COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, Crownsville, Maryland on April 16, 1999.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Hon. John F. McAuliffe
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
William J. Boarman, Commission on Judicial Disabilities
Hon. Glenn T. Harrell, Jr., Commission on Judicial Disabilities
Hon. Maurice W. Baldwin, Jr.
Connie R. Beims, Commission on Judicial Disabilities
Hon. James T. Smith, Jr.
Pamela J. White, Esq.
William J. Rowan, III, Esq.
Steven P. Lemmey, Esq., Investigative Counsel, Commission on Judicial Disabilities
Amy S. Scherr, Esq., Executive Secretary, Commission on Judicial Disabilities
Hon. Sally Denison Adkins, Chair, Commission on Judicial Disabilities
Claire Smearman, Esq., Select Committee on Gender Equality
Robert E. Cahill, Jr., Esq.
Hon. Mary Ann Stepler, Circuit Court for Frederick County

The Chair called the meeting to order. He introduced the Honorable James W. Dryden, Administrative Judge of the District Court for Anne Arundel County, who is the newest member of the Rules Committee. The Chair announced that the 142nd and 143rd Reports of the Rules Committee were presented to the Court of Appeals on April 12, 1999. The Court approved the Reports with a few style changes. The Chair asked if there were any additions or corrections to the minutes of the March 12, 1999 Rules Committee meeting. There being none, Judge Kaplan moved that the minutes be approved as presented. The motion was seconded, and it passed unanimously.

Agenda Item 2. Consideration of a proposed amendment to Appendix: Rules of professional Conduct - Rule 1.8 (Conflict of Interest: Prohibited Transactions)

Mr. Brault presented Rule 1.8, Conflict of Interest: Prohibited Transactions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

AMEND the Comment to Rule 1.8 to conform to the text of the Rule, as follows:

Rule 1.8. Conflict of Interest: Prohibited Transactions.

(a) A lawyer shall not enter into a

business, financial or property transaction with a client unless:

(1) the transaction is fair and equitable to the client; and

(2) the client is advised to seek the advice of independent counsel in the transaction and is given a reasonable opportunity to do so.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where:

(1) the client is related to the donee; or

(2) the client is represented by independent counsel in connection with the gift.

. . .

COMMENT

Transactions between client and lawyer.-- As a general principle, all transactions between client and lawyer must be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. The lawyer is required by paragraph (a)(2) to advise the client to seek advice of independent counsel and to give the client a reasonable opportunity to do so. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. See paragraph (b). For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraphs (a) and (b) do not,

however apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, paragraph (a)(2) requires that the client must be offered the opportunity to have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative or the donee or the gift is not substantial.

. . .

Rule 1.8 was accompanied by the following Reporter's Note.

Kendall Calhoun, Esq., Assistant Bar Counsel, pointed out that since paragraph (c)(2) of Rule 1.8 requires that a client be represented by independent counsel, the second paragraph of the Commentary could be misinterpreted, because it seems to indicate that in all cases the client must only be offered the opportunity to seek the advice of counsel. The Commentary is proposed to be amended to refer to paragraph (a)(2).

Mr. Brault explained that the change to the commentary of Rule 1.8 was requested by Kendall Calhoun, Esq., Assistant Bar Counsel.

She had pointed out that while paragraph (c)(2) requires that a client be represented by independent counsel, the second paragraph of the Commentary seems to indicate that in all cases, a client need only be offered the opportunity to seek the advice of counsel. The Subcommittee is proposing to amend the commentary to refer specifically to paragraph (a)(2) in the third sentence of the second paragraph. Mr. Brault moved that this change be approved, the motion was seconded, and it passed unanimously.

Agenda Item 3. Consideration of a proposed amendment to the Rules Governing Admission to the Bar - Rule 17 (Character Committees

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Mr. Brault presented Rule 17, Character Committees, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

AMEND Bar Admission Rule 17 of the Rules Governing Admission to the Bar of Maryland to organize Character Committees by Appellate Judicial Circuits, as follows:

Rule 17. Character Committees.

The Court shall appoint a Character Committee for each of the ~~eight judicial circuits~~ seven Appellate Judicial Circuits of the State. Each Character Committee shall consist of not less than five members whose

terms shall be for five years each and which shall be staggered, except that in the Sixth Appellate Circuit the term of each member shall be two years. The Court shall designate the chair of each Committee, and may provide compensation to the members. ~~Each Committee shall elect a secretary.~~

Source: This Rule is derived from former Rule 4 a and e.

Bar Admission Rule 17 was accompanied by the following Reporter's Note.

The proposed amendment to this Rule is threefold.

First, at the request of Chief Judge Robert M. Bell, the amended Rule organizes Character Committee by Appellate Judicial Circuits, rather than by judicial circuits.

Second, the amendment incorporates into the Rule the current practice of appointing Character Committee members from Baltimore City to two-year terms, rather than to five-year terms.

Finally, the requirement of electing a secretary has been eliminated, to be consistent with the practice by many of the circuits which do not elect a secretary.

Mr. Brault explained that the Character Committee is organized by Appellate Judicial Circuits rather than by judicial circuits, so the Rule needed to be amended to reflect this. Baltimore City appoints its Character Committee members to two-year terms, and this aspect of the Rule was amended. Finally, the last sentence of the Rule is proposed to be deleted, because not all of the circuits elect

a secretary. Mr. Brault noted that Bedford T. Bentley, Jr., Esq., Secretary to the Board of Bar Examiners had requested these changes. Mr. Brault moved that the proposed changes be approved. The motion was seconded, and it carried unanimously.

Agenda Item 1. Consideration of proposed changes to the Rules concerning the Commission on Judicial Disabilities and the Maryland Code of Judicial Conduct: Amendments to Rule 16-803 (Commission on Judicial Disabilities — Definitions), Rule 16-804 (Commission), Rule 16-805 (Complaints; Preliminary Investigations), Rule 16-806 (Further Investigation), Rule 16-807 (Disposition Without proceedings on Charges), Rule 16-808 (Proceedings Before Commission), Rule 16-809 (Proceedings in Court of Appeals), Rule 16-810 (Confidentiality), Add new Rule 16-810.1 (immunity From Civil Liability), and Amendments to Rule 16-813 (Maryland Code of Judicial Conduct)

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The Chair said that several judges, who had served as consultants to the General Court Administration Subcommittee, as well as some of the members of the Judicial Disabilities Commission (Commission) were present for today's discussion. The Honorable Glenn T. Harrell, Associate Judge of the Court of Special Appeals, who had previously been Chair of the Judicial Disabilities Commission, and the Honorable Sally D. Adkins, Associate Judge of the Court of Special Appeals, current Chair of the Commission, were also present. Judge Harrell and Judge Adkins had organized their comments as to the various issues involved in the drafting of the Judicial Disabilities Commission Rules.

The Chair presented Rule 16-808 for the Committee’s consideration, and he asked the Committee to focus on the two alternatives presented in subsection (h)(5).

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-808 to reorganize it, to delete the requirement of service by certified mail, to lengthen the period for the hearing to be scheduled, to provide for a prompt hearing, to lengthen the time for providing a list of witnesses and documents, to permit the parties to submit proposed findings of fact and conclusions of law, to delete the public reprimand, and to provide for a consent by discipline proceeding, as follows:

Rule 16-808. PROCEEDINGS BEFORE COMMISSION

(a) ~~How Commenced; Caption~~ Charges

After considering any recommendation of Investigative Counsel and upon a finding by the Commission of probable cause to believe that a judge has a disability 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 has committed sanctionable conduct. The charges shall (1) state the nature of the alleged disability or sanctionable conduct, including each ~~Canon~~ specific provision of the Maryland Code of Judicial Conduct allegedly violated by the judge, (2) specify the alleged facts upon which the charges are based, and (3) state that the judge has the right to file a written response to the charges within 30 days after service of the charges.

(b) Service; Notice

~~A copy of the charges shall be delivered~~

~~to the judge by a competent private person as defined in Rule 2-123 (a) or by certified mail. If it appears to the Commission that, after reasonable effort for a period of ten days, personal delivery cannot be made, s~~Service may be made upon the judge by any ~~other~~ means of service the Commission deems appropriate in the circumstances and reasonably calculated to give actual notice. A return of service of the charges shall be filed with the Commission pursuant to Rule 2-126. Upon service, the Commission shall send notice to any complainant that charges have been filed against the judge. Cross reference: See Md. Const., Article IV, §4B (a).

(c) Response

Within 30 days after service of the charges, the judge may file with the Commission an original and ~~seven~~ 11 copies of a response.

~~(d) Exchange of Information~~

~~Unless ordered otherwise by the Commission for good cause:~~

~~(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 and copy all evidence accumulated during the investigation and all statements as defined in Rule 2-402 (d) 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 10 days before 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.~~

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

~~(1)~~ Upon the filing of a response or upon expiration of the time for filing it, the Commission shall notify the judge of the time and place of a hearing. If the hearing is on a charge of sanctionable conduct, the Commission shall also notify the complainant. Unless the judge has agreed to an earlier hearing date, ~~T~~the notices shall be mailed at least ~~30~~ 60 days before the date set for the hearing.

~~(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) The hearing shall be conducted in accordance with the rules of evidence in Code, State Govt. Art., §10-213.~~

~~(5) The proceedings at the hearing shall be stenographically or electronically recorded. Except as provided in section (j) of this Rule, the Commission is not required to have a transcript prepared. The judge may, at the judge's expense, have the recording of the proceedings transcribed.~~

~~(f) Procedural Rights of Judge~~

~~The judge has the right to be represented by an attorney, to the issuance of a subpoena 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.~~

~~Cross reference: For the right of the Commission to issue subpoenas, see Code, Courts Article, §13-401.~~

~~(g) Amendments~~

~~At any time before its decision, the Commission on motion of Investigative Counsel~~

~~or the judge or on its own initiative may allow amendments to the charges or the response. The charges or the response may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing, except that, if the amendment changes the character of the disability or sanctionable conduct alleged, the consent of the judge and Investigative Counsel is required. If an amendment to the charges is made, the judge shall be given a reasonable time to respond to the amendment and to prepare and present any defense.~~

~~(h) Extension of Time~~

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

~~(i) 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 (j) of this Rule. Otherwise, it shall dismiss the charges filed by Investigative Counsel and terminate the proceeding.~~

~~(j) Record~~

~~If the Commission refers the case to the Court of Appeals, it 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 as to retirement or as to censure, removal, or other appropriate discipline, and enter those findings and recommendations in the record;~~

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

~~(3) make the transcript of testimony 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 record in the proceedings including any dissenting or concurring statement by a Commission member, certified by the Chair of the Commission; and~~

~~(5) promptly serve upon the judge notice of the filing of the record and a copy of the Commission's findings, conclusions, and recommendations and any dissenting or concurring statement by a Commission member. Service shall be made by certified mail addressed to the judge's last known home address or, if previously authorized by the judge, to an attorney designated by the judge.~~

(e) Extension of Time

The Chair of 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 a prompt hearing on the charges, to be represented by an attorney, to the issuance of a subpoena 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; Discovery

Unless ordered otherwise by the Chair of the Commission for good cause:

(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 and copy all evidence accumulated during the investigation and all

statements as defined in Rule 2-402 (d) 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 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 into evidence at the hearing.

(3) The taking of depositions and other discovery is governed by Chapter 400 of Title 2, except that the Chair of the Commission may enter protective orders permitted by Rule 2-403 and make other rulings as justice may require pertaining to any discovery question.

(4) When the charges or any response allege that the judge has a disability, the Chair of the Commission for good cause may order the judge to submit to a mental or physical examination pursuant to Rule 2-423.

(h) Hearing

(1) At a hearing on charges, the applicable provisions of Rule 16-806 (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 or suggestion for recusal of a member of the Commission shall be filed not less than 30 days prior to the hearing.

ALTERNATIVE 1

(5) The hearing shall be conducted in accordance with the rules of evidence in Code, State Govt. Art., §10-213.

ALTERNATIVE 2

(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 or electronically 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 recording of the proceedings transcribed.

