections (a).

REPORTER'S NOTE

This Rule carries forth the changes to Rule 18-406 (a)(2) approved by the Rules Committee in 2016 that were included in the Committee's 191st Report to the Court of Appeals. The Rule eliminates the current right of the judge to reject a dismissal accompanied by a letter of cautionary advice. Although the complainant would be informed of the dismissal, the existence and content of the letter would remain private and not be disclosed to the complainant. The letter does not constitute discipline and is purely prophylactic advice to the judge. The complainant would be informed that the complaint was brought to the judge's attention and that the Commission concluded that no public action against the judge was taken.

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DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

Rule 18-426. CONDITIONAL DIVERSION AGREEMENT

(a) When Appropriate

The Commission and the judge may enter into a conditional diversion agreement if, after an investigation:

(1) the Commission concludes (A) that ~~the~~ **any** alleged sanctionable conduct was not so serious, offensive, or repeated as to justify the filing of charges or, if charges already had been filed, the imposition of any **immediate** discipline, and (B) that the appropriate disposition is for the judge to undergo specific treatment, participate in one or more specified educational or therapeutic programs, issue an apology to the complainant, or take other specific corrective or remedial action; and

(2) the judge, in the agreement, (A) agrees to the specified conditions, (B) waives the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals, and (C) agrees that the conditional diversion agreement may be revoked for noncompliance in accordance with the

provisions of section (b) of this Rule, and (D) agrees that the agreement may be admitted in any subsequent disciplinary proceeding against the judge to the extent that it is relevant to the allegations at issue or the sanction that may be imposed.

**Committee Note: A conditional diversion agreement may be the most appropriate response to the situation set forth in subsection (a)(1) where any sanctionable conduct was predominantly the product of the judge's impairment, as it can provide a meaningful opportunity for remedial assistance to the judge which, by consenting to the agreement, the judge recognizes is needed, as well as protection of the public. The judge is free, of course, to reject an offer of a conditional diversion agreement, in which event the Commission may deal with any sanctionable conduct in other ways.**

(b) Compliance

The Commission shall direct Investigative Counsel or some other person to monitor compliance with the conditions of the agreement and may direct the judge to document compliance.

Investigative Counsel shall give written notice to the judge of the nature of any alleged failure to comply with a condition of the agreement. If, after affording the judge at least 15 days to respond to the notice, the Commission finds that the judge has failed to satisfy a material condition of the agreement, the Commission may revoke the agreement and proceed with any other disposition authorized by these Rules. If, upon request of the judge, a monitor other than Investigative Counsel is appointed, all reasonable expenses of the monitor shall be assessed against

the judge.

(c) Not a Form of Discipline

A conditional diversion agreement under this section does not constitute discipline or a finding that sanctionable conduct was committed.

(d) Notice to Complainant; Confidentiality

The Commission shall notify the complainant that the complaint has resulted in an agreement with the judge for corrective or remedial action. Except as permitted in Rule 18-417, the terms of the agreement shall remain confidential and not be disclosed to the complainant or any other person unless the judge consents, in writing, to the disclosure.

(e) Termination of Proceedings

Upon notification by Investigative Counsel that the judge has satisfied all conditions of the agreement, the Commission shall terminate the proceedings.

Source: This Rule is derived in part from former Rule 16-807 (c) (2016) and in part from Rule 18-406 (c) (2018).

REPORTER'S NOTE

This Rule carries forth the changes approved to current Rule 18-406 (c) approved by the Rules Committee in 2016 and were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals.

**In addition, a Committee note pertaining to impairment of a judge is added after section (a).**

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DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

Rule 18-427. REPRIMAND

(a) When Appropriate

The Commission may issue a reprimand to the judge if, after an investigation and an opportunity for a hearing:

(1) the Commission concludes that the judge has committed sanctionable conduct that justifies some form of discipline;

(2) the Commission further concludes that the sanctionable conduct was not so serious, offensive, or repetitious as to justify the filing of charges and that a reprimand is an appropriate disposition under the circumstances.

~~DRAFTER'S NOTE: Because the Commission has the Constitutional authority to issue a reprimand as a form of sanction, there is no need for the judge to have to consent to it or waive any rights.~~

(b) Procedure

(1) If, after investigation, Investigative Counsel recommends a reprimand, Investigative Counsel shall serve notice of that recommendation on the judge.

(2) Within 15 days after service of the notice, the judge shall ~~inform~~ serve notice on Investigative Counsel that the judge

(A) will not oppose that disposition, (B) will not contest the facts underlying the recommendation but requests a hearing before the Commission on whether a reprimand is a proper disposition, or (C) will contest the facts underlying the recommendation.

(3) If the judge agrees to proceed in accordance with subsection (b)(2)(A) or fails to make a timely response, the Commission may issue the reprimand.

(4) If the judge agrees to proceed in accordance with subsection (b)(2)(B), the matter shall be transmitted to the Board and the Commission pursuant to Rule 18-423. Proceedings before the Commission shall be on the record but, if the Commission issues the reprimand, those proceedings and the reprimand shall be confidential and not subject to disclosure, except as allowed by Rule 18-407 (b).

