

SUPPLEMENTAL PUBLIC NOTICE

On October 23, 2018, notice was posted of substantial revisions to the Rules governing the Judicial Disabilities Commission and the processing of complaints filed with the Commission. The proposed revisions deal with two types of complaints – (1) those alleging sanctionable conduct and (2) those alleging a disability, which Article IV, § 4B(b)(1) of the Maryland Constitution regards as a disability “which is or is likely to become permanent and which seriously interferes with the performance of the judge’s duties.” The appropriate remedy for such a permanent disability is retirement from office.

Subsequent to the posting of those revisions, a judge expressed concern that the Subcommittee had failed to deal with the situation of a judge alleged to suffer from a physical, mental, or addictive problem that (1) impedes the judge from properly carrying out his or her judicial duties, or (2) causes the judge to act in ways that are inappropriate, but (3) through treatment or therapy can be resolved and thus would not likely become permanent. Those situations have arisen, but neither the current Rules nor the proposed revision deals with them or provides any guidance to the Commission as to how to deal with them.

The Subcommittee has found some validity in that concern and proposes to amend the revision previously posted in order to address it by recognizing a status of “impairment” and a way of dealing with it through the device of a conditional diversion agreement that would allow the judge to get the help he or she needs and avoid the prospect of either sanctions for the inappropriate behavior or mandatory retirement. It also would allow the judge to reject such an agreement and contest any allegations of sanctionable conduct or permanent disability.

Attached to this Notice are proposed amendments to the previously posted revisions. Those amendments, which include some style revisions, are in bold type and will be considered by the full Rules Committee at its November 16, 2018 meeting. Comments are invited.

November 5, 2018

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

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CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-401. PREAMBLE; FUNCTION OF THIS CHAPTER

(a) Code of Judicial Conduct

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

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

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Cross reference: See Rule 18-100.4.

(b) Function of This Chapter

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

(A) enforcing standards of judicial conduct;

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

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

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

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

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

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

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

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

Source: This Rule in new.

REPORTER'S NOTE

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

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DIVISION 1. GENERAL PROVISIONS

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

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

(a) Address of Record

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

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

(b) Board

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

(c) Censure

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

~~(e)~~ (d) Charges

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

~~(d)~~ (e) Commission

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

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

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

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

~~(f)~~ (g) Complainant

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

~~(g)~~ (h) Complaint

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

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

~~(h)~~ (i) Disability

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

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

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

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

(j) Impairment; Impaired

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

~~(j)~~ (k) Judge

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

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

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

(1) Reprimand

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

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

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

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

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

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

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

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

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

REPORTER'S NOTE

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

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

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

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

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

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

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

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

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

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

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

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

With respect to censure, the Committee advised:

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

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

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

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

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

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

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

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

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

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Rule 18-403. RIGHT TO ATTORNEY

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

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

Source: This Rule is new.

REPORTER'S NOTE

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

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Rule 18-404. SERVICE OF DOCUMENTS

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

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

Source: This Rule is new.

REPORTER'S NOTE

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

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or the Commission also should not be electronic.

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DIVISION 1. GENERAL PROVISIONS

Rule 18-405. EX PARTE COMMUNICATIONS

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

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

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

REPORTER'S NOTE

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

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DIVISION 1. GENERAL PROVISIONS

Rule 18-406. STANDARD OF PROOF

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

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

REPORTER'S NOTE

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

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DIVISION 1. GENERAL PROVISIONS

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

(a) Generally

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

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

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

(2) ~~Complaints; and Investigations; Disposition Without Charges~~

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

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

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

(4) Work Product, Proceedings, and Deliberations

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

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

(5) Proceedings in the Court of Appeals

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

(b) Permitted Release of Information by Commission

(1) Written Waiver

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

(2) Explanatory Statement

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

(3) To Chief Judge of Court of Appeals

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

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

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

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

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

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

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

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

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

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

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

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

(A) Permitted Disclosures

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

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

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

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

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

(B) Restrictions

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

(C) Copy to Judge

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

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

(c) Statistical Report

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

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

REPORTER'S NOTE

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

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

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

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

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

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

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CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-408. COSTS

(a) Generally

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

(b) Costs defined

Costs include:

(1) court costs;

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

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

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

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

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

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

Source: This Rule is new.

