COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, 100 Community Place, Crownsville, Maryland on May 14, 1999.

Members present:

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

Lowell R. Bowen, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
H. Thomas Howell, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Timothy F. Maloney, Esq.
Anne C. Ogletree, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Debra K. Dear, Member, Judicial Disabilities Commission
Hon. James T. Smith, Jr.
Hon. Maurice W. Baldwin, Jr.
Claire Smearman, Esq., Select Committee on Gender Equality
Amy S. Scherr, Esq., Executive Secretary
Hon. Sally Denison Adkins
Steven P. Lemmey, Esq., Investigative Counsel
Buz Winchester, Esq., Maryland State Bar Association

The Chair convened the meeting. He said that the minutes of the April 16, 1999 Rules Committee meeting will be considered at the June meeting, because the minutes were mailed out too late for the members to review.

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

The Chair presented Rule 16-803, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-803 to add definitions of "address of record" and "Commission record" to modify the definitions of "judge" and "sanctionable conduct," and to add a certain Committee note, as follows:

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

The following definitions apply in Rules 16-804 through 16-810.1 except as expressly otherwise provided or as necessary implication requires:

(a) Address of Record

"Address of record" means the judge's current home address, which shall remain confidential at all stages of proceedings under these rules, or another address designated by

the judge.

~~(a)~~ (b) Charges

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

~~(b)~~ (c) Commission

"Commission" means the Commission on Judicial Disabilities.

(d) Commission Record

"Commission record" means all documents filed with the Commission pertaining to the judge who is the subject of charges and includes all documents made available to any member of the Commission.

~~(c)~~ (e) Complainant

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

~~(d)~~ (f) Complaint

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

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

~~(e)~~ (g) Disability

"Disability" means a mental or physical disability that seriously interferes with the

performance of a judge's duties and is, or is likely to become, permanent.

~~(f)~~ (h) Judge

"Judge" means a judge of the Court of Appeals, the Court of Special Appeals, a circuit court, the District Court, or an orphans' court, and a retired judge during any period that the retired judge has been designated for temporary active service.
Cross reference: See Code, Courts Article, §1-302.

~~(g)~~ (i) Sanctionable Conduct

(1) "Sanctionable conduct" means misconduct while in office, the persistent failure by a judge to perform the duties of the judge's office, or conduct prejudicial to the proper administration of justice. ~~It includes any conduct constituting a violation of the Maryland Code of Judicial Conduct promulgated by Rule 16-813. An erroneous ruling, finding, or decision in a particular case does not alone constitute sanctionable conduct~~.

A judge's violation of any of the provisions of the Maryland Code of Judicial Conduct promulgated by Rule 16-813 may be regarded as conduct prejudicial to the proper administration of justice.

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

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

~~Committee note: The phrase "misconduct while in office" includes misconduct committed by a judge while in active service who then resigns~~

~~or retires and misconduct by a retired judge during any period that the retired judge has been recalled to temporary active service pursuant to Code, Courts Article, §1-302.~~

Committee note: "Sanctionable conduct" includes the use of a judge's office to obtain special treatment for friends or relatives, acceptance of bribes, and other abuses of judicial office. Failure or refusal of a judge to cooperate or the intentional misrepresentation of a material fact during any stage of a disciplinary proceeding may constitute sanctionable conduct. Sanctionable conduct could include repeated instances of improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties. Sanctionable conduct does not include a judge's making wrong decisions -- even very wrong decisions -- in particular cases.

Cross reference: Maryland Constitution, Art. IV, §4B (b)(1).

For powers of the Commission in regard to any investigation or proceeding under §4B of Article IV of the Constitution, see Code, ~~CJ~~ Courts Article §§13-401 to 13-403.

As expressly stated stated in the Preamble to Rule 16-813, the Maryland Code of Judicial Conduct "is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies" and "[i]t is not intended that every transgression of the Code will result in disciplinary action."

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

Source: This Rule is in part derived from former Rule 1227 (adopted 1995) and is in part new.

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

The proposed amendments to Rule 16-803 add definitions of "address of record" and "commission record," and modify the definitions of "judge" and "sanctionable conduct."

Proposed new subsection (a) provides that a judge's home address is the "address of record," unless the judge specifies a different address. The judge's home address remains confidential at all times.