(5) If the judge elects to contest the underlying facts, the matter shall be transmitted to the Board pursuant to Rule 18-423, but proceedings before the Commission and any disposition by the Commission shall be public.

(c) Form of Discipline

A reprimand constitutes a form of discipline.

(d) Retention of Copy

Investigative Counsel and the Commission shall retain a copy of the reprimand and may consider it if relevant in any



subsequent proceeding against the judge.

(e) Notice to Complainant

Upon the issuance of a reprimand, the Commission shall notify the complainant that the complaint was brought to the judge's attention and that the Commission concluded that no public action ~~would be~~ **was** taken against the judge.

Source: This Rule is derived in part from former Rule 16-807 (b) (2016) and in part from former Rule 18-406 (b) (2018).

REPORTER'S NOTE

This Rule, together with the proposed repeal of current Rule 18-407 (j), would implement the Committee's recommendation, noted in the Reporter's Note to proposed Rule

that, with the one exception noted, all reprimands issued by the Commission would be private and that, if the judge elected to contest the facts underlying a proposed reprimand and the Commission, after an evidentiary hearing finds that the judge committed sanctionable conduct and that neither dismissal, suspension, or removal is appropriate, it shall recommend to the Court of Appeals that the judge be censured.

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

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DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

Rule 18-428. RETIREMENT AS A DISPOSITION

(a) Applicability

This Rule applies to a retirement ordered by the Court of Appeals as a disposition upon a finding of disability. It does not apply to a voluntary retirement by the Judge.

(b) When Appropriate

Retirement of a judge may be an appropriate disposition upon a determination that (1) the judge suffers from a disability, as defined in Rule 18-401 (h), and (2) any alleged conduct that otherwise may constitute sanctionable conduct was predominantly the product of that disability and did not involve misconduct so serious that, if proven, would justify suspension or removal of the judge from office or, in light of the circumstances, would justify a censure.

(c) Effect

(1) Retirement under this Rule is permanent. A judge who is retired under this Rule may not be recalled to sit on any court, but the judge shall lose no other retirement benefit to which he

or she is entitled by law.

(2) Retirement under this Rule does not constitute discipline.

Cross reference: See Rule 18-441 dealing with special procedures in disability cases. See also Md. Constitution, Art. IV, §4B (a)(2), authorizing the Commission to recommend to the Court of Appeals retirement of a judge "in an appropriate case" and Rule 19-740 authorizing a comparable disposition for attorneys who have a disability.

Source: This Rule is new.

REPORTER'S NOTE

This is a new Rule, the text of which was approved by the Rules Committee in 2016 and was included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. It is to be read in conjunction with proposed new Rule 18-441. The Rule applies to retirement ordered by the Court of Appeals as a disposition upon a finding of disability. It does not apply to voluntary retirement by the judge. Md. Constitution, Art IV, §4B(a)(2) permits the Commission to recommend retirement "in an appropriate case." Section 4B(b)(1), is more limiting. It permits the Court "after hearing *and upon a finding of disability which is likely to become permanent and which seriously interferes with the performance of the judge's duties*" to retire the judge from office (emphasis added).

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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

RULE ~~18-407~~ 18-431. ~~PROCEEDINGS BEFORE COMMISSION~~ FILING OF CHARGES

(a) ~~Charges~~ Direction by Commission

After considering the report and recommendation of the Board **or Investigative Counsel** submitted pursuant to Rule ~~18-404~~ (j) 18-423 and any timely filed response, and upon a finding by the Commission of probable cause to believe that a judge has a disability **or impairment** or has committed sanctionable conduct, the Commission may direct Investigative Counsel to initiate proceedings against the judge by filing with the Commission charges that the judge has a disability **or impairment** or has committed sanctionable conduct.

(b) Content of Charges

The charges shall (1) state the nature of the alleged disability, **impairment**, or sanctionable conduct, including each Rule of the Maryland Code of Judicial Conduct allegedly violated by the judge, (2) allege the specific facts upon which the charges are based, and (3) state that the judge has the right to

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file a written response to the charges within 30 days after service of the charges.

~~(b)~~(c) Service; Notice

The charges may be served upon the judge ~~by any means reasonably calculated to give actual notice~~ pursuant to Rule 18-404. A return of service of the charges shall be filed with the Commission pursuant to Rule ~~2-126~~ 18-404. Upon service, the Commission shall notify any complainant that charges have been filed against the judge.

Cross reference: See Md. Const., Article IV, § 4B (a).

~~(e)~~(d) Response

Within 30 days after service of the charges, the judge may file with the Commission an original and 11 copies of a written response or file a response electronically pursuant to Rule 18-404.

~~(d)~~(e) Notice of Hearing

(1) Generally

Upon the filing of a response or, if no response is filed upon expiration of the time for filing ~~it~~ one, the Commission shall schedule a hearing and notify the judge of the date, time, and place of a the hearing. Unless the judge has agreed to an earlier hearing date, the ~~notice~~ hearing shall not be held

~~earlier than mailed at least 60 days before after~~ the date set for the hearing notice was sent.