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

(i) Amendment

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

(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 refer the matter to the Court of Appeals pursuant to section (k) of this Rule. Otherwise, the Commission shall dismiss the charges filed by 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 as to the appropriate sanction, including retirement, censure, or removal, 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 conducted by the Commission to be prepared and included in the record;

(3) make the transcript of testimony 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 record in the proceedings including any dissenting or concurring statement by a Commission member, certified by the Chair of the Commission; and

(5) promptly serve upon the judge notice of the filing of the record and a copy of the findings, conclusions, and recommendations and any dissenting or concurring statement by the Commission members. Service shall be made pursuant to section (b) of this Rule.

(l) Discipline By Consent

At any time 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 that shall be made public in which the judge (1) admits to all or part of the charges in exchange for a stated sanction; (2) agrees to take the corrective or remedial action provided for in the agreement; (3) admits the truth of all facts constituting sanctionable conduct, as set forth 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. Unless the stated sanction is censure, retirement, or removal, the agreement shall be submitted to the Commission, which shall either reject or approve the agreement. If the stated sanction is censure, retirement, or removal, the agreement shall be submitted to the Court of Appeals for approval. If the stated sanction is rejected by the Commission or the Court of Appeals, the proceeding shall resume as if no consent had been given. All admissions and waivers contained in the agreement are withdrawn and may not be admitted into evidence. The agreement shall remain confidential and privileged until the Commission or the Court of Appeals approves it and imposes the stated sanction upon the judge.

Source: This Rule is in part derived from former Rule 1227E and in part new.

Rule 16-808 was accompanied by the following Reporter's Note.

Section (a) is derived from section (a) of former Rule 1227E. The Subcommittee changed the tagline and changed the language which read, "Canon of Judicial Conduct" to the language "specific provision of the Maryland Code of Judicial Conduct" for clarity.

Section (b) is derived from section (b) of former Rule 1227E. The Subcommittee agreed that service by certified mail was not necessary, so it deleted that provision, leaving the method of service up to the Commission.

Section (c) is derived from section (c) of former Rule 1227E. The Subcommittee increased the number of copies of the judge's response to be filed, because the number of Commission members was increased by constitutional

amendment.

Section (d) is derived from subsection (e)(1) of former Rule 1227E. The Subcommittee lengthened the period from 30 to 60 days for the hearing to be scheduled with a provision for the judge to agree to an earlier hearing date.

Section (e) is substantially the same as section (h) of former Rule 1227E.

Section (f) is derived from section (f) of former Rule 1227E. At the suggestion of the then-Chair of the Judicial Disabilities Commission, the Subcommittee added the right to a prompt hearing on the charges.

Section (g) is derived from section (d) of former Rule 1227E.

Subsection (g)(1) is substantially the same as subsection (d)(1) of former Rule 1227E.

Subsection (g)(2) is substantially the same as subsection (d)(2) of former Rule 1227E, except that the Subcommittee changed the time for providing the list of witnesses and documents from 10 days before the hearing to 30 days before the hearing to give the parties more time to prepare for the hearing.

Subsection (g)(3) is new. It is derived from proposed Attorney Discipline Rules 16-766 and 16-746 (b), and provides a mechanism to handle discovery.

Subsection (g)(4) is new. It is derived from proposed Attorney Discipline Rule 16-746 (c), a parallel provision for attorneys.

Section (h) is derived from section (e) of former Rule 1227E.

Subsection (h)(1) is new and was added to clarify that subpoenas are governed by Rule 16-806 (b).

Subsection (h)(2) is substantially the same as subsection (e)(2) of former Rule 1227E.

Subsection (h)(3) is substantially the same as subsection (e)(3) of former Rule 1227E.

Subsection (h)(4) is new. The Subcommittee added it because of the expanded recusal provision in Rule 16-804 (b) and to notify the judge that a motion or suggestion for recusal shall be filed not less than 30 days prior to the hearing.

Subsection (h)(5) is derived from subsection (e)(4) of former Rule 1227E. Alternative 1 is taken verbatim from the former Rule. Because the Commission hearing is a judicial proceeding and the ABA has recommended that the judicial rules of evidence be followed, which is Alternative 2, the Subcommittee is asking the full Committee for a policy decision as to which alternative it prefers.

Subsection (h)(6) is substantially the same as subsection (e)(5) of former Rule 1227E.

Subsection (h)(7) is new. The initial proposed language provided that the Chair of the Commission shall instruct the Commission as to the applicable law and that the parties may submit written requests for instructions at or before the close of the evidence. The Commission was not in favor of this provision. The Subcommittee then proposed that the parties be able to submit proposed findings of fact and conclusions of law so that they can clarify their positions to the Commission.

Section (i) is derived from section (g) of former Rule 1227E. Because the then-Chair of the Judicial Disabilities Commission was opposed to modifying the charges at the hearing, the Subcommittee deleted the second sentence of section (g), which provides that the charges or response may be amended to conform to proof or to set forth additional facts, with the consent of the judge and

Investigative Counsel if the amendment charges the character of the disability or conduct.

Section (j) is derived from section (i) of former Rule 1227E. After a lengthy discussion, the Subcommittee deleted the language providing that if the Commission finds by clear and convincing evidence that the judge has committed sanctionable conduct, the Commission has the option of issuing a public reprimand. The Subcommittee was concerned that the reprimand is public and may be administered without the judge's consent, but that the judge should be able to obtain review of it by the Court of Appeals; therefore, the Commission's power to reprimand is conditioned upon prior review by the Court of Appeals.

Section (k) is derived from section (j) of former Rule 1227E.

Subsection (k)(1) is substantially the same as subsection (j)(1) of former Rule 1227E.

Subsection (k)(2) is substantially the same as subsection (j)(2) of former Rule 1227E.

Subsection (k)(3) is substantially the same as subsection (j)(3) of former Rule 1227E.

Subsection (k)(4) is substantially the same as subsection (j)(4) of former Rule 1227E.

Subsection (k)(5) is derived from subsection (j)(5) of former Rule 1227E. The Subcommittee decided that it was not necessary to serve the notice of the record and a copy of the Commission's findings by certified mail, and instead referred to section (b) of the Rule which provides for notice by any means the Commission deems appropriate which is reasonably calculated to give actual notice.

Section (l) is new. It is derived from Rule 16-782, Consent to Discipline or Inactive Status, one of the proposed Attorney Discipline Rules. This procedure has worked very well in attorney discipline proceedings, and the

Subcommittee recommends its addition to the Judicial Disabilities Commission Rules.

The Chair commented that the first issue for discussion is which rules of evidence are appropriate to be used in hearings by the Judicial Disabilities Commission. Should the hearings be conducted under the Administrative Procedures Rules or pursuant to the Title 5 Rules of Evidence? The Chair called upon Judge Adkins to introduce the members of the Commission and counsel to the Commission.

Judge Adkins told the Committee that she was pleased to be present for the discussion. She introduced two of the current Commission members, Constance Beims, former appointments secretary for the Honorable Harry Hughes, who has been a member of the Commission since 1996, and William Boarman, Vice President of the Communication Workers of America. Judge Adkins noted that both these individuals make insightful and thoughtful contributions to the Commission. She also introduced Amy S. Scherr, Esq., Executive Secretary of the Commission, Judge Harrell, and Steve Lemmey, Esq., Investigative Counsel.

Judge Harrell told the Committee that he had chaired the Commission for three years prior to December 31, 1998. Many decisions, including the case of In re Formal Inquiry Concerning Diener and Broccolino, 268 Md. 659 (1973), have held that the fundamental rules of fairness govern the evidentiary aspects of judicial disabilities matters. In 1995, the Court of Appeals adopted

Rule 1227E (e)(4), which is now Rule 16-808 (e)(4), and this provides that the hearing shall be conducted in accordance with the rules of evidence in Code, State Government Article, §10-213, which is the Administrative Procedures Act (APA).

Judge Harrell remarked that he is familiar with this set of rules, and he expressed the view that the Court of Appeals made the correct decision to employ the APA rules rather than Title 5. Critics have called the APA Rules "wishy-washy," because one cannot predict what evidence is allowed to come in, but the Rules have more backbone than is first obvious. Even though the Rules permit hearsay to be admitted, this does not mean anything is fair game. Case law including the case of Travers v. Baltimore City Police Department, 115 Md. App. 395 (1997), has held that even if hearsay testimony is not technically excluded, this does not mean that the hearsay comes in unless it is reliable and of probative value. This requires a close analysis. A 1995 Judicial Disabilities case involved a question about the result of the transmittal from the Office of the State's Attorney to the Commission of polygraph test results. The concern was that the Commission was tainted by this evidence. A motion for recusal of the entire Commission was denied. No polygraph tests were offered at the hearing. The Court of Special Appeals has held that polygraph test results are not admissible, even in administrative proceedings. The Court of Appeals has said that what the Commission does is neither civil nor criminal. Its aim is to

maintain the honor and integrity of the judiciary, not to punish judges. Judge Harrell expressed the view that the Court of Appeals through case law prefers the fundamental rules of fairness and not the strict rules of evidence. He stated that he was not aware of evidentiary abuse under the APA Rules.

Judge McAuliffe cautioned that the statement that the APA Rules are rules of fundamental fairness may imply that the Title 5 Rules of Evidence are not fair. Should the APA Rules be adopted in place of Title 5? The question is how the APA Rules are superior to the Title 5 Rules. Judge Harrell responded that the APA Rules are not better than Title 5, they are better adapted to Commission inquiries. The Vice Chair noted that the Rules Committee recently submitted the proposed revised Attorney Discipline Rules to the Court of Appeals. The standard for those rules is the Title 5 Rules of Evidence. She asked why the same rules would not apply to judges. Judge Harrell said that the Attorney Discipline Rules are designed for the protection of the public. The main punishment is de-licensure. The analogy to the Judicial Disabilities Rules is not apt. Judges may be removed from the bench, but they are not de-licensed to practice law concurrently. Attorney discipline is more like consumer protection. The work of the Judicial Disabilities Commission is broader than that. The rules of fundamental fairness provide a good balance to protect the judges, but allow the Commission to protect the honor and integrity of the judiciary.

Judge Vaughan inquired if the experiences or outcomes would be different if Title 5 were applied instead of the APA Rules. Judge Harrell replied that he had only chaired one proceeding, and the two different sets of evidentiary rules would have made no difference in the outcome. Mr. Sykes pointed out that the APA Rules allow hearsay to be admitted when it is material and trustworthy. Title 5 has an exception for exceptional circumstances which allows hearsay to be admitted if it is reliable and trustworthy. With either of the sets of rules, one can get hearsay admitted. Mr. Bowen remarked that if the APA Rules are perceived as looser, allowing less chance of a judge to escape under a technicality, the public's perception of a change from the APA Rules to Title 5 would be that the Rules are being weakened. He questioned whether the proposed change is needed, particularly since the results are not any different.

Mr. Howell said that the Diener-Broccolino case, as well as the case of In re Bennett, 301 Md. 517 (1984), held that the Rules of Evidence do not apply to judicial disabilities proceedings. The Diener-Broccolino case was decided in 1973 and the Bennett case in 1984. At the time of these cases, there were no codified rules of evidence in Maryland. The evidence rules were common law rules. The Rules Committee spent years formulating the Title 5 Rules. Four years ago when the Judicial Disabilities Commission Rules were revised, the Rules Committee recommended to the Court of Appeals that the Title 5 Rules be applied to Judicial Disabilities proceedings,

but the efforts were unsuccessful. Mr. Howell explained that his problem is viewing the Commission as an administrative agency. The Commission is the only body he knows which uses less than the Rules of Evidence at the final adjudicatory stage.

Mr. Rowan was the next speaker. He told the Committee that he was an attorney who had represented the defense in the first public case where a judge was charged with sexual activity in his chambers and the failure to recess the court promptly when the existence of a fire was announced in the courthouse. The two cases were tried back to back. Something happened in the fire case to taint the other proceeding. This issue was raised in the appellate briefs, but did not get to the Court of Appeals, because the judge retired. In the fire case, the Honorable Robert Sweeney, who was then Chief Judge of the District Court, was called as a witness and allowed to testify over the objection of defense counsel that the judge's actions endangered the lives of the people in the courtroom. Judge Sweeney was also allowed to give an opinion that the judge was emotionally unstable. Because of the looseness of the Rules, the testimony was admitted. Under the technical rules of evidence, Judge Sweeney's testimony would not have been admitted, unless he were first qualified as an expert. The Commission could have brought in a psychiatrist to testify. Judge Sweeney should not have been allowed to testify as he relied on hearsay. If the APA Rules are used, judges do not get the benefit of the same rules as other citizens in

court or attorneys in grievance proceedings.