REPORTER'S NOTE

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

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-409. USE OF ALLEGATIONS FROM DISMISSED CASE

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

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

REPORTER'S NOTE

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

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 2. STRUCTURE

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

(a) Chair and Vice Chair

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

(b) Compensation

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

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

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

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

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

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

(1) Appointment; Compensation

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

(2) Duties

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

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

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

(1) Appointment; Compensation

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

(2) Duties

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

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

(3) Additional Attorneys and Staff

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

~~(e)~~ (f) Quorum

(1) Generally

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

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

OPTIONAL ADDITIONAL PROVISION

(2) Special Designation of Substitute Member

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

(g) General Powers of Commission

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

(1) administer oaths and affirmations;

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

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

forfeiture; and

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

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

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

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

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

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

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

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

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

REPORTER'S NOTE

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

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

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

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

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

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

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

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

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

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

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DIVISION 2. STRUCTURE

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

(a) Creation and Composition

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

(b) Compensation

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

(c) Chair and Vice Chair

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

(d) Recusal, Removal, or Replacement

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

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

(e) Quorum

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

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

~~(f)~~ ~~Powers and Duties~~

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

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

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

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

REPORTER'S NOTE

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

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

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DIVISION 3. ADMINISTRATIVE PROCEDURE

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

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

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

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

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

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

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

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

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

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

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

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

(d) Stale Complaints

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

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

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

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

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

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

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

~~(c) Dismissal by Investigative Counsel~~

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

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

~~(d)~~ (f) Inquiry

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

~~(e)~~ Preliminary Investigation

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

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

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

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

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

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

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

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

~~(f) Recommendation by Investigative Counsel~~

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

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

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

~~(h) Authorization of Further Investigation~~

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

~~(i) Informal Meeting With Judge~~

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

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

~~(1) Contents~~

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

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

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

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

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

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

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

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

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

~~(k) Filing of Objections~~

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

~~(l) Action by Commission~~

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

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

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

REPORTER'S NOTE

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

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 3. ADMINISTRATIVE PROCEDURE

RULE 18-422. INVESTIGATION BY INVESTIGATIVE COUNSEL

(a) Conduct of Investigation

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

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

(2) Subpoena

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

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

(3) Grant of Immunity

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

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

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

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

(4) Notice to Judge

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

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

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

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

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

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

(5) Opportunity of Judge to Respond

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

(6) Time for Completion

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

(b) Report and Recommendation by Investigative Counsel

(1) Duty to Make

Upon completion of an investigation, Investigative

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

(2) Contents

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

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

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

(C) a conditional diversion agreement;

(D) a reprimand;

(E) the filing of charges; or

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

(3) Recipient of Report

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

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

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

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

(c) Records

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

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

REPORTER'S NOTE

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

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

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

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 3. ADMINISTRATIVE PROCEDURE

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

(a) Review of Investigative Counsel's Report

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

(b) Informal Meeting with Judge; Peer Review

(1) Generally

The Board may meet informally with the judge.

(2) Peer Review

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

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

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

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

(c) Further Investigation

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

(d) Board's Report to Commission

(1) Contents

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

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

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

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

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

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

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

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

(2) Time for Submission of Report

(A) Generally

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

(B) Extension

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

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

(C) Failure to Submit Timely Report

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

(D) Copy to Investigative Counsel and Judge

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

(e) Filing of Response

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

(f) Action by Commission on Board Report and Recommendation

(1) Review

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

(2) Appearance by Judge

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

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

(3) Disposition

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

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

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

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

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

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

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

REPORTER'S NOTE

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 3. ADMINISTRATIVE PROCEDURE

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

(a) Notice to Judge

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

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

(b) Subpoenas

(1) Issuance

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

(2) Notice to Judge

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

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

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

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

(4) Failure to Comply

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

~~(3)~~ (5) Confidentiality

(A) Subpoena

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

(B) Court Files and Records

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

(C) Hearings

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

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

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

(c) Time for Completion of Investigation

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

(d) Report and Recommendation ~~by Investigative Counsel~~

(1) Duty to Make

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

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

(2) Contents

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

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

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

(C) a conditional diversion agreement;