(2) Sanctionable Conduct

If the hearing is on a charge of sanctionable conduct, the Commission ~~shall~~ also shall notify the complainant and ~~publish post~~ a notice ~~in the Maryland Register~~ on the Judiciary website that is limited to (1) the name of the judge, (2) the date, time, and place of the hearing, ~~and~~ (3) ~~a statement that~~ the charges that have been filed, and (4) any response ~~by~~ from the judge. ~~are available for inspection at the office of the Commission.~~ If the charges also contain allegations of disability or impairment, any information related to those allegations shall be governed by the provisions of subsection (d)(3) and shall not be posted on the Judiciary website or otherwise made public.

(3) Disability or Impairment

If the hearing is on a charge of disability or impairment, the Commission shall notify the complainant that charges have been filed and a hearing date has been set, but all other information, including the charges, any response from the judge, and all proceedings before the Commission, shall be confidential.

Cross reference: See Rule 18-409 (a)(3) concerning the time for posting on the Judiciary website.

~~(e)~~(f) Extension of Time

The Commission may extend the time for filing a response and for the commencement of a hearing.

~~(f)~~ Procedural Rights of Judge

~~The judge has the right to inspect and copy the Commission Record, to a prompt hearing on the charges, to be represented by an attorney, to the issuance of subpoenas for the attendance of witnesses and for the production of designated documents and other tangible things, to present evidence and argument, and to examine and cross-examine witnesses.~~

~~(g)~~ Exchange of Information

~~(1) Upon request of the judge at any time after service of charges upon the judge, Investigative Counsel shall promptly (A) allow the judge to inspect the Commission Record and to copy all evidence accumulated during the investigation and all statements as defined in Rule 2-402 (f) and (B) provide to the judge summaries or reports of all oral statements for which contemporaneously recorded substantially verbatim recitals do not exist, and~~

~~(2) Not later than 30 days before the date set for the hearing, Investigative Counsel and the judge shall each provide~~

~~to the other a list of the names, addresses, and telephone numbers of the witnesses that each intends to call and copies of the documents that each intends to introduce in evidence at the hearing.~~

~~(3) Discovery is governed by Title 2, Chapter 400 of these Rules, except that the Chair of the Commission, rather than the court, may limit the scope of discovery, enter protective orders permitted by Rule 2-403, and resolve other discovery issues.~~

~~(4) When disability of the judge is an issue, on its own initiative or on motion for good cause, the Chair of the Commission may order the judge to submit to a mental or physical examination pursuant to Rule 2-423.~~

~~(h)(g) Amendments Amendment~~

At any time before the hearing, the Commission on ~~motion~~ request may allow amendments to the charges or the response. If an amendment to the charges is made less than 30 days before the scheduled hearing, the judge, upon request, shall be given a reasonable time to respond to the amendment and to prepare and present any defense.

~~(i) Hearing~~

~~(1) At a hearing on charges, the applicable provisions of Rule 18-405 (b) shall govern subpoenas.~~



~~(2) At the hearing, Investigative Counsel shall present evidence in support of the charges.~~

~~(3) The Commission may proceed with the hearing whether or not the judge has filed a response or appears at the hearing.~~

~~(4) Except for good cause shown, a motion for recusal of a member of the Commission shall be filed not less than 30 days before the hearing.~~

~~(5) The hearing shall be conducted in accordance with the rules of evidence in Title 5 of these rules.~~

~~(6) The proceedings at the hearing shall be stenographically recorded. Except as provided in section (k) of this Rule, the Commission is not required to have a transcript prepared. The judge may, at the judge's expense, have the record of the proceedings transcribed.~~

~~(7) With the approval of the Chair of the Commission, the judge and Investigative Counsel may each submit proposed findings of fact and conclusions of law within the time period set by the Chair.~~

~~(j) Commission Findings and Action~~

~~If the Commission finds by clear and convincing evidence that the judge has a disability or has committed sanctionable conduct, it shall either issue a public reprimand for the sanctionable conduct or refer the matter to the Court of Appeals~~

~~pursuant to section (k) of this Rule. Otherwise, the Commission shall dismiss the charges filed by the Investigative Counsel and terminate the proceeding.~~

~~(k) Record~~

~~If the Commission refers the case to the Court of Appeals, the Commission shall:~~

~~(1) make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding, state its recommendations, and enter those findings and recommendations in the record in the name of the Commission;~~

~~(2) cause a transcript of all proceedings at the hearing to be prepared and included in the record;~~

~~(3) make the transcript available for review by the judge and the judge's attorney in connection with the proceedings or, at the judge's request, provide a copy to the judge at the judge's expense;~~

~~(4) file with the Court of Appeals the entire hearing record which shall be certified by the Chair of the Commission and shall include the transcript of the proceedings, all exhibits and other papers filed or marked for identification in the proceeding, and all dissenting or concurring statements by Commission members;~~

~~and~~

~~(5) promptly mail to the judge at the judge's address of record notice of the filing of the record and a copy of the findings, conclusions, and recommendations and all dissenting or concurring statements by Commission members.~~