Ms. White said that she had been the Chair of the Select Committee on Gender Equality. She introduced Claire Smearman, Esq., a member of the Select Committee, who was representing M. Peter Moser, Esq. Ms. White told the Rules Committee that she is an employment attorney. The APA Rules are used in personnel and performance issues. They offer the most flexibility, focusing on performance and other issues of state employees, including judges. Mr. Brault asked if employee hearings are confidential. Mr. Zarnoch replied that they can be closed. Mr. Brault remarked that once a hearing is public, it needs to be structured carefully. There has been a push to make all attorney grievance hearings public. Some of the people from the American Bar Association had attended a Rules Committee meeting several years ago, and they had explained that when everything is made public, people and the media lose interest in the matter. When he was questioned by the media in the judicial disabilities matter represented by Mr. Rowan, Mr. Brault told the media that even if the judge were innocent, the media coverage had already ruined the judge's life. Mr. Brault expressed the view that Title 5 provides structure for public hearings.

Judge Adkins remarked that had she chaired the hearing where Judge Sweeney was allowed to testify, even under the APA Rules, she might not have allowed in the testimony of a non-expert in psychology. The issue may not have been the APA Rules as much as a

judgment call upon the part of the presiding judge at the hearing. The Chair noted that the APA Rules do not address expert testimony, but Rule 5-702, Testimony by Experts, is right on point. Judge Harrell said that the examples pointed out by Mr. Rowan in the fire case made a better argument for harmless error. The testimony by Judge Sweeney was not relied on by the Commission when it made its decision.

Mr. Brault commented that he had been a character witness in the case being discussed. Because the case involved sexual misconduct and the emotional stability of a judge, the press covered it every day. Many lives were ruined. The press covered Judge Sweeney's testimony. The APA evidence rules were too loose to be applied in a public hearing.

Judge McAuliffe expressed his concern about the basic theorem that the Title 5 Rules are wrong for judicial disabilities matters and the corollary that the APA Rules are more fair. He moved to accept Alternative 2 on page 32 of the Rules, which provides that "[t]he hearing shall be conducted in accordance with the rules of evidence in Title 5 of these rules." The motion was seconded, and it passed on a vote of 13 in favor and two opposed.

The Chair presented Rule 16-807, for the Committee’s consideration and he asked the Committee to focus on the two alternatives presented in subsection (a)(2), involving dismissal with a warning.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-807 to reorganize section (a), to change the standard for admitting a reprimand in subsequent disciplinary proceedings, to provide that a deferred discipline agreement may be revoked for noncompliance, to provide that the terms of the deferred discipline agreement are confidential, and to provide a termination provision, as follows:

Rule 16-807. DISPOSITION WITHOUT PROCEEDINGS ON CHARGES

(a) Dismissal

(1) Evidence Fails to Show Disability or Sanctionable Conduct

The Commission shall dismiss a complaint ~~and terminate the proceeding~~ if, after an investigation, it concludes that ~~(1)~~ the evidence fails to show that the judge has a disability or has committed sanctionable conduct~~, or (2) any sanctionable conduct that may have been committed by the judge is not likely to be repeated and was not sufficiently serious to warrant discipline~~. The Commission shall notify the judge and any complainant of the dismissal.

ALTERNATIVE 1

(2) Sanctionable Conduct Not Likely to be Repeated

If the Commission determines that any

sanctionable conduct that may have been committed by the judge is not likely to be repeated and was not sufficiently serious to warrant discipline, ~~T~~the Commission may accompany a dismissal ~~under subsection (a)(2) of this Rule~~ with a warning against ~~further~~ future sanctionable conduct. 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. At least 30 days before a warning is issued, the Commission shall mail to 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 that a warning was given. In those cases where the complainant is to be notified, the judge may reject the warning by filing with the Commission before the intended date of issuance of the warning, a written rejection. 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, the warning shall not issue and shall have no effect. The Commission may either dismiss the complaint or take any other action not inconsistent with these Rules.

ALTERNATIVE 2

Alternative 2 is identical to Alternative 1, except that the fourth sentence would be deleted and the following sentence substituted in lieu thereof:

The judge may reject the warning by filing with the Commission before the intended date of issuance of the warning, a written rejection.

~~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 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 ~~shall not be protected by confidentiality~~ may be admitted in any subsequent disciplinary proceeding against the judge to the extent such evidence 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.

(c) Deferred Discipline Agreement

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

(A) The Commission concludes that the alleged sanctionable conduct was not so serious, offensive, or repeated 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 ~~shall not be protected by confidentiality in any subsequent disciplinary proceeding against the judge~~ may be revoked for noncompliance.

(2) The Commission shall direct Investigative Counsel to monitor compliance with the conditions of the agreement and may direct the judge to document compliance. If, after written notice by Investigative Counsel to the judge of the nature of any alleged failure to ~~satisfy~~ comply with a condition and, after affording the judge a minimum 15-day opportunity to present any information or explanation that the judge chooses, 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. The agreement shall specifically authorize the Commission to proceed in accordance with this ~~paragraph~~ subsection.

(3) The Commission shall notify the complainant that the complaint has resulted in an agreement with the judge for corrective or remedial action, but, unless the judge consents in writing, ~~shall not inform the complainant of the terms of the agreement~~ the terms of the agreement shall remain confidential and not disclosed to the complainant or any other person, except as provided in the deferred discipline agreement. 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 the conditions, the Commission shall terminate the proceedings.

Source: This Rule is derived from former Rule 1227D, except for subsection (c)(4) which is new.

Rule 16-807 was accompanied by the following Reporter's Note.

> Section (a) is derived from section (a) of former Rule 1227D.
>
> Subsection (a)(1) has been changed by the Subcommittee which recommends deleting the language, "and terminate the proceeding" as unnecessary and reorganizing the provision, so that subsection (a)(1) focuses on the situation where the evidence fails to show that the judge has a disability or has committed sanctionable conduct.
>
> Subsection (a)(2) has been changed to focus on the situation where the Commission determines that any sanctionable conduct that may have been committed by the judge is not likely to be repeated and was not serious enough to warrant discipline. The Subcommittee expanded on the warning provision of the former Rule by adding that 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. The Subcommittee could not agree as to whether the judge should be able to reject the warning in all cases or only in those cases where the complainant is to be notified. Two alternatives of subsection (a)(2) are being presented. The first one provides that the judge may reject the warning in those cases where the complainant was notified. The second alternative provides that the judge may always reject the warning. The former rule does not provide for any rejection of the warning by the judge.
>
> Section (b) is derived from section (b) of former Rule 1227D.
>
> The first two parts of subsection (b)(1) are substantially the same as subsection (b)(1) of former Rule 1227D (b)(1)(A) and (B). Part

(C) is derived from the former Rule, but narrows the use of the reprimand in subsequent disciplinary proceedings. The former Rule provided that the reprimand is not protected by confidentiality in any subsequent disciplinary proceeding against the judge. The proposed language provides that the judge agrees that the reprimand may be admitted in any subsequent disciplinary proceeding against the judge to the extent such evidence is relevant to the charges at issue or the sanction to be imposed.

Subsection (b)(2) is substantially the same as subsection (b)(2) of former Rule 1227D.

Section (c) is derived from section (c) of former Rule 1227D.

Subsection (c)(1) is substantially the same as the former Rule except that at the end of Part (B), the Subcommittee changed the language which provided that the judge agrees that the deferred discipline agreement is not protected by confidentiality in any subsequent disciplinary proceeding to the language which provides that the judge agrees that the agreement may be revoked for noncompliance. The Subcommittee did not feel that the fact that a deferred discipline agreement was worked out should be used in a later disciplinary proceeding.

Subsection (c)(2) is substantially the same as subsection (c)(2) of former Rule 1227D with style changes.

Subsection (c)(3) is derived from subsection (b)(3) of former Rule 1227D. The Subcommittee has clarified that the agreement includes one for remedial as well as corrective action and that the terms of the agreement are confidential, unless there is a provision which states otherwise in the deferred discipline agreement. The Subcommittee also added the final sentence which provides that a deferred discipline agreement does not constitute discipline or a finding that sanctionable conduct was committed.

Subsection (c)(4) is new. The Subcommittee added the termination provision to be consistent with current practice.

The Chair noted that this issue arose also in the Attorney Discipline Rules. The question is under what circumstances should a judge be able to reject a warning. A number of judges had expressed the concern that judges applying for other benches would have to inform the Judicial Nominating Commission about warnings they had received, even though they might not have had an opportunity to argue the warning. Judge Harrell explained that the current rules provide that if the Commission dismisses the case, the complainant is to be notified. The Commission also notifies the complainant if a private reprimand is issued. If a deferred discipline agreement is the resolution of the case, the Rules require that the complainant be notified of the fact of the agreement, but not the details.

Judge Harrell continued that Rule 16-807 (a) provides that a dismissal may be accompanied by a warning. A warning is not a reprimand and is not discipline. The Commission's interpretation is that if a judge applies to a judicial nominating commission, in response to their inquiry, a judge must disclose complaints or charges which do not result in dismissal. One problem would be a judge who had received a dismissal with a warning, and the complainant was told of the warning. The complainant could disseminate the information about the warning, and the nominating commission or a bar association may receive information from

extrinsic sources about the warning. One rational construction would be to notify the complainant but with only a "bare bones" explanation. The Commission has not notified the complainant in all cases.

Judge Harrell told the Committee that the Commission does not like either of the alternatives presented in subsection (a)(2). One concern is that if the rejection of the warning causes the judge to be charged, it forces the Commission into a dilemma. The charge may have been sanctionable conduct which is not likely to be repeated, and the Commission may be concerned about charging the judge. The ability to reject the warning also takes away the discretion of the Commission. The warning is designed to give guidance to a judge who may have skated near or crossed over the edge of inappropriate behavior. Rejecting the warning removes the Commission's discretion.

Mr. Brault commented if a question on an application for judicial office asks about prior discipline and the judge correctly states that the judge was never disciplined, if the nominating commission learns from an outside source that the judge received a dismissal with a warning, the inference would not be favorable. Alternatively, the question may be couched as "has there ever been a complaint made against you?" In this case, the fact that a warning is not discipline makes no difference. The judge must disclose the warning. Judge Harrell said that he had not looked at a judicial application form for eight years, and he did not recall the form of

the question. Mr. Brault observed that in his experience with the judicial nominating process, the applicants always relate every detail of all complaints made against them. The Rules Committee wrestled with this issue in the discussion of the Attorney Discipline Rules. Judge McAuliffe did not like the fact that the Judicial Disabilities Commission rules provide no opportunity to appeal from a warning. Often applications for malpractice insurance ask about complaints made against the applicant. Mr. Howell remarked that the warning is supposed to be used as guidance for the judge, but it does not always work as it should. Judges are public figures, and often there is vast media coverage when the complainant learns of a warning. In one recent case that was dismissed with a warning, the media correctly reported that disposition but then went on to repeat all of the allegations against the judge, even allegations that were unfounded. Most judges appreciate the guidance when they step near to or over the line. As between a choice of receiving a warning or being the subject to proceedings that could result in a reprimand, most judges would choose the warning. A judge may be covered by the media on a daily basis. A judge may be denied his or her day in court without the opportunity to prove unfounded charges.

Mr. Boarman was the next speaker. He thanked the Rules Committee for the opportunity to appear. He thanked the Chair for his appearance at the previous Commission meeting. He said that all of the Commission members are in agreement as to the criticisms of

the proposed amendments. They are a dedicated group of individuals with no axes to grind and no agenda. Their goal is to ensure that the public respects the judiciary. By changing Rule 16-807, the Committee is proposing to take away the Commission's best tool. The Commission strives to be fair to judges and to complainants, and to honor its confidentiality. The confidentiality requirements may hurt the Commission, because it cannot discuss any matter which is not public. When only one side of the Commission's actions are heard, it is difficult to make a judgment about their decisions.