Proposed new section (d) is added to make clear what the "Commission record" is, since that is a term to which Rule 16-808 refers in several places. The Committee takes a broad view of what the Commission record entails, because it believes that the judge's right to review the Commission record under Rule 16-808 should include the right to review anything that any Commission member has seen that pertains to the judge.

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

In section (i), substantial changes to the definition of "sanctionable conduct" are proposed. Subsection (i)(1) sets out what is "sanctionable conduct." The language of the first sentence is unchanged from the current rule and corresponds exactly with the language of Article IV, §4B (b)(1) of the Maryland Constitution. The second sentence is a transfer of the substance of Canon 6B of the Maryland Code of Judicial Conduct to the definition of "sanctionable conduct." In examining the relationship of the provisions of the Maryland Code of Judicial Conduct to the definition of "sanctionable Conduct," the Subcommittee concluded that language in the current definition is overly broad. Specifically, the phrase "includes any conduct constituting a violation" automatically sweeps into the definition not only the provisions of the Code that impose binding obligations on a judge (violation of which would be serious transgressions), but also the provisions of the Code that are intended to be hortatory. The

Subcommittee believes that the preferable statement of the relationship between the Code and the definition is found in current Canon 6B — that a judge's violation of any of the provisions of the Code "may be regarded as conduct prejudicial to the proper administration of justice" [emphasis added].

Subsection (i)(2) sets out two categories of conduct that do not constitute sanctionable conduct, "[u]nless the conduct is occasioned by fraud or corrupt motive or raises a substantial question as to the judge's fitness for office." The current rule states that an "erroneous ruling, finding, or decision in a particular case does not alone constitute sanctionable conduct" [emphasis added]. The current language, which is proposed to be deleted, leaves open the question of what must be added to the erroneous acts in order for there to be sanctionable conduct. The revised language of subsection (i)(2)(B) answers this question. Also answered in subsection (i)(2) is the question of under what circumstances a judge's failure to make timely decisions would constitute sanctionable conduct. Subject to the introductory clause concerning fraud, corrupt motive, and a substantial question as to the judge's fitness, proposed new subsection (i)(2)(A) states that the failure to decide matters in a timely manner is not sanctionable conduct unless the failure is habitual.

A new Committee note is proposed to be added following section (i). Except for the second sentence, the Committee note is substantially derived from a portion of Rule 1 (a) of the Rules of the Judicial Council of the Fourth Circuit Governing Complaints of Judicial Misconduct and Disability. The second sentence of the Committee note is derived from Rule 5 (b) of the Colorado Rules of Procedure, Chapter 24, Judicial Discipline.

A revised cross reference to the Maryland Code of Judicial Conduct highlights two provisions in the proposed new Preamble to Rule 16-813.

The Vice Chair suggested that the language in section (a) which reads "which shall remain confidential at all stages of the proceedings under these rules" should be moved to Rule 16-810, Confidentiality, because the definitions should not contain such a substantive provision. The Committee agreed by consensus with this suggestion. The Vice Chair asked if only the home address is confidential, or if the other address designated by the judge is also confidential. The Reporter answered that only the home address is confidential. Mr. Titus questioned as to the judge including a vacation home as an address. The Vice Chair responded that to keep that address confidential, the judge should not designate it.

Turning to section (d), the Chair noted that the record sent to the Court of Appeals is not necessarily the Commission record. The judge has the opportunity to review the Commission record should charges be filed and a hearing necessary. The Vice Chair commented that it is possible that documents may have been made available to Commission members, but not filed with the Commission. The Chair stated that this would not be part of the Commission record. Mr. Howell explained that the Subcommittee's thinking was that if the judge wanted to make something part of the hearing record, it would be incumbent upon the judge to do so. Material given to the Commission is not part of the record, but is available to the judge through discovery. If the judge feels that something received by the

Commission is prejudicial, the judge can make it part of the record.