~~(1) Discipline by Consent~~

~~After the filing of charges alleging sanctionable conduct and before a decision by the Commission, the judge and Investigative Counsel may enter into an agreement in which the judge (1) admits to all or part of the charges; (2) as to the charges admitted, admits the truth of all facts constituting sanctionable conduct as set forth in the agreement, (3) agrees to take any corrective or remedial action provided for in the agreement; (4) consents to the stated sanction; (5) states that the consent is freely and voluntarily given; and (6) waives the right to further proceedings before the Commission and subsequent proceedings before the Court of Appeals. The agreement shall be submitted to the Court of Appeals, which shall either approve or reject the agreement. Until approved by the Court of Appeals, the agreement is confidential and privileged. If the Court approves the agreement and imposes the stated sanction, the agreement shall be made public. If the Court rejects the stated sanction, the proceeding shall resume as if no consent had been given, and~~

~~all admissions and waivers contained in the agreement are  
withdrawn and may not be admitted into evidence.~~

Source: This Rule is derived in part from former Rule 16-808 (2016) and in part from Rule 18-407 sections (a) through (h) (2018).

REPORTER'S NOTE

This Rule, along with proposed Rules 18-432 through 18-437 constitute a reorganization of current Rule 18-407 and incorporate some of the changes to that Rule approved by the Rules Committee in 2016 and included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. This Rule deals only with the filing of charges. Section (d) permits the judge to file a response electronically in a format acceptable to the Commission.

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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

Rule 18-432. PROCEDURAL RIGHTS OF JUDGES

The judge has the right to:

(1) discovery pursuant to Rule 18-433;

(2) receive a prompt hearing on the charges in accordance

with ~~this~~ Rule 18-434;

(3) the issuance of subpoenas for the attendance of witnesses  
and for the production of documents and other tangible things;

(4) present evidence and argument; and

(5) examine and cross-examine witnesses.

Source: This Rule is new.

REPORTER'S NOTE

This Rule is new but is derived from parts of current Rule 18-407. It lists the procedural rights of the judge in contesting charges before the Commission.

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

Rule 18-433. DISCOVERY

(a) Generally

(1) Except as otherwise provided in this Rule, discovery is governed by the relevant Rules in Title 2, Chapter 400.

(2) The Chair of the Commission, rather than the court, may limit the scope of discovery, enter protective orders permitted by Rule 2-403, and resolve other discovery issues.

(3) Investigative Counsel has the obligation to respond to the judge's discovery requests addressed to Investigative Counsel.

(4) Investigative Counsel, the Commission, and the judge have a continuing duty to supplement information required to be disclosed under this Rule.

(5) The Commission shall preclude a party from calling a witness, other than a rebuttal witness, or otherwise presenting evidence upon a finding, after the opportunity for a hearing if one is requested, that (1) the witness or evidence was subject to disclosure under this Rule, (2) the party, without substantial

justification, failed to disclose the witness or evidence in a timely manner, and (3) that failure was prejudicial to the other party. For purposes of this Rule, the parties are Investigative Counsel and the judge against whom charges have been filed.

(b) Open File

Upon request by the judge or the judge's attorney, at any time after service of charges upon the judge (1) the Executive Secretary of the Commission shall allow the judge or attorney to inspect and copy the entire Commission record,(2) Investigative Counsel shall (A) allow the judge or attorney to inspect and copy all evidence accumulated during the investigation and all statements as defined in Rule 2-402 (f), and (B) provide summaries or reports of all oral statements for which contemporaneously recorded substantially verbatim recitals do not exist, and (C) certify to the judge in writing that, except for material that constitutes attorney work product or that is subject to a lawful privilege or protective order issued by the Commission, the material disclosed constitutes the complete record as of the date of inspection.

(c) Exculpatory Evidence

Whether as part of the disclosures pursuant to § (b) or otherwise, no later than 30 days prior to the scheduled hearing, Investigative Counsel shall disclose to the judge all statements

or other evidence (1) that directly negates any allegation in the charges, (2) that would be admissible to impeach a witness intended to be called by Investigative Counsel, or (3) that would be admissible to mitigate a permissible sanction.

(d) Witnesses

No later than 30 days prior to the scheduled hearing, Investigative Counsel and the judge shall exchange the names and addresses of all persons, other than a rebuttal witness, the party intends to call at the hearing.

Source: This Rule is new.

REPORTER'S NOTE

This Rule breaks out from current Rule 18-407 the principles governing discovery but adds a continuing duty to supplement information required to be disclosed and, in subsection (a)(5) an enforcement provision directing the Commission to preclude a party from calling a witness, other than a rebuttal witness, or presenting evidence upon a finding, after the opportunity of a hearing, that the witness or evidence was subject to disclosure, the party, without substantial justification, failed to disclose the witness or evidence in a timely manner, and the failure was prejudicial to the other party. This is intended as a limited, targeted sanction designed to assure fairness. The Rule includes the open file provision in the current Rule but adds, in § (c), an overarching *Brady*-type requirement that Investigative Counsel disclose all exculpatory evidence, whether or not **included** in Investigative Counsel's file. Subsection (a)(3) addresses an issue raised in *White* and clarifies that, whether or not technically a party to a proceeding before the Commission, Investigative Counsel has the obligation to respond to a judge's discovery requests.