Mr. Boarman commented that the Commission is very aware of the possible damage that a charge to a sitting judge can be to the judge's future career. The Commission ensures the fairest possible result. All of the Commission members respect the position of judge. They balance the rights of citizens with the rights of judges. Mr. Boarman urged the Committee not to tamper with the Commission's authority to dismiss with a warning. The Rule as it exists now works very well. If it is changed, it would be more difficult to dismiss cases, and the change could have the opposite effect of what is intended. Also, the proposal to change the definition of the term "sanctionable conduct" would be harmful to the judicial discipline process. It would restrict the Commission and be harmful to the public. There is no reason to make the change.

Mr. Howell asked what the harm would be to allow a judge to consider a proposed warning and have the opportunity to consent to it

or reject it. A similar provision exists for private reprimands. Mr. Boarman replied that the rejection would put the Commission in a difficult position. If the Commission decides to charge the judge, the media will come in. The Commission would end up charging more judges. The Chair of the Rules Committee had pointed out that it is more damaging to a judge to be charged.

Mr. Johnson inquired if an attorney has the right to reject a warning under the proposed Attorney Discipline Rules. Mr. Brault answered that there is no right to reject a warning, only a reprimand. Mr. Johnson questioned as to why a judge's situation is different than an attorney's. Mr. Howell noted that under the Attorney Grievance Commission's own set of internal rules, an attorney can reject a warning. Mr. Brault remarked that in the real world, the matter would be worked out with Bar Counsel. When he represents attorneys in the discipline process, Mr. Brault said that he and his clients usually agree that the issuance of a warning is a good result.

Judge Vaughan observed that a dismissal is personal and confidential. The Chair pointed out the problem of informing someone that the case was dismissed with a warning. He reiterated the problem of a judicial nominating commission finding out from a complainant that a dismissal with a warning had been issued. The applicant's chances to move up to a new job could be damaged if the complainant tells. Judge Vaughan commented that the applicant might

have been better off explaining about the dismissal with a warning. The Chair stated that if he, as the trial judge, were the subject of a complaint by the mother-in-law of a party litigant, and he felt that he had done nothing wrong, and he did not want the warning, he should have the opportunity to argue the warning.

The Vice Chair raised again the question of why the judge should be in a better position than the attorney. Mr. Brault noted that in the Attorney Discipline Rules, there are two levels of warnings. The first warning is by Bar Counsel. This is informal and the in-house grievance rules set out the procedure. The second warning is the more powerful one -- the hearing panel can dismiss the case with a warning.

Mr. Brault suggested that Mr. Boarman's written remarks be made part of the record of today's meeting. The Committee agreed by consensus to this suggestion. (See Appendix 1). Mr. Brault commented that in his experience with attorney discipline, an attorney who rejects a warning will be charged. A judge who comes before the nominating commission and reports a dismissal with a warning can argue articulately that he or she did not have the opportunity to reject the warning. This will cause a problem only on rare occasions. Judge McAuliffe said that he would not want the rule to be written to allow a body to issue a warning without the ability of the judge to be able to reject or appeal the warning. This would be unfair, and it would be a major stigma for the judge. The power

of the Commission to issue a dismissal with a warning is invaluable, and 999 of 1000 judges would accept the warning. In the rare case, if the judge disagrees with the warning, any judge will know that a rejection of the warning will result in a charge. Judge McAuliffe expressed the opinion that Alternative 2 is the better option. Mr. Howell added that the Subcommittee's position was that if a judge rejected a warning, the judge is estopped in any later proceeding from using the fact that a dismissal was offered.

Mr. Sykes remarked that in certain cases where the Commission dismisses without a warning, it might be beneficial for the Commission to hold an informal, off-the-record counseling session with the judge. Mr. Hochberg asked if the word "warning" could be changed to the word "advice." A dismissal could be entered, the advice given, and the case closed. The Chair reiterated that judges have been destroyed by the media.

Mrs. Beims told the Committee that it might be helpful if they understood how the Commission decides about the warning. If a judge has stepped over the line, in 95% of the cases, a warning is issued. The judge is invited to an informal meeting to which he or she may or may not bring an attorney. The process used is very fair. The Commission members ask the judge questions. The matter may end in a dismissal, but if the Commission concludes the issues are very important, the case will not be dismissed.

Ms. Knox inquired as to what the next step would be in the

process if the judge rejects the warning. Would there be another meeting with the Commission? The Chair answered that the ball would be back in the Commission's court, and the Commission could proceed any way it wished. Judge Adkins commented that the Commission would not necessarily charge the judge after a rejection of the warning. Often their preference is to provide guidance to the judge. They may not be happy about the rejection, but they still might decide not to proceed.

Mr. Karceski questioned as to Judge Smith's and Judge Baldwin's opinions on the proposed amendments. Judge Smith said that the judicial discipline process is an evolving one. It is different today than it was in 1973. In prior years, there was more informality and more opportunity for the Commission to counsel judges. The concept today is to maintain the high quality of the judiciary, leaving judges the independence necessary to make difficult decisions. It is important for the public to be confident as to the high quality of the judiciary. It is the charge of the Judicial Disabilities Commission to do that. It is equally important that judges have confidence in the Judicial Disabilities Commission Rules. Even though many judges have never been in front of the Commission, many judges are concerned about the Rules. One issue is the definition of "sanctionable conduct." Judges care whether they are brought before the Commission or their colleagues are. Some of the judges' concerns affect the independence of the judiciary,

including concerns about the press. As far as the ability to reject, the judges do not see the downside which the Commission sees. The decision to charge a judge with sanctionable conduct is a difficult one, and it is the role of the Commission to make that difficult decision.

Judge Baldwin commented that in a domestic case, his obligation, as a judge, is to be frank. If, for example, he tells someone that the person has been a horrible parent, he does not want a complaint to be filed. He said that if he feels he has done his job correctly, he should have the right to reject a warning. The right to reject does not rob the Commission of its power. Ninety-nine out of 100 warnings will be by agreement. A serious dispute over conduct would be a rare instance.

Judge Johnson inquired if complainants are told about the warnings under the current rules. The Chair replied that they may be. Judge Johnson noted that seven years ago, when he sat on the Commission, judges were frequently counseled. The Chair commented that the public did not know that this was occurring. The previous Commission was hamstrung by the confidentiality requirements. Because the public could not know what was going on, there was a concern that no action was being taken. A breakthrough was allowing the complainant to be notified, but now the problem is that the media are publicizing the matter.

Ms. White said that the Select Committee on Gender Equality is

interested in ensuring that a judge's bad conduct is not repeated. Removing the warning option and replacing it with counseling would deprive the Commission of an effective means of improving judicial performance in the area of gender bias and put the Commission in the untenable position of having to charge the judges.

The Chair pointed out that Alternative 2 does not prevent the judge agreeing to the warning and being sent to counseling. The question is whether the judge wishes to reject the warning. The Vice Chair commented that she could go either way in choosing one of the alternatives, but her opinion was that the Judicial Disabilities Rules should be parallel to the Attorney Discipline Rules, which do not provide for a rejection of a warning.

Judge McAuliffe moved to approve Alternative 2. The motion was seconded, and it passed on a vote of 10 to nine, the Chair having broken a tie vote.

Mr. Hochberg commented that he was against both alternative amendments to Rule 16-807. The Vice Chair suggested that when the Rule is presented to the Court of Appeals, the Court should be apprised of the tie vote. Mr. Bowen suggested that there be a vote as to who is opposed to both alternatives. The Chair asked the Committee how many were opposed to any change, and six members raised their hands. Mr. Sykes suggested that the Attorney Discipline Rules be reconsidered to provide for a parallel rejection of a warning. The Chair said that this could be considered. Mr. Lemmey pointed out

that the Commission had suggested that section (a) be left unchanged, but the Subcommittee's recommendation was that some change be made. The Vice Chair noted that the existing provision was not presented to the Committee as an option.

The Chair presented Rule 16-803, Commission on Judicial Disabilities — Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-803 to modify the definition of "sanctionable conduct," and "judge" and add a definition of "record," as follows:

Rule 16-803. COMMISSION ON JUDICIAL DISABILITIES -- DEFINITIONS

The following definitions apply in Rules 16-804 through 16-810 except as expressly otherwise provided or as necessary implication requires:

(a) Charges

"Charges" means the charges filed with the Commission by Investigative Counsel pursuant to Rule 16-808.

(b) Commission

"Commission" means the Commission on Judicial Disabilities.

(c) Complainant

"Complainant" means a person who has filed a complaint.

(d) Complaint

"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.

(e) Disability

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

(f) Judge

"Judge" means a judge of the Court of Appeals, the Court of Special Appeals, a circuit court, the District Court, or an orphans' court, and a retired judge during any period that the retired judge has been designated for temporary active service pursuant to law.

(g) Record

"Record" means all documents filed with the Commission whether or not offered or admitted in evidence, and includes the pleadings, motions, transcripts of hearings, exhibits offered in evidence, and the Commission's written decision.

~~(g)~~ (h) 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. It includes any conduct ~~constituting a violation of the Maryland Code of Judicial Conduct promulgated by Rule 16-813. An erroneous ruling, finding, or decision in a particular case does not alone constitute sanctionable conduct~~ that raises a substantial question as to the judge's fitness for office.

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

(A) failure to decide matters in a timely fashion unless such failure is habitual.

(B) making erroneous findings of fact, reaching an incorrect legal conclusion, or misapplying the law.

(C) matters which can be raised in an appeal of the judge's decision.

(D) failure to adhere to the Canons of the Maryland Code of Judicial Conduct that are neither mandatory nor prohibitory.

~~Committee note: The phrase "misconduct while in office" includes misconduct committed by a judge while in active service who then resigns or retires and misconduct by a retired judge during any period that the retired judge has been recalled to temporary active service pursuant to Code, Courts Article, §1-302.~~

Committee note: "Sanctionable conduct" includes the use of a judge's office to obtain special treatment for friends or relatives, acceptance of bribes, and other abuses of judicial office. It could include repeated instances of improperly engaging in discussions with lawyers or parties to cases in the absence

of representatives of opposing parties. Sanctionable conduct does not include a judge's making wrong decisions -- even very wrong decisions -- in particular cases.

Cross references: Maryland Constitution, 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, CJ §§13-401 to 13-403.

Canon 6 B. of the Maryland Code of Judicial Conduct provides that "~~[v]iolation of any of the provisions of~~ [c]onduct prohibited by this Code of Judicial Conduct by a judge or other violation of this Code that is serious or persistent may be regarded as conduct prejudicial to the proper administration of justice within the meaning of Maryland Rule 16-803 g of the Rules concerning the Commission on Judicial Disabilities."

See preamble to Rule 16-813.

Source: This Rule is derived from former Rule 1227 (adopted 1995), except for section (g) which is new.

Rule 16-803 was accompanied by the following Reporter's Note.

Section (f) is modified to include in the definition of "judge" a retired judge who has been designated for temporary active service so that the behavior of retired judges falls within the scope of the Judicial Disabilities Commission Rules. This language is currently in a Committee note.

Section (g) is added to make clear what the "record" is, since that is a term to which some of the Rules refer. The Subcommittee took a very broad view of what the record entails,

including in it documents filed with the Commission, whether or not offered into evidence and all motions, transcripts, and exhibits offered into evidence, plus the Commission's written decisions.

Section (h) is changed to spell out in greater detail the definition of "sanctionable conduct" instead of merely referring to the Maryland Code of Judicial Conduct as the previous rule did. The first sentence of subsection (h)(1) has been amended to correspond exactly with the language of Article IV, §4B (b)(1) of the Maryland Constitution. The Subcommittee deleted the language defining "sanctionable conduct" as "any conduct constituting a violation of the Maryland Code of Judicial Conduct" to avoid the possibility of relatively minor violations of the Code being prosecuted (e.g., "A judge should dispose promptly of the business of the court.") The language in subsection (h)(2)(D) was added to reinforce this. A number of trial judges expressed the concern that "[a]n erroneous ruling, finding, or decision in a particular case," which is the wording of the rule currently in effect, could be considered in a determination of whether there was sanctionable conduct in a particular case, even though the Rule provides that this alone is not sufficient to constitute sanctionable conduct. This could have a "chilling effect" on trial judges. The Subcommittee is proposing that this language be deleted.