(D) entering into a private reprimand;

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

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

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

REPORTER'S NOTE

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

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

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

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

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

(b) With Letter of Cautionary Advice

(1) When Appropriate

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

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

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

(2) Notice to Judge

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

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

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

~~(b) Private Reprimand~~

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

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

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

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

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

(3) Confidentiality

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

(4) Not a Form of Discipline

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

~~(c) Deferred Discipline Agreement~~

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

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

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

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

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

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

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

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

REPORTER'S NOTE

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

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DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

Rule 18-426. CONDITIONAL DIVERSION AGREEMENT

(a) When Appropriate

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

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

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

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

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

(b) Compliance

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

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

the judge.

(c) Not a Form of Discipline

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

(d) Notice to Complainant; Confidentiality

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

(e) Termination of Proceedings

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

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

REPORTER'S NOTE

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

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

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Rule 18-427. REPRIMAND

(a) When Appropriate

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

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

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

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

(b) Procedure

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

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

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

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

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

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

(c) Form of Discipline

A reprimand constitutes a form of discipline.

(d) Retention of Copy

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

subsequent proceeding against the judge.

(e) Notice to Complainant

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

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

REPORTER'S NOTE

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

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

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Rule 18-428. RETIREMENT AS A DISPOSITION

(a) Applicability

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

(b) When Appropriate

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

(c) Effect

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

or she is entitled by law.

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

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

Source: This Rule is new.

REPORTER'S NOTE

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

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DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

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

(a) ~~Charges~~ Direction by Commission

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

(b) Content of Charges

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

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

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

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

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

~~(e)~~(d) Response

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

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

(1) Generally

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

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

(2) Sanctionable Conduct

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

(3) Disability or Impairment

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

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

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

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

~~(f)~~ ~~Procedural Rights of Judge~~

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

~~(g)~~ ~~Exchange of Information~~

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

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

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

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

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

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

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

~~(i) Hearing~~

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

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

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

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

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

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

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

~~(j) Commission Findings and Action~~

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

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

~~(k) Record~~

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

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

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

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

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

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

~~(1) Discipline by Consent~~

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

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

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

REPORTER'S NOTE

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

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Rule 18-432. PROCEDURAL RIGHTS OF JUDGES

The judge has the right to:

(1) discovery pursuant to Rule 18-433;

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

with ~~this~~ Rule **18-434**;

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

(4) present evidence and argument; and

(5) examine and cross-examine witnesses.

Source: This Rule is new.

REPORTER'S NOTE

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

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Rule 18-433. DISCOVERY

(a) Generally

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

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

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

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

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

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

(b) Open File

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

(c) Exculpatory Evidence

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

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

(d) Witnesses

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

Source: This Rule is new.

REPORTER'S NOTE

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

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Rule 18-434. HEARING ON CHARGES

(a) Bifurcation

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

(b) Subpoenas

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

(c) Non-Response or Absence of Judge

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

(d) Motion for Recusal

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

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

(e) Role of Investigative Counsel

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

(f) Evidence

Title 5 of the Maryland Rules shall generally apply.

(g) Recording

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

(h) Proposed Findings

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

Source: This Rule is new.

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REPORTER'S NOTE

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

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

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

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Rule 18-435. COMMISSION FINDINGS AND ACTION

(a) Finding of Disability

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

(b) Finding of Impairment

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

(c) Finding of Sanctionable Conduct

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

refer the matter to the Court of Appeals.

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

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

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

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

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

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

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

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

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

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

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

(f) **Confidentiality upon Finding as to Disability or Impairment**

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

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

REPORTER'S NOTE

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

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Rule 18-436. CONSENT TO DISPOSITION

(a) Generally

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

(1) dismissal of the complaint accompanied by a letter of cautionary advice pursuant to Rule 18-425;

(2) a conditional diversion agreement pursuant to Rule 18-426;

(3) a reprimand pursuant to 18-427;

(4) suspension or removal from judicial office; or

(5) retirement from judicial office pursuant to Rule 18-428.