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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

Rule 18-434. HEARING ON CHARGES

(a) Bifurcation

If the judge has been charged with both sanctionable conduct and disability **or impairment**, the hearing shall be bifurcated and the hearing on charges of disability **or impairment** shall proceed first.

(b) Subpoenas

Upon application by Investigative Counsel or the judge, the Commission shall issue subpoenas to compel the attendance of witnesses and the production of documents or other tangible things at the hearing. To the extent otherwise relevant, the provisions of Rule 2-510 (c), (d), (e), (g), (h), (i), (j), and (k) shall apply.

(c) Non-Response or Absence of Judge

The Commission may proceed with the hearing whether or not the judge has filed a response or appears at the hearing.

(d) Motion for Recusal

Except for good cause shown, a motion for recusal of a

member of the Commission shall be filed at least 30 days before the hearing. The motion shall specify with particularity the reasons for recusal.

(e) Role of Investigative Counsel

At the hearing, Investigative Counsel shall present evidence in support of the charges. If Investigative Counsel and any assistants appointed pursuant to Rule 18-411(e)(3) are recused from a proceeding before the Commission, the Commission shall appoint an attorney to handle the proceeding.

(f) Evidence

Title 5 of the Maryland Rules shall generally apply.

(g) Recording

The proceeding shall be recorded verbatim, either by electronic means or stenographically, as directed by the Chair of the Commission. Except as provided in Rule 18-435 (e), the Commission is not required to have a transcript prepared. The judge, at the judge's expense, may have the record of the proceeding transcribed.

(h) Proposed Findings

The Chair of the Commission may invite the judge and Investigative Counsel to submit proposed findings of fact and conclusions of law within the time period set by the Chair.

Source: This Rule is new.

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Post 10/12/2018 SC Meeting (1.1)  
Plus Impairment

REPORTER'S NOTE

This Rule carries forth changes to current Rule 18-413 approved by the Rules Committee in 2016 and were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. In order to preserve confidentiality in disability cases, it adds a requirement that, if a judge has been charged with both disability and sanctionable conduct, the hearing shall be bifurcated and the hearing on disability shall proceed first.

A suggestion was made by some judges that the Rule specifically allow for expert testimony and other evidence on the applicable "standard of care." Several States have dealt with that issue, but in a judicial, not a quasi-legislative, context. In conformance with their general Rules of evidence, those States generally permit expert testimony in discipline and disability cases in the discretion of their disciplinary authority but have concluded that it is not an abuse of discretion for the disciplinary authority to disallow expert opinions on the ultimate questions of whether the judge committed sanctionable conduct or, if so, what a proper disposition should be.

Two principal reasons are cited: (1) expert opinions usually are not allowed on ultimate questions of law, and (2) whether the judge violated the Code of Judicial Conduct or what a proper sanction should be may depend on judgments as to the credibility of witnesses and the weighing of evidence, which are peculiarly in the discretion of the trier of fact and are not proper subjects for expert testimony. See *In re Assad*, 185 P.3d 1044 (Nev. 2008); *In re Boardman*, 979 A.2d 1010 (Vt. 2009); *Disciplinary Counsel v. Gaul*, 936 N.E.2d 28 (Ohio 2010); *In re Flanagan*, 690 A.2d 865 (Conn. 1997); Greenstein and Scheckman, *The Judicial Ethics Expert*, 33 Judicial Conduct Reporter, No. 1 (2011), American Judicature Society for Judicial Ethics. The courts that have adopted that view have applied it notwithstanding that some members of the disciplinary authority are public members. The Committee believes this issue should be reserved for judicial determination by the Court of Appeals and not resolved by Rule.

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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

Rule 18-435. COMMISSION FINDINGS AND ACTION

(a) Finding of Disability

If the Commission finds ~~by clear and convincing evidence~~ that the judge has a disability, it shall refer the matter to the Court of Appeals, whether or not the Commission also finds that the judge committed sanctionable conduct.

(b) Finding of Impairment

If the Commission finds that the judge has an impairment and a conditional diversion agreement has not been signed pursuant to Rule 18-426, the Commission shall refer the matter to the Court of Appeals, whether or not the Commission also finds that the judge committed sanctionable conduct.

(c) Finding of Sanctionable Conduct

If the Commission finds ~~by clear and convincing evidence~~ that the judge has committed sanctionable conduct and that dismissal, with or without a letter of cautionary advice, is not appropriate but does not find that the judge has a disability **or impairment**, it shall either issue a reprimand to the judge or

refer the matter to the Court of Appeals.

(d) Finding of No Disability, **Impairment**, or Sanctionable Conduct

If the Commission finds that the judge does not have a disability **or** impairment and did not commit sanctionable conduct, it shall dismiss the charges with or without a letter of cautionary advice and terminate the proceeding.