The Chair said that another issue for discussion was the definition of "sanctionable conduct." Judge Adkins told the Committee that the Commission is opposed to the suggested change to the definition. It is not the intent of the Commission to discipline judges for all possible violations of the Canons of Judicial Conduct, but the new standard of raising a substantial question of the fitness

of a judge for office is too high a threshold for the Commission. If the Commission is able to address problems with the judge with a warning or a reprimand at the lower end of the disciplinary scale, this will result in a better judiciary.

Judge Adkins pointed out that subsection (h)(2)(D) contains a new distinction. The proposed amendments provide no modifications to the Judicial Canons, so they do not take into account the new distinction. Judge Adkins surmised that the "shall" v. "should" distinction came from the American Bar Association (ABA) Preamble. Judge Adkins explained that she compared the ABA model with the one in Maryland. In 20 places, the ABA uses the word "shall," and the Maryland model uses the word "should." If the Rules Committee approves the new definition, the Canons also should be considered. They are considerably weaker than the ABA's and those in place in other states. One example is Canon 2, which addresses judicial conduct off the bench. Canon 2A states that "[a] judge should behave with propriety and should avoid even the appearance of impropriety. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The ABA model uses the word "shall" instead of the word "should," and the Maryland canon should do so, also. Impartiality is the cornerstone of the judicial system. For example, if a judge makes public comments off the bench which are racist, these comments should be worthy of consideration by the

Commission.

Judge Adkins noted another example of the weakness of the Maryland Canons. The second sentence of Canon 2B states "[a] judge should not use the prestige of judicial office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position to influence judicial conduct." If a judge were to go to the clerk of court in a county and request a job for the judge's nephew, pressuring the clerk of court, that would be conduct the Commission should look into. However, Canon 2B is not mandatory.

Judge Adkins said that subsection (h)(2)(C) overlaps with subsection (h)(2)(D). The matter of the bias of a judge is covered in Canon 3A(9). It is one of the few mandatory statements. Presumably, the Subcommittee is recommending that if the judge exhibits bias while on the bench, the conduct is subject to Commission jurisdiction, even if the bias is not bad enough to make the judge unfit for office. Subsection (h)(2)(C) seems to indicate that the Commission cannot address the matter if an appellate court can consider it. This is an inconsistency.Judge Adkins stated that her view is that if a judge showed bias, it would not necessarily mean that the judge is unfit. The "shall" Canons are moving further from the concept of progressive discipline. The Commission would not be able to address an issue unless it were serious enough to justify the removal of the judge. This seems to do

away with the concept of public or private reprimands. Judge Adkins commented that she was sure the Rules Committee did not intend this. Cases justifying a reprimand are not so serious, offensive, or repeated to warrant removal. The new definition of "sanctionable conduct" is at odds with the concept of a private reprimand. Outside of the Commission, there is a limited means to monitor judges. Very few do not live up to the standards. A person who knows about his or her transgression is more apt to learn and not transgress again. The judges are somewhat insulated. A disciplinary body that can warn and reprimand can have a positive impact on a judge and on the system as a whole.

After the lunch break, Mrs. Beims said that she wished to thank the Rules Committee Chair for attending the Commission's last meeting. This cleared the air for the Chair to hear the concerns of the Commission. She told the Committee that she has been connected with the judiciary for a long time. She appreciates its quality and wisdom. The Commission's responsi-bility is to see to it that judges are never inappropriately charged with a violation of the Canons. There are two diametrically opposed responsibilities. The Commission has to build public confidence, and it has to be an avenue for legitimate complaints. The Commission prefers that no change be made to the Judicial Disabilities Commission Rules. There are two issues pertaining to this. One is timing and one is the cumulative effect. The proposed revisions tell the Commission that it cannot look at any

judicial conduct matter unless the Canon involved is mandatory or prohibitory. This closes the door and produces an adversarial effect. As far as the timing of the proposed changes, it is similar to the suggestion to panelize the Commission. Making the changes to the definition of "sanctionable conduct" flies in the face of the Canons. The "shalls" and the "shoulds" should be considered first. Otherwise, making the changes to the Rules is putting the cart before the horse. Narrowing the scope of the Rules is not the right thing to do. When a citizen writes to the Commission about a judge, the Commission responds. Tightening the definitions will cause the Commission to respond differently. It is important that the process be stabilized.

Mrs. Beims said that the accumulation of the changes, including rejection of the warning, the abandonment of the Commission's ability to conduct a hearing under the APA rules, and changes in the record will hamper the Commission. Its jurisdiction will be limited to the most egregious acts of judges, and the public perception will be affected in that there may be some inference that lay people are unable to participate fully in the process. The Commission contains some of the finest and most dedicated people in Maryland. Judge Harrell has given the Commission a huge amount of time. He is wise and patient. There is no major reason for all of the focus on the way the Commission business is conducted. Judge Adkins has been a steady force for the Commission. Mrs. Beims stated that it is an

honor for her to serve, but considering the timing and cumulative effect of the proposed changes, it is not a pretty picture. She thanked the Committee for its consideration.

The Chair thanked Mrs. Beims for attending the discussions at the General Court Administration Subcommittee. He also acknowledged Mr. Boarman's contributions to the Subcommittee. Judge Adkins questioned whether the language "persistent or habitual" should be included in the definition of "sanctionable conduct." The Chair suggested that in the first part of subsection (h)(2), the word "habitual" could be added after the word "is" and before the word "occasioned." The word "substantial" could be deleted. The Chair explained that the reason he was suggesting this change was the fact that when he attended the Commission meeting, the members had expressed their concern that the proposed changes were somehow stripping the Commission of the right to investigate. The Commission has jurisdiction to determine its jurisdiction. Nothing prohibits the Commission from acting on a complaint to determine if conduct is habitual.

Judge Adkins inquired how the Commission finds out if the conduct complained of happened once or once a week. The Chair answered that that is the role of Investigative Counsel. Judge Adkins pointed out that Mr. Lemmey had said that he cannot go back through transcripts of cases the judge had heard. He can only consider the conduct complained of that is before the Commission.

The Chair responded that if the Commission feels that the judge is lying about prior conduct, it can go through transcripts or ask attorneys. Mr. Lemmey remarked that his understanding was that subsection (h)(2)(D) as written means that if the judge had never behaved this way before, the Commission would not be able to do anything. It might be helpful to state in a Rule or a note that a single incident, if serious enough, would allow the Commission to take action. The Chair agreed, because the single incident might raise a question as to the judge's fitness for office.

Mr. Sykes commented that he had two problems with the definition of "sanctionable conduct." If the word "habitual" is placed in the beginning of subsection (h)(2), it could mean that a judge who is often reversed may be guilty of sanctionable conduct. Secondly, he agreed with Judge Adkins that many of the Canons should be couched as "shall." Under the present Canons, it is difficult to change subsection (h)(2)(D). Ms. Smearman told the Committee that she was representing the interests of the Select Committee on Gender Equality and M. Peter Moser, Esq. Mr. Moser was personally involved with drafting the ABA Code of Judicial Conduct. He was concerned about the changes to the Maryland Code, exchanging the word "should" for the word "shall."

Mr. Titus expressed the opinion that no subject has caused more concern than the Judicial Disabilities Commission Rules. He is very concerned about the way two of the cases have been handled, which are

affecting judicial independence. One is the matter concerning the Honorable John F. Fader, II, who had sent in a letter explaining his interaction with the Commission. (See Appendix 2.) Mr. Titus commented that something needs to be done. Too many unnecessary cases are going before the Commission. He supports a judge being able to reject a warning. One way to handle some of the problems may be to refer the case to the administrative judge.

Judge Adkins said that she would respond to the matter concerning Judge Fader. She clarified that Judge Fader was never charged. The matter never got to the second stage of further investigation. Once the complaint was made about Judge Fader, Mr. Lemmey did not throw it out. He took the cautious approach of contacting Judge Fader and asking him what happened. Judge Adkins remarked that a judge should be allowed to explain the complaint. It probably took him one hour to write the letter. Judges are not totally unaccountable for their actions. She reiterated that as a judge she would be pleased to be given the opportunity to respond to Investigative Counsel or to the Judicial Disabilities Commission.

Judge Smith commented that it probably took Judge Fader more than one hour to write his letter. Being a member of the judiciary is a difficult job, especially hearing custody cases. Judges want to respect the system and take the Judicial Disabilities Commission seriously. Judge Smith questioned as to how Judge Fader's conduct could be "sanctionable conduct." Judge Adkins asked again what is

wrong with a judge explaining his or her conduct to the Commission. Judge Smith responded that it depends on to whom the explanation is given. He said that he would prefer not to hear from the Commission, even just to make an explanation. Judge Adkins commented that Mr. Lemmey had made a judgment call, and she asked how Judge Fader was prejudiced, even if Mr. Lemmey had erred. The Chair pointed out that in an ongoing custody case, one must tell the attorneys about the complaint, and someone might file a motion for recusal. If the judge does not disclose the complaint, the failure to disclose could be the subject of a second complaint.

Mr. Brault remarked that as an attorney, one of his concerns is that the judiciary be independent and feel free to apply the law. It is important that serious matters, such as alcoholism and serious personality disorders, be looked into. It is also important that judges' rulings are not made out of a fear of criticism. Judges should not be looking over their shoulders as they make decisions.

Mr. Howell noted that there is a problem with the Canons and suggested that the definition of "sanctionable conduct" be remanded to the Subcommittee. Mr. Moser had pointed out that the way the Judicial Canons are worded can be interpreted broadly or narrowly. If they are broadly interpreted, no judge is protected. There would be no limits as to what can be investigated. The nature of the Commission's jurisdiction needs to be defined. The first sentence of Rule 16-803 (h)(1) is taken from the Maryland Constitution. It

cannot be expanded, but it can be limited. The Subcommittee did an excellent job drafting the Rule, but there is room for improvement. A well-intentioned inquiry from Investigative Counsel can send a chill down the spine of a judge. Certain areas could be more clearly defined.

Mr. Brault referred to the Chair's concern about "judge-shopping." One trial tactic might be to use the Commission to write a letter to force a judge out of a case. Mr. Lemmey responded that the Commission tries not to be used for "judge-shopping." He may ask the Commission to review his decision to contact a judge. He remarked that, if possible, he calls the judge before the judge receives a certified letter to warn the judge as to what is coming and to ask where the letter should be sent. The Rule presently permits Investigative Counsel to dismiss a complaint that is "frivolous on its face." He could consider the complaint and selected portions of the transcript, order the entire transcript, or ask the judge for his or her input. Mr. Lemmey asked if it is fair to a judge to take only the complainant's version of the event or is it fairer to ask the judge for his or her version. As an example, in considering Judge Fader's letter, Mr. Lemmey would have only one side of the argument. He would have to ask the judge for his or her statement, if the complaint is not "frivolous on its face."

The Chair said that the definition of "sanctionable conduct" will be tightened up to avoid getting in the middle of custody cases.

The Vice Chair remarked that determining the definition of "sanctionable conduct" is a difficult task. The current Rule provides that all violations of the Code of Judicial Conduct are sanctionable conduct. She suggested that if the Code is clear, the term could be changed to "misconduct." She suggested that the language which reads "raises a substantial question as to the judge's fitness for office" should be taken out. Mr. Titus added that the Code of Judicial Conduct needs to be changed. The Vice Chair moved that Rule 16-803 go back to the Subcommittee for its further consideration. The motion was seconded.

Judge Baldwin cautioned that the Committee should not "throw out the baby with the bath water." Rule 16-803 is appropriate to amend. All 171 judges in the Circuit Judges Association endorse amendments to Rule 16-803, and probably the rest of the Maryland judges do, also. The Constitution refers to "misconduct while in office," but in the Rules, the word "misconduct" is not defined. Neither is the language "conduct prejudicial to the administration of justice." Almost any conduct could qualify as prejudicial to the administration of justice, even if it is inconsequential. Many judges in the State are afraid to speak, as they do not know what will be reported. Some reining in of the definitions is necessary. The Rule should go back to the Subcommittee. Judge Baldwin thanked the Chair for allowing him to speak.