The Chair noted that in a recent case, evidence submitted to the Commission was not part of the exhibits at the hearing. If a hearing is held, the judge has the right to inspect the entire Commission record to make use of whatever the judge would like. It can be put into the record to the Court of Appeals. The Vice Chair remarked that the definition does not accomplish its purpose, which is that all documents available to the Commission are part of the record. Mr. Lemmey clarified that this is the Commission record, not the hearing record. The Vice Chair observed that the definition of "Commission record" should include everything, whether it is part of the hearing record or not. The Reporter commented that further back in time at the investigation phase, Investigative Counsel accumulates evidence which the Commission may want to see. If Investigative Counsel shows any of this evidence to a Commission member, the judge has a chance to see it. The Rules Committee decided against panelization, so the functions of the Commission are intermeshed, more than the American Bar Association (ABA) recommends. The Vice Chair questioned the breadth of the definition that provides that everything made available to any member of the Commission is part of the Commission record, regardless of whether it was ever offered or admitted in evidence at the hearing. The Reporter pointed out that this is the "Commission record," and not the hearing record that is sent to the Court of Appeals. The judge is able to see the

Commission record.

Mr. Sykes asked about the meaning of the language in section (d) which reads "filed with." If something is not filed with the Commission, yet the Commission has it, can the judge see it? The definition can be read as being limited to documents filed. He suggested that the word "means" be changed to the word "includes." The Reporter made an alternative suggestion to delete the word "includes" in the third line of section (d), and the Committee agreed by consensus to this suggestion.

Turning to section (h), the Chair explained that this provision has been amended to include a retired judge designated for temporary service. Judge Kaplan inquired as to why the word "temporary" is necessary. Mr. Titus questioned whether this is statutory language. He looked at the statute, Code, Courts Article, §1-302, which uses the language "a retired judge assigned to sit temporarily." He suggested that section (h) provide "...a retired judge during any period that the retired judge has been assigned to sit temporarily," and he suggested that the cross reference include a reference to Article IV, §3A of the Constitution. The Committee agreed by consensus to both of these suggestions.

The Chair pointed out that in subsection (i)(1), the second sentence has been changed by substituting the words "may be regarded" for the previous language "it includes." Subsections (i)(2)(A) and (B) were modified to state what is not "sanctionable conduct," to

help clarify the definition of "sanctionable conduct." This modification was satisfactory to the Commission and the Subcommittee consultants. Mr. Sykes suggested that the language "may constitute" should be substituted for the language "may be regarded as." This would make it clear that a violation of the Judicial Code of Conduct does not necessarily constitute conduct prejudicial to the proper administration of justice.

The Vice Chair pointed out that the first sentence of subsection (i)(1) provides that "sanctionable conduct" includes three different things, but the second sentence only refers to one of those things -- conduct prejudicial to the proper administration of justice. Mr. Bowen replied that the definition of "sanctionable conduct" is made up of the three categories listed in the Constitution. The definition in the Rule includes a separate comment on one of the three categories. The Vice Chair asked if a violation of the Code of Judicial Conduct is the only example of conduct prejudicial to the administration of justice. Mr. Bowen responded that he does not read the Rule that way. He reiterated Mr. Sykes' suggestion to change the language in subsection (i)(1) to "may constitute" instead of "may be regarded as." Mr. Sykes observed that the mere fact that a canon has been violated does not mean that the conduct is sanctionable. The Committee agreed by consensus to the change.

Mr. Howell noted that subsection (i)(1) defines "sanctionable

conduct," not simply "conduct prejudicial to the administration of justice." He suggested that the phrase "conduct prejudicial to the proper administration of justice" in the second sentence be changed to "sanctionable conduct." The Committee agreed by consensus.

Mr. Titus suggested that the language "in an appropriate case" could be added after the word "may" and before the word "constitute." Mr. Sykes pointed out that if this suggestion were adopted, similar language would have to be added to other rules. Mr. Titus requested that the minutes reflect that the word "may" means "in an appropriate case."