(e) Duties of Commission on Referral to Court of Appeals

If the Commission refers the case to the Court of Appeals, the Commission shall:

(1) make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding, state its recommendations, and enter those findings and recommendations in the record;

(2) cause a transcript of all proceedings at the hearing to be prepared and included in the record;

(3) make the transcript available for review by the judge and the judge's attorney or, at the judge's request, provide a copy to the judge at the judge's expense;

(4) file with the Court of Appeals, under seal if related to charges of disability **or impairment**, the entire hearing record, which shall be certified by the Chair of the Commission and shall include the transcript of the proceedings, all exhibits and

other papers filed or marked for identification in the proceeding, and all dissenting or concurring statements by Commission members;

(5) promptly serve on the judge pursuant to Rule 18-404 notice of the filing of the record and a copy of the findings, conclusions, and recommendations and all dissenting or concurring statements by Commission member; and

(6) if the Commission has made a finding that the judge did or did not commit sanctionable conduct, notify the complainant and post on the Judiciary website a notice that contains the Commission's finding of sanctionable conduct or no sanctionable conduct and any written findings of fact, conclusions of law, and recommendation as to a proposed sanction, if any;

(f) Confidentiality upon Finding as to Disability or Impairment

If the Commission has made a finding that the judge is or is not disabled or impaired, the Commission's findings of fact, conclusions of law, and recommendation shall remain confidential, except that the Commission may notify the complainant of the finding.

Source: This Rule is in part derived from former Rule 16-808 (a) through (k) (2016), in part derived from 18-407 (j) through (k) and is in part new.

REPORTER'S NOTE

This Rule carries forth changes to current Rule 18-413 approved by the Rules Committee in 2016 and were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. The provision permitting the Chair of the Commission to order a judge to submit to a mental or physical examination when the judge's disability is in issue has been amended and moved to proposed new Rule 18-441.

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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

Rule 18-436. CONSENT TO DISPOSITION

(a) Generally

At any time after completion of an investigation by Investigative Counsel, a judge may consent to:

- (1) dismissal of the complaint accompanied by a letter of cautionary advice pursuant to Rule 18-425;
- (2) a conditional diversion agreement pursuant to Rule 18-426;
- (3) a reprimand pursuant to 18-427;
- (4) suspension or removal from judicial office; or
- (5) retirement from judicial office pursuant to Rule 18-428.

Committee note: If the consent is to dismissal accompanied by a letter of cautionary advice or to a reprimand and is entered into after charges have been filed, it will be a matter of public record. For those dispositions to remain private, they must be imposed prior to the filing of charges.

(b) Form of Consent

(1) Generally

A consent shall be in the form of a written agreement between the judge and the Commission.



(2) If Charges Directed to Be Filed

If the agreement is executed after charges have been directed to be filed, it shall contain:

(A) an admission by the judge to all or part of the charges or an acknowledgment that there is sufficient evidence from which the Commission could find all or part of the charges sustained;

(B) as to the charges admitted, an admission by the judge to the truth of all facts constituting the sanctionable conduct, **impairment**, or disability as set forth in the agreement;

(C) an agreement by the judge to take any corrective or remedial action provided for in the agreement;

(D) a consent by the judge to the stated sanction;

(E) a statement that the consent is freely and voluntarily given; and

(F) a waiver by the judge of the right to further proceedings before the Commission and subsequent proceedings before the Court of Appeals.

(3) If Charges Not Yet Directed to Be Filed

Unless the consent is to a dismissal accompanied by a letter of cautionary advice or a reprimand, if the agreement is executed before charges have been directed to be filed, it shall contain a statement by the Commission of the charges that would have been filed but for the agreement and the consents and

admissions required in subsection (b)(2) of this Rule shall relate to that statement.

(c) Submission to Court of Appeals

An agreement for a disposition that can be made only by the Court of Appeals shall be submitted to the Court, which shall either approve or reject the agreement. Until approved by the Court of Appeals, the agreement is confidential and privileged. If the Court approves the agreement and imposes the stated sanction, the Commission shall notify the complainant and the agreement shall be made public, except that any portion of the agreement and stated sanction that relates to charges of disability shall be confidential. If the Court rejects the stated sanction, the proceeding shall resume as if no consent had been given, and all admissions and waivers contained in the agreement are withdrawn and may not be admitted into evidence.

Committee note: Because the Commission has the authority, on its own, to dismiss a complaint accompanied by a letter of cautionary advice, and to issue a reprimand, **and to enter into a conditional diversion agreement**, a consent to ~~either of~~ those dispositions need not be submitted to the Court of Appeals for approval. See, however, Rule 18-407 (b)(3).

Source: This Rule is derived in part from former Rule 16-808 (1) (2016), is derived in part from former Rule 18-407 (1) (2018) and is in part new.

REPORTER'S NOTE

This Rule carries forth changes to current Rule 18-414

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approved by the Rules Committee in 2016 and were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals, with the addition of a provision permitting the judge to acknowledge the existence of sufficient evidence to sustain the charges, without making an admission.

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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

RULE ~~18-408~~ 18-437. PROCEEDINGS IN COURT OF APPEALS

(a) Expedited Consideration

Upon receiving the hearing record file pursuant to Rule ~~18-407 (k)~~ 18-435, the Clerk of the Court of Appeals shall docket the case for expedited consideration.