Mr. Sykes observed that the Subcommittee may need some guidance

as to how to proceed. Does "sanctionable conduct" consist of fraud, corrupt motive, and habitual failure to decide?
Erroneous findings of fact, reaching an incorrect legal conclusion, or misapplying the law do not, in themselves, constitute "sanctionable conduct." The Subcommittee needs to look at the rest of the Rule as well as at the Canons of Judicial Conduct. It would be a mistake to tie the Canons as such to the definition of "sanctionable conduct."

The Chair asked about the second sentence in the Rule which reads currently: "It includes any conduct constituting a violation of the Maryland Code of Judicial Conduct promulgated by Rule 16-813." Mr. Sykes commented that this needs to be deleted. The Chair suggested that a Committee note could be added to explain the deletion. The Vice Chair remarked that she agreed with Mr. Sykes that what is and is not sanctionable conduct needs to be reconsidered by the Subcommittee. Attorneys often hear litigants say that the judge was unfair. Attorneys have a direct interest in judicial discipline. Judges do make mistakes, and most of the mistakes do not constitute "sanctionable conduct."

Mr. Bowen inquired whether the word "substantial" is to be deleted from subsection (h)(1). Mr. Brault commented that subsections (h)(2)(A) and (B) should remain in the Rule. The Reporter noted that subsection (h)(2)(C) needs to be tightened if it is going to remain in the Rule. The Chair referred to subsection

(h)(2)(D), and he remarked that the Subcommittee needs to go through the Canons of Judicial Conduct, considering whether the language should be drafted with the words "shall" or "should." Once this is accomplished, subsection (h)(2)(D) would be correct. Mr. Johnson questioned whether the word "persistent" is to be deleted from subsection (h)(1), and the Reporter answered that it will go back into the Rule. The Chair added that the word "persistent" is in the Constitution.

The Chair introduced the Honorable Mary Ann Stepler. Judge Stepler told the Committee that she was representing the Honorable Marvin S. Kaminetz, President of the Maryland Circuit Judges Association. Their organization has advocated refining Rule 16-803. They have made some suggestions which have been distributed to the Committee in a manila folder. (See Appendix 3). The first document in the folder is a resolution that the definition of misconduct found in Rule 1227 (g)[now Rule 16-803 (g)] is inadequate to determine what constitutes sanctionable conduct. This issue is of grave importance to trial judges. The second document in the folder is a letter from the Honorable James T. Smith, Jr., and the third is a letter from the Honorable Kathleen O'Ferrall Friedman. The fourth document is a letter from Judges Gerard F. Devlin, Chair of the Executive Committee of the Maryland Judicial Conference; Frederick C. Wright, III, Chair of the Conference of Circuit Judges; and Kathleen O'Ferrall Friedman, President, Maryland Circuit Judges Association. The fifth letter is

from the Honorable Lawrence R. Daniels pertaining to the case involving Judge Fader.

Judge Stepler said that no judge wants to hear from the Judicial Disabilities Commission. Judges have become reluctant to speak. Judge Fader's case points out a need for a change in the Rule. Many cases are unpleasant, and the terminology used cannot always be pleasant. Judge Stepler said that she was pleased that the Rules Committee was looking at Rule 16-803. Judge Kaplan commented that he agreed with Judge Stepler. The Baltimore City Circuit Court bench unanimously supports the work done by the Subcommittee. They are requesting that the definition of "sanctionable conduct" include what is not sanctionable conduct. They have been concerned about several recent judicial discipline cases, including that of Judge Fader.

The Chair referred to the motion to have the Subcommittee reconsider Rule 16-803. Mr. Titus expressed the opinion that the Subcommittee should look at this soon. Judge Adkins spoke about Mr. Brault's point that the Commission should not be used for "judge-shopping." A provision can be added that ongoing cases will be put on hold. "Judge-shopping" will occur, and the Subcommittee can deal with the problem. The Chair suggested that Rule 16-805 require that the complainant advise the Commission of the status of the case (whether ongoing or resolved.) Judge Adkins commented that the filing of a complaint is not a reason for recusal. The Chair pointed

out that the Rules do not require recusal.

Mr. Brault remarked the rules could provide a mechanism that would allow Investigative Counsel to deal with the issue of recusal. Investigative Counsel could check the complaint, and then ask the clerk if the case is ongoing. Action could be delayed until the final ruling, unless the nature of the complaint requires otherwise. Mr. Lemmey pointed out that the proposed change to Rule 16-810 provides that a complainant would be notified that a violation of the required confidentiality may be the basis for dismissal of the complaint.

The Chair called for a vote on the Vice Chair's motion to recommit Rule 16-803 to the Subcommittee, and the motion passed with a unanimous vote.

Mr. Bowen questioned the meaning of the language in section (f) of Rule 16-803 "pursuant to law." The Chair responded that there are some statutory provisions and other rule provisions, but that the language could be deleted. Mr. Bowen expressed the view that it should be deleted. Judge Johnson commented that it is important that the Rule make clear that whatever the retired judge who has been designated for temporary service does remains subject to the jurisdiction of the Commission. Mr. Brault added that the intent of the language "pursuant to law" is that the Rule applies to a retired judge who comes in on a private contract.

Mr. Brault noted that Mr. Bowen had questioned in section (g)

of Rule 16-803 why the term "record" includes all documents not admitted into evidence. The Chair remarked that an appellate record contains those items offered into evidence. Mr. Howell explained that the Commission, as an investigative body, receives information in advance of the hearing. Defense counsel argues whatever is unduly prejudicial at the adjudicatory stage. Mr. Brault commented that the Court of Appeals makes the final decision. What is admitted goes up to the Court, as well as those items claimed to be erroneously refused for admission. Mr. Howell added that the Subcommittee decided that it would be fairer to send to the Court whatever was filed with the Commission for the hearing.

Ms.Scherr expressed her opposition to this. The revised definition of "record" is unlimited. The Court of Appeals makes its own decision, but the Commission merely recommends. The definition of "record" is more expansive than any other similar definition in the Rules of Procedure. The new Rule lets the parties put in items after the case is over which items the Commission never considered. This causes erosion of the work product principle in Rule 16-810. Investigative Counsel would have to file more documentation in response for a balanced view by the Court. The Subcommittee recommended in Rule 16-809 (c) that the Court of Appeals have the opportunity to remand the case to the Commission for findings on additional evidence. This would extend the time needed for the case with no limits. If the judge is a bad actor, the judge is still on

the bench. If the judge is not, the case is still stretching on against him or her.

The Chair commented that nothing in section (g) requires anything to be filed. Another rule can deal with what is sent to the Court of Appeals. Mr. Howell suggested that the Subcommittee can take another look at section (g).

The Chair presented Rule 16-804, Commission, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-804 to provide for a Vice Chair, to expand on the definition of "interested member," to provide that Investigative Counsel may be removed by the Commission and may make recommendations, to expand on the definition of "quorum," and to expand on the definition of the address of a judge, as follows:

Rule 16-804. COMMISSION

(a) Chair and ~~Acting~~ Vice Chair

The Commission shall select one of its members to serve as Chair and another to serve as Vice-Chair for such terms as the Commission shall determine. ~~If the Chair is disqualified or otherwise unable to act, the Commission shall select one of its members to serve as acting chair.~~ The Vice-Chair shall perform the duties of the Chair whenever the Chair is disqualified or otherwise unable to act.

(b) Interested Member

A member of the Commission shall not participate as a member in any proceeding in which (1) that member is a complainant, ~~or in which~~ (2) that member's sanctionable conduct or disability is in issue, (3) that member's impartiality might reasonably be questioned, including but not limited to instances where the member has a personal bias or prejudice concerning the judge or personal knowledge of disputed evidentiary facts involved in the proceeding, or (4) 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.

(c) Executive Secretary

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 ~~the~~ other administrative powers and duties assigned by the Commission, and receive the compensation set forth in the budget of the Commission.

(d) Investigative Counsel; Assistants

The Commission shall appoint an attorney ~~to serve~~ as Investigative Counsel. Investigative Counsel ~~shall serve at the pleasure of the Commission,~~ may be removed by the Commission. Investigative Counsel shall have the powers and duties set forth in these rules, report and make recommendations to the Commission as directed by the Commission, and receive the compensation set forth in the budget of the Commission. 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 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) Quorum

The presence of a majority of members of the Commission constitutes a quorum for the transaction of business. ~~The concurrence of a majority of members is required for all action taken by the Commission other than adjournment of a meeting for lack of a quorum.~~ A quorum of the Commission must include one member from each category of membership. No action may be taken by the Commission other than adjournment of a meeting for lack of a quorum without the concurrence of a majority of members of the Commission.

(f) Record

The Commission shall keep a record of all proceedings concerning a judge.

(g) Annual Report

The Commission shall submit an annual report to the Court of Appeals, not later than September 1, regarding its operations and including statistical data with respect to complaints received and processed, subject to the provisions of Rule 16-810.

(h) ~~Home~~ Address of ~~Judges~~ Record

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. The judge's home address shall remain confidential pursuant to Rule 16-810. The judge's home address shall be the address of record unless the judge designates otherwise.

Source: This Rule is derived from former Rule 1227A.

Rule 16-804 was accompanied by the following Reporter's Note.

> Section (a) is derived from section (a) of former Rule 1227A, but it has been changed to provide for the Commission to select a Vice Chair at the same time a Chair is selected instead of the current procedure which provides for an acting Chair if the Chair is disqualified or otherwise unable to act. The newer procedure is a more efficient one, and it is similar to the one used in the Attorney Discipline Rules.
>
> Section (b) is derived from section (b) of former Rule 1227A, but it has been broadened so that an "interested member" is also one whose impartiality might be questioned and one whose recusal is required by the Maryland Code of Judicial Conduct.
>
> Section (c) is derived from section (c) of former Rule 1227A, but it has broadened the duties of the Executive Secretary to include advice and assistance to the Commission.
>
> Section (d) is derived from section (d) of former Rule 1227A, but it has been changed to clarify that the Commission can remove Investigative Counsel and to provide that Investigative Counsel can make recommendations to the Commission.
>
> Section (e) is derived from section (e) of former Rule 1227A, but it adds the requirement that a quorum must include one member from each category of membership. The constitutional amendments to Article IV, §§4A and 4B which pertain to the Judicial Disabilities Commission were approved in 1996. One of these expanded the number of Commission members from seven to eleven, and requiring representation from each category of membership not only provides a more equitable decision but is consistent with the expansion of the Commission.

> Section (h) is derived from section (h) of former Rule 1227A, but it has been modified to provide for the judge's home address to be confidential, and for the judge to have the ability to designate an address of his or her choice. This protects the privacy of the judge.

The Vice Chair expressed the view that the Vice Chair of the Judicial Disabilities Commission should be an attorney. The Rules Committee Chair pointed out that that would mean that no lay member could be the Vice Chair. Judge Johnson asked if this could be done consistent with the constitutional provision which provides that all of the Commission members are of equal standing.

The Vice Chair asked if there is any input from the public and local bar associations as to the hiring of Investigative Counsel. Mr. Howell observed that the hiring process is similar to the appointment of Bar Counsel, and it might be a good idea to involve the public and local bar associations. The Chair suggested that the procedure be made parallel to the procedure for the appointment of Bar Counsel set out in proposed revised Rule 16-712 (a), and the Committee agreed with this suggestion by consensus.

The Chair presented Rule 16-805, Complaints; Preliminary Investigations, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-805 to change the requirements for dismissal of a complaint, to delete the provision that Investigative Counsel may issue a subpoena during the preliminary investigation, to provide that the judge be notified of the contents of the complaint, and to provide for an extension of time for completing the preliminary investigation, as follows:

Rule 16-805. COMPLAINTS; PRELIMINARY INVESTIGATIONS

(a) Complaints

All complaints against a judge shall be sent to Investigative Counsel. Investigative Counsel shall number and open a file on each complaint received that complies with Rule 16-803 (d) and promptly in writing shall (1) acknowledge receipt of the complaint and (2) explain to the complainant the procedure for investigating and processing the complaint. Upon receiving from a person information that does not qualify as a complaint but indicates that a judge may have a disability or have committed sanctionable conduct, Investigative Counsel shall, if possible, (1) inform the person providing the information of his or her right to file a complaint, ~~and~~ (2) if the information received does not comply with the verification requirement of Rule 16-803 (d), (A) inform the person providing the information that the complaint must be verified and (B) provide to the person the appropriate form of affidavit, and (3) inform the person providing the information that if the complaint does not comply with the requirements of this section within 30 days after the date of the notice, Investigative Counsel is not required to take action, and the complaint may be dismissed.