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

(b) Form of Consent

(1) Generally

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

(2) If Charges Directed to Be Filed

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

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

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

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

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

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

(F) a waiver by the judge of the right to further proceedings before the Commission and subsequent proceedings before the Court of Appeals.

(3) If Charges Not Yet Directed to Be Filed

Unless the consent is to a dismissal accompanied by a letter of cautionary advice or a reprimand, if the agreement is executed before charges have been directed to be filed, it shall contain a statement by the Commission of the charges that would have been filed but for the agreement and the consents and

admissions required in subsection (b) (2) of this Rule shall relate to that statement.

(c) Submission to Court of Appeals

An agreement for a disposition that can be made only by the Court of Appeals shall be submitted to the Court, which shall either approve or reject the agreement. Until approved by the Court of Appeals, the agreement is confidential and privileged. If the Court approves the agreement and imposes the stated sanction, the Commission shall notify the complainant and the agreement shall be made public, except that any portion of the agreement and stated sanction that relates to charges of disability shall be confidential. If the Court rejects the stated sanction, the proceeding shall resume as if no consent had been given, and all admissions and waivers contained in the agreement are withdrawn and may not be admitted into evidence.

Committee note: Because the Commission has the authority, on its own, to dismiss a complaint accompanied by a letter of cautionary advice, and to issue a reprimand, **and to enter into a conditional diversion agreement**, a consent to either of those dispositions need not be submitted to the Court of Appeals for approval. See, however, Rule 18-407 (b) (3).

Source: This Rule is derived in part from former Rule 16-808 (1) (2016), is derived in part from former Rule 18-407 (1) (2018) and is in part new.

REPORTER'S NOTE

This Rule carries forth changes to current Rule 18-414

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

approved by the Rules Committee in 2016 and were included in the Committee's 191st Report to the Court of Appeals, with the addition of a provision permitting the judge to acknowledge the existence of sufficient evidence to sustain the charges, without making an admission.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

RULE ~~18-408~~ 18-437. PROCEEDINGS IN COURT OF APPEALS

(a) Expedited Consideration

Upon receiving the hearing record file pursuant to Rule ~~18-407 (k)~~ 18-435, the Clerk of the Court of Appeals shall docket the case for expedited consideration.

(b) Exceptions

The judge may except to the findings, conclusions, or recommendation of the Commission by filing exceptions with the Court of Appeals ~~eight copies of exceptions~~ within 30 days after service of the notice of filing of the record and in accordance with Rule 20-405. The exceptions shall set forth with particularity all errors allegedly committed by the Commission and the disposition sought. A copy of the exceptions shall be served on the Commission in accordance with Rules 1-321 and 1-323.

(c) Response

The Commission shall file ~~eight copies of~~ a response within 15 days after service of the exceptions in accordance with

Rule 20-405. The Commission shall be represented in the Court of Appeals by its Executive Secretary or such other ~~counsel~~ attorney as the Commission may appoint. A copy of the response shall be served on the judge in accordance with Rules 1-321 and 1-323.

(d) Hearing Memoranda

If exceptions are timely filed, upon the filing of a response or, if no response is filed, upon the expiration of the time for filing it, the Court shall set a schedule for filing memoranda in support of or in opposition to the exceptions and any response and a date for a hearing.

(e) Hearing

The hearing on exceptions shall be conducted in accordance with Rule 8-522. If no exceptions are timely filed or if the judge files with the Court a written waiver of the judge's right to a hearing, the Court may decide the matter without a hearing.

~~(e)~~ (f) Disposition

The Court of Appeals may (1) impose the ~~sanction~~ disposition recommended by the Commission or any other ~~sanction~~ disposition permitted by law; (2) dismiss the proceeding; or (3) remand for further proceedings as specified in the order of remand.

Cross reference: For rights and privileges of the judge after disposition, see Md. Const., Article IV, § 4B (b).

~~(f)~~(g) Decision Order

The decision shall be evidenced by the order of the Court of Appeals, which shall be certified under the seal of the Court by the Clerk ~~and shall be accompanied by an opinion.~~ An opinion shall accompany the order or be filed at a later date. Unless the case is remanded to the Commission, the record shall be retained by the Clerk of the Court of Appeals.