(b) Exceptions

The judge may except to the findings, conclusions, or recommendation of the Commission by filing exceptions with the Court of Appeals ~~eight copies of exceptions~~ within 30 days after service of the notice of filing of the record and in accordance with Rule 20-405. The exceptions shall set forth with particularity all errors allegedly committed by the Commission and the disposition sought. A copy of the exceptions shall be served on the Commission in accordance with Rules 1-321 and 1-323.

(c) Response

The Commission shall file ~~eight copies of~~ a response within 15 days after service of the exceptions in accordance with

Rule 20-405. The Commission shall be represented in the Court of Appeals by its Executive Secretary or such other ~~counsel~~ attorney as the Commission may appoint. A copy of the response shall be served on the judge in accordance with Rules 1-321 and 1-323.

(d) Hearing Memoranda

If exceptions are timely filed, upon the filing of a response or, if no response is filed, upon the expiration of the time for filing it, the Court shall set a schedule for filing memoranda in support of or in opposition to the exceptions and any response and a date for a hearing.

(e) Hearing

The hearing on exceptions shall be conducted in accordance with Rule 8-522. If no exceptions are timely filed or if the judge files with the Court a written waiver of the judge's right to a hearing, the Court may decide the matter without a hearing.

~~(e)~~(f) Disposition

The Court of Appeals may (1) impose the ~~sanction~~ disposition recommended by the Commission or any other ~~sanction~~ disposition permitted by law; (2) dismiss the proceeding; or (3) remand for further proceedings as specified in the order of remand.

Cross reference: For rights and privileges of the judge after disposition, see Md. Const., Article IV, § 4B (b).

~~(f)~~(g) Decision Order

The decision shall be evidenced by the order of the Court of Appeals, which shall be certified under the seal of the Court by the Clerk ~~and shall be accompanied by an opinion.~~ An opinion shall accompany the order or be filed at a later date. Unless the case is remanded to the Commission, the record shall be retained by the Clerk of the Court of Appeals.

(h) Confidentiality

All proceedings in the Court of Appeals related to charges of disability or impairment shall be confidential and remain under seal unless otherwise ordered by the Court of Appeals.

Source: This Rule is former Rule ~~16-809 (2016)~~ 18-408 (2018).

REPORTER'S NOTE

This Rule carries forth changes to current Rule 18-415 approved by the Rules Committee in 2016 and were included in the Committee's 191<sup>st</sup> Report to the Court of Appeals.

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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

Rule 18-438. SUSPENSION OF EXECUTION OF DISCIPLINE

(a) Authority

In imposing discipline upon a judge pursuant to the Rules in this Chapter, whether pursuant to an agreement between the judge and the Commission or otherwise, the Court of Appeals, in its Order, may suspend execution of all or part of the discipline upon terms it finds appropriate.

(b) Monitoring Compliance

(1) Unless the Court orders otherwise, the Commission shall monitor compliance with the conditions stated in the order. The Commission may direct Investigative Counsel or any other person to monitor compliance on its behalf. If, upon request of the judge, a monitor other than Investigative Counsel is appointed, all reasonable expenses of the monitor shall be assessed against the judge.

(2) The Commission may direct the judge to provide to the monitor such information and documentation and to authorize other designated persons to provide such information and documentation

to Investigative Counsel as necessary for the Commission effectively to monitor compliance with the applicable conditions.

(3) Upon any material failure of the judge to comply with those requirements or upon receipt of information that the judge otherwise has failed to comply with a condition imposed by the Court, the monitor promptly shall file a report with the Commission and send written notice to the judge that it has done so. The notice shall include a copy of the report and inform the judge that, within fifteen days from the date of the notice, the judge may file a written response with the Commission.

(4) The Commission promptly shall schedule a hearing on the report and any timely response filed by the judge and shall report to the Court its findings regarding any material violation by the judge. The report shall include any response filed by the judge.

(5) If a material violation found by the Commission is based upon conduct by the judge that could justify separate discipline for that conduct, the Commission may direct Investigative Counsel to proceed as if a new complaint had been filed and shall include that in its report to the Court.

(c) Response; Hearing

Within fifteen days after the filing of the Commission's report, the judge may file a response with the Court. The judge



shall serve a copy of any response on the Commission. The Court shall hold a hearing on the Commission's report and any timely response filed by the judge and may take whatever action it finds appropriate. The Commission may be represented in the proceeding by its Executive Secretary or any other attorney the Commission may appoint.

Source: This Rule is new.

REPORTER'S NOTE

This Rule carries forth the language of proposed new Rule 18-416 approved by the Rules Committee in 2016 and was included in the Committee's 191<sup>st</sup> Report to the Court of Appeals. **It adds a provision allowing the Commission to designate a monitor other than Investigative Counsel but requires that, if an alternative monitor is chosen at the judge's request, the judge bear the expenses of the monitor.**

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 6. SPECIAL PROCEEDINGS

Rule 18-441. CASES OF ALLEGED OR APPARENT DISABILITY OR

IMPAIRMENT

(a) In general

Except as otherwise provided in this Rule, proceedings involving an alleged disability or impairment of a judge shall be in accordance with the other Rules in this Chapter.