(b) Preliminary Investigation

(1) If Investigative Counsel concludes that the complaint ~~is frivolous on its face,~~

does not allege facts that constitute sanctionable conduct or disability and that no reasonable grounds exist to conduct a preliminary investigation, Investigative Counsel shall dismiss the complaint. ~~and notify t~~The complainant, the Commission, and, upon request, the judge ~~of the action~~ shall be notified that the complaint has been dismissed. Otherwise, Investigative Counsel shall conduct a preliminary investigation to determine whether reasonable grounds exist to believe ~~the allegations of the complaint~~ that the judge may have a disability or may have committed sanctionable conduct.

(2) Upon receipt of information from a complainant or from any other source indicating that a judge has a disability or has committed sanctionable conduct, Investigative Counsel, ~~without a complaint,~~ may make an inquiry and, following the inquiry, may undertake a preliminary investigation. Investigative Counsel shall number and open a file on each preliminary investigation undertaken under this subsection and shall promptly inform the Commission that the investigation is being undertaken.

(3) ~~Upon application by Investigative Counsel and for good cause, the Commission may authorize Investigative Counsel to issue a subpoena to obtain evidence during a preliminary investigation.~~ In a preliminary investigation Investigative Counsel may conduct interviews and examine evidence, but may not issue a subpoena.

(4) Unless directed otherwise by the Commission for good cause, ~~Investigative Counsel,~~ before the conclusion of the preliminary investigation, Investigative Counsel shall notify the judge who is the subject of the 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) ~~that before the preliminary investigation is concluded, the judge may present to Investigative Counsel, in person or in writing, any information the judge may wish to present~~ of the judge's rights under subsection (b)(5). The notice shall be given by first class mail ~~and~~ or by certified mail requesting "Restricted Delivery -- show to whom, date, address of delivery" addressed to the judge at the judge's ~~last known home address~~ address of record.

(5) Before the conclusion of the preliminary investigation ~~and in accordance with the notice~~, Investigative Counsel shall afford the judge a reasonable opportunity to present, in person or in writing, such information as the judge chooses ~~to present~~.

(6) ~~Unless the time is extended by the Commission for good cause,~~ Investigative Counsel shall complete a preliminary investigation ~~(A) undertaken as the result of a complaint within 60 days after receiving the complaint and (B) undertaken on the initiative of Investigative Counsel~~ within ~~60~~ 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Commission 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.

(c) Recommendation by Investigative Counsel

~~Upon the conclusion of~~ Within the time for completing a preliminary investigation, Investigative Counsel shall report the results of the investigation ~~to the Commission~~ in ~~such~~

the form ~~as~~ that the Commission requires. As part of the report Investigative Counsel shall recommend ~~that~~ one of the following: (1) any complaint be dismissed and the investigation terminated, (2) the judge be offered a private reprimand ~~by the Commission~~ or a deferred discipline agreement, (3) the Commission authorize a further investigation, or (4) charges be filed against the judge ~~and the Commission conduct a formal proceeding on the charges~~.

Source: This Rule is derived from former Rule 1227B.

Rule 16-805 was accompanied by the following Reporter's Note.

Section (a) is derived from former Rule 1227B (a), but it has language added clarifying that a complaint against a judge has to comply with the definition in Rule 16-803 (d). There is also language added providing for notice to the complainant that if the complaint does not comply with the requirements of the Rule within 30 days after the date of notice, Investigative Counsel may dismiss the complaint. This will keep the system moving efficiently, and avoid the pitfalls of a complaint being filed so late that it is difficult to prosecute the case.

Section (b) is derived from section (b) of former Rule 1227B.

Subsection (b)(1) has been modified to change the standard for dismissal of the complaint from "frivolous on its face" to "does not allege facts that constitute sanctionable conduct or disability and that no reasonable grounds exist to conduct a preliminary investigation." This is a clearer definition as it refers to "sanctionable conduct" which is defined in section (g) of Rule 16-803. The requirement that Investigative Counsel must

notify the parties of the dismissal has been changed, so that the shift to the passive tense does not put the onus on any one person concerning the notification, yet is clear that the complainant, Commission, and the judge who so requests shall be notified. The last sentence has been modified to be more specific as to what criteria Investigative Counsel may use to continue on with the matter.

Subsection (b)(2) is derived from former Rule 1227B (b)(2), but it has been modified to clarify that the information submitted to Investigative Counsel about a judge can come from a complainant as well as from any other source.

Subsection (b)(3) is derived from former Rule 1227B (b)(3), but it has been changed by the Subcommittee which decided that during the preliminary investigation, Investigative Counsel may not issue a subpoena. The Subcommittee decided that a subpoena is the function of a further investigation authorized by the Commission pursuant to Rule 16-806.

Subsection (b)(4) is derived from former Rule 1227B (b)(4) but it has been changed to add to the notification received by the judge the contents of the complaint which was filed. This provides more information to the judge as to the nature of the complaint. The Subcommittee has recommended deleting the duplicative language in part (E) and instead cross-referencing subsection (b)(5) where the same language appears. The change at the end of the subsection is consistent with the change to section (h) of Rule 16-804.

Subsection (b)(5) is derived from former Rule 1227B (b)(5), but it contains style changes.

Subsection (b)(6) is derived from former Rule 1227B (b), but it contains a longer time period within which the preliminary investigation must be completed. The time for completing the preliminary investigation has

> been changed so that it is limited to an additional 30-day period. Previously no limit was placed for an extension. Imposing a limitation will set some boundaries as to how much time the investigation should take. At the request of the Investigative Counsel, the time period has been changed from 60 to 90 days. The Subcommittee also added a new provision which allows the Commission to dismiss a complaint if the time requirements of subsection (b)(6) are not met.
>
> Section (c) is derived from section (c) of former Rule 1227B, but it has new language which refers to the time period in the previous section. There are also style changes.

The Chair explained that new language has been added to subsection (a)(3), indicating that if complainants do not comply with the requirements of the Rule, the Commission may dismiss the complaint. The Reporter pointed out that there is no corresponding section implementing the sanction stated in the notice.

The Vice Chair commented that in discussing the Attorney Discipline Rules, the distinction was made between the words "incompetency" and "incapacity." In these Rules, the word "disability" sounds as if the subject is the Americans with Disability Act.

Mr. Hochberg inquired if the judge gets notified that an investigation is being undertaken. The Reporter remarked that the judge may not want to know about it. Judge Vaughan added that this may cause a problem with recusal. Judge Kaplan said that most judges would not want to know, but the Chair argued that some might. The

Vice Chair asked if, pursuant to subsection (b)(3), Investigative Counsel is able to conduct interviews and examine evidence without prior notice to the judge. Mr. Lemmey responded affirmatively. He noted that this is not the current Rule, and he said the Commission opposes the change. Even though the subpoena is rarely used, some people are uncomfortable with informal interviews, and prefer giving the information after being subpoenaed. The current rule is that Investigative Counsel can subpoena during the preliminary investigation after permission by the Commission.

The Vice Chair said that the theory of subpoena availability in attorney discipline cases is for those rare times when Bar Counsel needs to gather information prior to the attorney knowing about the investigation. The judicial discipline process is somewhat different. Mr. Howell agreed that the issues are different. The American Bar Association recommendation is that the subpoena be reserved for further investigation under the control of the Commission. The Vice Chair pointed out that if Investigative Counsel has no ability to subpoena without notice to the judge, then a judge who is guilty of misconduct will stop the misconduct upon receiving the notice. Mr. Howell responded that the Commission can postpone the giving of notice to the judge. The Commission does not have to make findings of fact to move into a further investigation. It can decide not to notify the judge and move into a further investigation.

The Vice Chair pointed out that subsection (b)(1) provides that

after service of the subpoena, Investigative Counsel shall notify the judge that the subpoena was served. The Chair suggested that this provision should not be changed. Mr. Lemmey said that Judge Harrell had expressed the concern that the way subsection (b)(3) was changed would be inconsistent with the constitutional provision, Constitution of Maryland, Section 4B (a)(1)(ii). Mr. Sykes moved to delete the changes to subsection (b)(3). The motion was seconded, and it carried with three opposed.

The Chair presented Rule 16-806, Further Investigation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-806 to provide that Investigative Counsel may request a judge to answer questions under oath, to change the time period for giving notice to a judge, to provide that Investigative Counsel must show good cause for a subpoena to be issued, to provide that the Commission may order a person to testify, and to provide an extension of time for Investigative Counsel to complete a further investigation, as follows:

Rule 16-806. FURTHER INVESTIGATION

(a) Notice to Judge

Upon approval of a further investigation by the Commission, Investigative Counsel shall promptly notify the judge who is the subject of

the investigation (1) that the Commission has authorized the further investigation, (2) of the nature of the disability or sanctionable conduct under investigation, including each ~~Canon~~ specific provision of the Maryland Code of Judicial Conduct allegedly violated by the judge, and (3) that the judge may file a written response within 20 days of the date on the notice. The notice may include a request that the judge appear before Investigative Counsel to respond to questions under oath at a time and place specified in the notice. The notice shall be given (1) by first class mail ~~and by certified mail addressed to the judge at~~ to the judge's ~~last known home~~ address of record, or (2) if previously authorized by the judge, by first class mail to an attorney designated by the judge. ~~If authorized by t~~The Commission, for good cause, ~~Investigative Counsel~~ may defer the giving of notice, but ~~if notice is deferred,~~ notice must be given ~~a reasonable time~~ not less than 30 days before Investigative Counsel makes a recommendation as to disposition.

(b) Subpoenas

(1) ~~In a further investigation, u~~Upon application by Investigative Counsel and for good cause, the Commission may authorize Investigative Counsel to issue a subpoena to compel the attendance of witnesses and the production of documents or other tangible things at a time and place specified in the subpoena. In addition to giving any other notice required by law, promptly after service of the subpoena Investigative Counsel shall provide notice of its service to the judge under investigation. The notice to the judge shall be sent by first class mail to the judge's ~~last known home~~ address of record or, if previously authorized by the judge, by first class mail to an attorney designated by the judge.

(2) On motion of the judge or the person served with the subpoena filed promptly and, whenever practicable, at or before the time

specified in the subpoena for compliance, the circuit court for the county in which the subpoena was served or, if the judge under investigation is a judge serving on that circuit court, another circuit court designated by the Commission may enter any order permitted by Rule 2-510 (e). 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.

(3) To the extent practicable, a subpoena shall not divulge the name of the judge under investigation. 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. Hearings before the circuit court on any motion shall be on the record and shall be conducted out of the presence of all persons except those whose presence is necessary.

(4) In accordance with Md. Constitution, Art. IV, §4B (a), ~~T~~the Commission~~, in accordance with Md. Constitution, Art. IV, §4B (a),~~ may grant immunity from prosecution or from penalty or forfeiture to any person compelled to testify and produce evidence. Investigative Counsel may request in writing that the Commission order the person to testify, answer, or otherwise provide information, notwithstanding the person's claim of privilege. If the Commission approves the request, the Commission shall inform the person in writing of the scope of the immunity the person will receive. No person shall refuse to answer or provide other information on the basis of the privilege against self-incrimination.

Cross reference: See Code, Courts & Jud. Proc. Art., §9-201; Rule 4-631.

(c) Completion ~~and Recommendation~~

~~Unless the time is extended by the Commission for good cause,~~ Investigative Counsel shall complete a further investigation

within 60 days after it is authorized by the Commission. Upon application by Investigative Counsel within the 60-day period served by first class mail upon the judge or counsel of record, and for good cause, the Commission may extend the time for completing the further investigation for a reasonable time.