(h) Confidentiality

All proceedings in the Court of Appeals related to charges of disability **or impairment** shall be confidential and remain under seal unless otherwise ordered by the Court of Appeals.

Source: This Rule is former Rule ~~16-809 (2016)~~ 18-408 (2018).

REPORTER'S NOTE

This Rule carries forth changes to current Rule 18-415 approved by the Rules Committee in 2016 and were included in the Committee's 191st Report to the Court of Appeals.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 5. FILING OF CHARGES, PROCEEDINGS BEFORE COMMISSION

Rule 18-438. SUSPENSION OF EXECUTION OF DISCIPLINE

(a) Authority

In imposing discipline upon a judge pursuant to the Rules in this Chapter, whether pursuant to an agreement between the judge and the Commission or otherwise, the Court of Appeals, in its Order, may suspend execution of all or part of the discipline upon terms it finds appropriate.

(b) Monitoring Compliance

(1) Unless the Court orders otherwise, the Commission shall monitor compliance with the conditions stated in the order. The Commission may direct Investigative Counsel or any other person to monitor compliance on its behalf. If, upon request of the judge, a monitor other than Investigative Counsel is appointed, all reasonable expenses of the monitor shall be assessed against the judge.

(2) The Commission may direct the judge to provide to the monitor such information and documentation and to authorize other designated persons to provide such information and documentation

to Investigative Counsel as necessary for the Commission effectively to monitor compliance with the applicable conditions.

(3) Upon any material failure of the judge to comply with those requirements or upon receipt of information that the judge otherwise has failed to comply with a condition imposed by the Court, the monitor promptly shall file a report with the Commission and send written notice to the judge that it has done so. The notice shall include a copy of the report and inform the judge that, within fifteen days from the date of the notice, the judge may file a written response with the Commission.

(4) The Commission promptly shall schedule a hearing on the report and any timely response filed by the judge and shall report to the Court its findings regarding any material violation by the judge. The report shall include any response filed by the judge.

(5) If a material violation found by the Commission is based upon conduct by the judge that could justify separate discipline for that conduct, the Commission may direct Investigative Counsel to proceed as if a new complaint had been filed and shall include that in its report to the Court.

(c) Response; Hearing

Within fifteen days after the filing of the Commission's report, the judge may file a response with the Court. The judge

shall serve a copy of any response on the Commission. The Court shall hold a hearing on the Commission's report and any timely response filed by the judge and may take whatever action it finds appropriate. The Commission may be represented in the proceeding by its Executive Secretary or any other attorney the Commission may appoint.

Source: This Rule is new.

REPORTER'S NOTE

This Rule carries forth the language of proposed new Rule 18-416 approved by the Rules Committee in 2016 and was included in the Committee's 191st Report to the Court of Appeals. **It adds a provision allowing the Commission to designate a monitor other than Investigative Counsel but requires that, if an alternative monitor is chosen at the judge's request, the judge bear the expenses of the monitor.**

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 6. SPECIAL PROCEEDINGS

Rule 18-441. CASES OF ALLEGED OR APPARENT DISABILITY OR

IMPAIRMENT

(a) In general

Except as otherwise provided in this Rule, proceedings involving an alleged disability or impairment of a judge shall be in accordance with the other Rules in this Chapter.

(b) Initiation

A proceeding involving alleged or apparent disability or impairment may be initiated:

(1) by a complaint alleging that the judge is disabled or impaired, or a finding to that effect by Investigative Counsel pursuant to Rule 18-421 (f);

(2) by a claim of disability or impairment made by the judge in response to a complaint alleging sanctionable conduct;

(3) upon direction of the Commission pursuant to Rule 18-431;

(4) pursuant to an order of involuntary commitment of the judge to a mental health facility; or

(5) pursuant to the appointment of a guardian of the person

or property of the judge based on a finding of disability that the judge is a disabled person as defined in Code, Estates and Trusts Article, § 13-101.

(c) Confidentiality

All proceedings involving a judge's alleged or apparent disability or impairment shall be confidential.