(b) Initiation

A proceeding involving alleged or apparent disability or impairment may be initiated:

(1) by a complaint alleging that the judge is disabled or impaired, or a finding to that effect by Investigative Counsel pursuant to Rule 18-421 (f);

(2) by a claim of disability or impairment made by the judge in response to a complaint alleging sanctionable conduct;

(3) upon direction of the Commission pursuant to Rule 18-431;

(4) pursuant to an order of involuntary commitment of the judge to a mental health facility; or

(5) pursuant to the appointment of a guardian of the person

or property of the judge based on a finding of disability that the judge is a disabled person as defined in Code, Estates and Trusts Article, § 13-101.

(c) Confidentiality

All proceedings involving a judge's alleged or apparent disability or impairment shall be confidential.

(d) Inability to Defend

Upon a credible allegation by the judge or other evidence that a judge, by reason of physical or mental disability, is unable to assist in a defense to a complaint of sanctionable conduct, impairment, or disability, the Commission may appoint (1) an attorney for the judge if the judge is not otherwise represented by an attorney or (2) a guardian ad litem, or (3) both.

(e) Interim Measure

If a disability proceeding is initiated pursuant to section (b) of this Rule, the Commission shall immediately notify the Court of Appeals which, after an opportunity for a hearing, may place the judge on temporary administrative leave pending further order of the Court and further proceedings pursuant to the Rules in this Chapter.

(f) Waiver of Medical Privilege; Medical or Psychological Examination

(1) The assertion by a judge of the existence of a mental or physical condition or an addiction, as a defense to or in mitigation of a charge of sanctionable conduct, or the non-existence of a mental or physical condition or an addiction, as a defense to a charge that the judge has a disability **or impairment** constitutes a waiver of the judge's medical privilege and permits:

(A) the Commission to authorize Investigative Counsel to obtain, by subpoena or other legitimate means, medical and psychological records of the judge **relevant to issues presented in the case;** and

(B) upon a motion by Investigative Counsel, the Board to order the judge to submit to a physical or mental examination by a licensed physician or psychologist designated by Investigative Counsel **and** direct the physician or psychologist to render a written report to Investigative Counsel. Unless the judge and Investigative Counsel agree otherwise, the cost of the examination and report shall be paid by the Commission, subject to a subsequent assessment as costs pursuant to Rule 18-408.

(2) Failure or refusal of the judge to submit to a medical or psychological examination ordered by the Board shall preclude the judge from presenting evidence of the results of medical examinations done on the judge's behalf, and the Commission may

consider such a failure or refusal as evidence that the judge has or does not have a disability **or impairment**.

DRAFTER'S NOTE: This Rule is derived, in part, from ABA Rule 27.

Source: This Rule is new.

REPORTER'S NOTE

This is a new Rule, derived in part from ABA Model Rule 27. It addresses special problems or issues in disability cases, which may be initiated as such or converted from what may have begun as a discipline case, including some that are not addressed in the current Rules. Section (a) makes clear that, except as provided in Rule 18-441, proceedings in disability cases shall be in accordance with the other Rules in the Chapter. Section (b) lists the various ways in which a claim of disability may arise. Section (c) preserves confidentiality in disability cases. Section (d) addresses the situation in which a judge, by reason of a disability, may be unable to defend him/herself, even in a sanctionable conduct case. Section (e) permits the Court of Appeals, upon a Report from the Commission, to place a judge with an apparent disability on administrative leave as an interim measure. Section (f) gives the Commission authority to gather certain information once a judge's physical or mental condition becomes an issue.

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DIVISION 6. SPECIAL PROCEEDINGS

Rule 18-442. INTERIM SUSPENSION OR ADMINISTRATIVE LEAVE UPON  
INDICTMENT

(a) Definition

In this Rule, "serious crime" means a crime (A) that constitutes a felony, (B) that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge, or (C) as determined by its statutory or common law elements, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy to commit such a crime.

(b) Interim Suspension

Upon notice by the Commission that a judge has been indicted for a serious crime and a recommendation by the Commission, the Court of Appeals may immediately place the judge on interim suspension pending further order of the Court.

(c) Administrative Leave

Upon notice by the Commission that a judge has been

charged by indictment or criminal information with other criminal misconduct for which incarceration is a permissible penalty and poses a substantial threat of serious harm to the public, to any person, or to the administration of justice, the Court of Appeals may place the judge on interim administrative leave pending further order of the Court.

(d) Reconsideration

A judge placed on interim suspension or administrative leave may move for reconsideration.

Source: This Rule is new.

REPORTER'S NOTE

This is a new Rule derived in part from ABA Model Rule 15, Rules adopted in other States, and Rule 19-738, dealing with attorneys who have been charged with criminal activity. There is no express provision for interim suspensions in the Constitution, but if a judge is indicted for whatever is defined as a serious crime, that authority would seem to be necessary. The Rule would give the Court of Appeals that authority upon a Report from the Commission and subject to the ability of the judge to contest such a ruling by filing a motion for reconsideration.