(d) Recommendation by Investigative Counsel

~~Upon completion,~~ Within the time for completing a further investigation, Investigative Counsel shall report the results of the investigation to the Commission in the form that the Commission requires. As part of the report Investigative Counsel shall recommend that (1) any complaint be dismissed and the investigation terminated, (2) the judge be offered a private reprimand or a deferred discipline agreement, or (3) charges be filed ~~and the Commission conduct a formal proceeding~~.
Source: This Rule is derived from former Rule 1227C.

Rule 16-806 was accompanied by the following Reporter's Note.

Section (a) is derived from section (a) of former Rule 1227C, but it adds the word "promptly" in the first sentence, so that the judge gets notified of the further investigation without too much time elapsing. The word "Canon" has been changed to the language "specific provision of the Maryland Code" for clarity. A 20-day time period for the judge to file a written response has been added to make the procedure more efficient. A new provision allows Investigative Counsel to request that the judge appear before him or her to respond to questions under oath. After concluding that first class mail is sufficient, the Subcommittee recommends deleting the requirement that the notice must be given by certified mail. Instead of Investigative Counsel being able to defer the giving of

notice, the Subcommittee suggests that the Commission do so. The Subcommittee has substituted a time period of not less than 30 days before Investigative Counsel's recommendation as to disposition in place of the original more vague period of "a reasonable time" before the recommendation.

Section (b) is derived from section (b) of former Rule 1227C.

Subsection (b)(1) adds the requirement of good cause shown before the Commission authorizes Investigative Counsel to issue a subpoena. This provides some limitations on issuance of the subpoena. The phrase "last known home address" has been changed to "address of record" for consistency with section (h) of Rule 16-804.

Subsection (b)(4) has been broadened to include a provision allowing Investigative Counsel to request in writing that the Commission order someone to testify notwithstanding the person's claim of privilege. The Commission may then determine the scope of the person's immunity.

Section (c) is derived from section (c) of former Rule 1227C, but it has been rewritten to add the requirement that the time to complete a further investigation only be extended by the Commission after Investigative Counsel files an application with the Commission requesting an extension.

Section (d) is derived from section (c) of former Rule 1227C, but it contains some style changes. The Subcommittee added the language at the beginning of the second sentence, "as part of the report" to clarify that Investigative Counsel's recommendations are to be part of the report to the Commission.

Mr. Bowen pointed out that the language in the second sentence

of section (a) which reads, "The notice may include a request that the judge appear before Investigative Counsel to respond to questions under oath at a time and place specified in the notice" sounds like a grand inquisition. It might be preferable to remove the words "before Investigative Counsel."

Mr. Hochberg asked if the request can be made before the judge's 20 days to respond. The Chair replied that it can. Mr. Hochberg expressed the view that the time period should be 30 days. Mr. Sykes commented that the 20 days is counted from the date on the notice and not from when the notice was sent or received. It could be calculated from 20 days of the date the notice was sent, but it may not have been sent on the date on the notice. The Chair suggested that the Rule could provide that the judge's written response could be filed within 30 days after the date on which the judge receives the notice. The Vice Chair pointed out that that date is unknown. Judge Adkins remarked that this provision could be deleted. The Vice Chair said that she reads this provision to mean that a judge has 20 days to respond, and Investigative Counsel can request that the judge meet with him or her. Mr. Lemmey cautioned that if Investigative Counsel is to have this power, it should be upon application to the Commission for good cause. The Chair suggested that the provision that requires the judge to appear before Investigative Counsel should be removed, and the Committee agreed by consensus. The Vice Chair noted that the current Rule has no time

frame for response by the judge, and suggested that 30 days would conform this Rule to the timing of other rules. The Committee agreed by consensus with this suggestion.

Mr. Howell observed that there is a problem with tying section (a) to the Code of Judicial Conduct. Instead of the language in the first sentence which reads, "including each specific provision of the Maryland Code of Judicial Conduct," the following language could be substituted: "including each specific provision of law." Mr. Bowen observed that the Code of Judicial Conduct is not law. The Chair suggested that the wording could be: "including each specific rule or law."

Mr. Howell suggested that there should be a specificity requirement as to which provision of the Canons is at issue. Mr. Sykes suggested that in place of the language in part (2) of section (a) which reads: "of the nature of the disability or sanctionable conduct under investigation," the following language could be substituted: "a specific description of the nature of the disability or the nature of the sanctionable conduct under investigation." The Vice Chair suggested that in part (2) the word "specific" could be added after the word "the" and before the word "nature." The Chair suggested that the phrase "including each specific provision of the Maryland Code of Judicial Conduct allegedly violated by the judge" should be deleted. The Committee agreed by consensus with the suggestions of the Chair and Vice Chair.

Turning to section (b), the Vice Chair observed that there ought to be times when a subpoena would issue without the notice to the judge required by subsection (b)(1). The Chair pointed out at the end of section (a), there is language which provides that the Commission may defer giving notice. The Vice Chair said that subsection (b)(1) requires that no matter at what stage of the proceedings, the judge must be given notice. Under certain circumstances, a judge may be able to hide something if he or she knows about the investigation.

Mr. Hochberg suggested that no notice be given, until after the judge is served. The Chair said that once the subpoena is served, there is no harm. Mr. Hochberg commented that under Code, Financial Institutions Article, §1-304, notice must be given to the depositor of a subpoena of that depositor's bank records. Judge Kaplan remarked that there are ways to avoid this. Mr. Lemmey said that he agreed with the Vice Chair as to delaying notice to the judge under investigation. He suggested that notice could be delayed for 30 days. The Reporter questioned whether there should be some opportunity for the judge to file a motion to quash the subpoena. If so, thirty days is too long.

Ms. Knox suggested that subsection (b)(1) be left as it appears in the meeting materials, and the Committee agreed by consensus.

Mr. Howell suggested that in the fourth sentence of subsection (b)(4) the following language should be added after the word "person"

and before the word "shall": "who has been granted immunity." The Committee agreed by consensus with this suggestion.

Mr. Dean questioned whether the immunity to which subsection (b)(4) refers is transactional immunity. The Chair said that the constitutional provision may specify the type of immunity. Mr. Howell noted that the constitutional provision is vague as to the type of immunity. Mr. Sykes expressed the opinion that the immunity provided for in subsection (b)(4) may be too broad to be constitutional. The Chair pointed out that one way to read subsection (b)(4) is that the Commission may confer any immunity. It may confer immunity from prosecution, but not from civil penalty or forfeiture. This is not transactional immunity. If one is granted immunity from forfeiture, but not from prosecution, one cannot be compelled to testify.

The Chair suggested that the fourth sentence of subsection (b)(4) should begin "no person who has been granted immunity" and should refer to the type of immunity that is provided for in Code, Courts Article, §13-403. The Committee agreed by consensus to the Chair's suggestion.

The Chair turned the Committee's attention to Rule 16-807, Disposition Without Proceedings on Charges, which had been considered earlier in the meeting on the topic of dismissal with a warning.

The Chair said that the issue in subsection (a)(2) had been resolved earlier with the decision to use Alternative 2. There were

no other comments to Rule 16-807.

The Chair drew the Committee's attention to Rule 16-808, Proceedings Before Commission.

The Chair noted that the issue of the appropriate rules of evidence to be used in the hearing had already been resolved earlier in today's discussion. Mr. Lemmey thanked the Committee for its attention. He said that the Commission had asked him to express its opposition to the change in the discovery procedure by bringing in full civil discovery. If this change is adopted, it will mean an increase in attorney staffing for the Commission. The current staffing is one full-time attorney, one .375 time attorney (15) hours, and an investigator. If full civil discovery is adopted, between .5 and 1.5 attorneys may need to be added. This would have a major impact on fiscal and budgetary terms. Under the current rule, the parties exchange documents and a witness list.

Mr. Lemmey said before he became Investigative Counsel in 1996, he worked as an Assistant State's Attorney in Prince George's County. His office used open file discovery, which is one of the alternatives to full discovery and could be codified in the Rules. The Chair commented that the withholding of information about a key witness in the case referred to earlier in the discussion involving the sexual allegations and delayed fire exit was outrageous. Attorneys cannot be allowed to refrain from giving out information to which the other side is entitled. Formal rules are needed to protect both sides. If

it costs money to comply, then it will have to be spent.

The Chair pointed out that section (g) begins with the language "unless ordered otherwise by the Chair of the Commission for good cause." Mr. Lemmey responded that the Commission's experience is that the parties generally agree to depositions and other information beyond the scope of the rules. Mr. Howell noted that there are two checks on the process. The first is the opening clause to section (g), as pointed out by the Chair. The second is the language in subsection (g)(3) which reads "except that the Chair of the Commission may enter protective orders permitted by Rule 2-403 and make other rulings as justice may require pertaining to any discovery question." A certain amount of the procedures can be worked between counsel without burdening the Commission Chair. The Chair is available if the parties do not agree.

Mr. Sykes remarked that Chapter 400 gives the trial judge discretion to modify discovery. Judge Dryden observed that if the Rule provides for open file discovery, the issue would be resolved. The Chair noted that the introductory language of Rule 2-402, Scope of Discovery, is: "[u]nless otherwise limited by order of the court." He suggested that subsection(g)(3) could read as follows: "The taking of depositions and other discovery is governed by Chapter 400 of Title 2, except that the Chair of the Commission may limit the scope of discovery, enter protective orders permitted by Rule 2-403, and have the same powers with respect to discovery as the Court has

under Title 2, Chapter 400."

The Chair said that the discussion of the definition of "record" had been previously deferred. Section (k) pertains to the record. He asked why in subsection (k)(4) the Court of Appeals should receive extraneous information which was not developed at the hearing. The problem Mr. Rowan had had was the submission of accusatory material which contained unreliable and incomplete information which could have poisoned the Commission. Mr. Sykes noted that the term "record" is not defined in section (k). Mr. Howell pointed out the term is defined in section (g) of Rule 16-803.

The Reporter commented that since the Committee decided not to accept the panelization concept, Commission members may have seen documents during the investigatory phase that are never a part of the hearing phase. The Chair suggested that the definition of "record" could be taken out of Rule 16-803 and defined in Rule 16-808. Mr. Howell remarked that the Rules should have the requirement that the Commission maintain its own record to make available for inspection, so that an attorney who so wishes can make a motion to recuse.

Ms. Scherr told the Committee that what happened to Mr. Rowan was before the 1995 rule revision, and it will not happen again under the existing rules. Judge Johnson said that he had served on the Commission prior to 1995. The Commission had hired an attorney to do the investigation. The attorney periodically reported, and all

Commission members saw the report. Mr. Sykes suggested that in subsection (g)(1), the word "evidence" could be changed to the word "documents."

The Chair suggested that in section (f) the phrase "inspect and copy the record" should be added to the other rights listed. Mr. Hochberg inquired if the Commission can look at the record. Mr. Lemmey answered that Investigative Counsel can show the Commission the file. The Reporter observed that if Investigative Counsel shows the Commission the file, the Commission may see a lot of information that is never offered as evidence at the hearing. Mr. Sykes commented that this provision does not contemplate only discovery. When the case goes to the Court of Appeals, the attorney for the judge should be able to look at everything in the file, even if everything does not go to the Court. The Chair pointed out that as a practical matter, what is offered at the hearing is marked for identification. If the objection is sustained, the item is not received into evidence, but it is part of the record.

Mr. Howell said that subsection (k)(4) does not need to be changed. The Chair asked if the word "hearing" should be added to subsection (k)(4) after the word "entire" and before the word "record." Mr. Howell commented that the proceedings encompass prior pleadings, charges, and the answer. Judge Kaplan remarked that the entire proceeding is the record. Mr. Klein asked if the term to be defined should be "Commission Record." Mr. Howell observed that the

term "proceedings" is defined in Title 1 of the Rules. Mr. Sykes said that nothing in the appellate record section of the Rules provided that pleadings and motions go up on appeal. The Chair expressed the view that the definition of "record" in Title 8 is not helpful for describing what goes to the Court of Appeals under the Judicial Disabilities Commission Rules. Ms. Scherr suggested that the definition in Rule 7-206 may be useful. The Chair and the Committee agreed to pattern the definition of "record" after Rule 7-206.

The Chair said that the Rules would be reconsidered at the next meeting when more members were present. The Chair adjourned the meeting.