(d) Inability to Defend

Upon a credible allegation by the judge or other evidence that a judge, by reason of physical or mental disability, is unable to assist in a defense to a complaint of sanctionable conduct, impairment, or disability, the Commission may appoint (1) an attorney for the judge if the judge is not otherwise represented by an attorney or (2) a guardian *ad litem*, or (3) both.

(e) Interim Measure

If a disability proceeding is initiated pursuant to section (b) of this Rule, the Commission shall immediately notify the Court of Appeals which, after an opportunity for a hearing, may place the judge on temporary administrative leave pending further order of the Court and further proceedings pursuant to the Rules in this Chapter.

(f) Waiver of Medical Privilege; Medical or Psychological Examination

(1) The assertion by a judge of the existence of a mental or physical condition or an addiction, as a defense to or in mitigation of a charge of sanctionable conduct, or the non-existence of a mental or physical condition or an addiction, as a defense to a charge that the judge has a disability **or impairment** constitutes a waiver of the judge's medical privilege and permits:

(A) the Commission to authorize Investigative Counsel to obtain, by subpoena or other legitimate means, medical and psychological records of the judge **relevant to issues presented in the case;** and

(B) upon a motion by Investigative Counsel, the Board to order the judge to submit to a physical or mental examination by a licensed physician or psychologist designated by Investigative Counsel **and** direct the physician or psychologist to render a written report to Investigative Counsel. Unless the judge and Investigative Counsel agree otherwise, the cost of the examination and report shall be paid by the Commission, subject to a subsequent assessment as costs pursuant to Rule 18-408.

(2) Failure or refusal of the judge to submit to a medical or psychological examination ordered by the Board shall preclude the judge from presenting evidence of the results of medical examinations done on the judge's behalf, and the Commission may

consider such a failure or refusal as evidence that the judge has or does not have a disability **or impairment.**

DRAFTER'S NOTE: This Rule is derived, in part, from ABA Rule 27.

Source: This Rule is new.

REPORTER'S NOTE

This is a new Rule, derived in part from ABA Model Rule 27. It addresses special problems or issues in disability cases, which may be initiated as such or converted from what may have begun as a discipline case, including some that are not addressed in the current Rules. Section (a) makes clear that, except as provided in Rule 18-441, proceedings in disability cases shall be in accordance with the other Rules in the Chapter. Section (b) lists the various ways in which a claim of disability may arise. Section (c) preserves confidentiality in disability cases. Section (d) addresses the situation in which a judge, by reason of a disability, may be unable to defend him/herself, even in a sanctionable conduct case. Section (e) permits the Court of Appeals, upon a Report from the Commission, to place a judge with an apparent disability on administrative leave as an interim measure. Section (f) gives the Commission authority to gather certain information once a judge's physical or mental condition becomes an issue.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 6. SPECIAL PROCEEDINGS

Rule 18-442. INTERIM SUSPENSION OR ADMINISTRATIVE LEAVE UPON
INDICTMENT

(a) Definition

In this Rule, "serious crime" means a crime (A) that constitutes a felony, (B) that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge, or (C) as determined by its statutory or common law elements, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy to commit such a crime.

(b) Interim Suspension

Upon notice by the Commission that a judge has been indicted for a serious crime and a recommendation by the Commission, the Court of Appeals may immediately place the judge on interim suspension pending further order of the Court.

(c) Administrative Leave

Upon notice by the Commission that a judge has been

charged by indictment or criminal information with other criminal misconduct for which incarceration is a permissible penalty and poses a substantial threat of serious harm to the public, to any person, or to the administration of justice, the Court of Appeals may place the judge on interim administrative leave pending further order of the Court.

(d) Reconsideration

A judge placed on interim suspension or administrative leave may move for reconsideration.

Source: This Rule is new.

REPORTER'S NOTE

This is a new Rule derived in part from ABA Model Rule 15, Rules adopted in other States, and Rule 19-738, dealing with attorneys who have been charged with criminal activity. There is no express provision for interim suspensions in the Constitution, but if a judge is indicted for whatever is defined as a serious crime, that authority would seem to be necessary. The Rule would give the Court of Appeals that authority upon a Report from the Commission and subject to the ability of the judge to contest such a ruling by filing a motion for reconsideration.