The Vice Chair said that she had a question about the Committee note. She commented that she could envision a case where a single instance of ex parte conduct was sanctionable, but the Rule seems to indicate the conduct must be repeated. The Chair suggested that the language "repeated instances of" should be taken out. Mr. Johnson questioned as to why a "laundry list" of categories has to be in the Committee note. Mr. Lemmey commented that the Commission would like for the third sentence to remain in the Rule, because it is helpful for judges and the Commission. Judge Adkins pointed out that the second sentence pertains to a judge lying or misrepresenting, but nowhere else in the Rules is there an indication that lying or misrepresenting is sanctionable conduct. Mr. Johnson expressed the opinion that this should be in the Rule and not in a Committee note. Mr. Sykes commented that this is covered by the language in

subsection (i)(1) which reads "raises a substantial question as to the judge's fitness for office." Mr. Howell explained that the language in the Committee note is meant to be illustrative and intended as a guide. It could begin with the language "By way of illustration" or something similar. Mr. Sykes suggested that the Committee note begin "Examples of sanctionable conduct include...". Mr. Johnson cautioned that the note should not give the impression that it contains every example of sanctionable conduct. The Committee agreed by consensus to Mr. Sykes' suggestion.

Judge Kaplan expressed the view that in the second sentence of the Committee note, the word "may" should not be used. The Reporter noted that the Vice Chair had suggested that the phrase "repeated instances" should be deleted. The Committee agreed by consensus with this suggestion. The Vice Chair suggested that the new paragraph which was added to the cross reference should be put into the Committee note. The Reporter remarked that she had tried to include the cross reference language in the body of the Rule. It is really a cross reference to the Preamble to the Code of Judicial Conduct. The Vice Chair observed that the Style Subcommittee can place the cross reference language.

Judge Adkins suggested that the second and third sentences of the Committee note should be part of the first sentence, so that the term "sanctionable conduct" modifies all of it. The Chair said that the cross reference sentence could go first. Mr. Sykes pointed out

that a problem with this is that some of the examples are always sanctionable conduct, and some may be sanctionable conduct. Judge Adkins commented that attorneys in disciplinary proceedings have no Fifth Amendment rights, and she asked why judges should. The finder of fact assumes that if the attorney declines to address an issue, a negative inference can be drawn. Mr. Bowen pointed out that there is a difference between misrepresenting a material fact and failure to cooperate. Judge Adkins agreed that they should be separated. Mr. Johnson observed that intentional misrepresentation is always sanctionable conduct and should not be in the sentence using the word "may." The language "the intentional misrepresentation of a material fact during any stage of a disciplinary proceeding" should be added to the first sentence. The Committee agreed by consensus to this change.

The Chair suggested that the language "failure or refusal of a judge to cooperate during any stage of a disciplinary proceeding" should be added to the second sentence of the Committee note as well as the language "improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties." The last sentence of the note would then read: "Sanctionable conduct does not include a judge's making wrong decisions -- even very wrong decisions -- in particular cases." The Committee agreed by consensus to these changes.

The Vice Chair moved that the Rule be approved as amended, the

motion was seconded, and it carried unanimously.

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

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-804 to provide for a Vice Chair, to expand on the definition of "interested member," to clarify the duties of the Executive Secretary, to make certain changes to the procedure for the appointment of Investigative Counsel, to provide that Investigative Counsel may make recommendations to the Commission, to expand on the definition of "quorum," and to provide for confidentiality of the home address of a judge, as follows:

Rule 16-804. COMMISSION

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

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

(b) Interested Member

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

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

(c) Executive Secretary

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

(d) Investigative Counsel; Assistants

Subject to approval by the Court of Appeals, ~~T~~the Commission shall appoint an attorney ~~to serve~~ as Investigative Counsel. Before appointing Investigative Counsel, the Commission shall notify bar associations and the general public of the vacancy and 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. Investigative Counsel shall have the powers and duties set forth in these rules, report and make recommendations to the Commission as directed by the Commission~~, and receive the compensation set forth in the budget of the Commission~~. As the need arises and to the extent funds are available in the Commission's budget, the Commission may appoint additional attorneys or other persons to assist Investigative Counsel. Investigative Counsel shall keep an accurate record of the time and expenses of additional persons employed and ensure that the cost does not exceed the amount allocated by the Commission.

(e) Quorum

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

(f) Record

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

(g) Annual Report

The Commission shall submit an annual

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

(h) Request for Home Address ~~of Judges~~

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, which shall remain confidential.

Cross reference: See Rule 16-803 (a).

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

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

The proposed amendments to section (a) provide for the Commission to select a Vice Chair at the same time a Chair is selected, instead of the current procedure which provides for an acting Chair if the Chair is disqualified or otherwise unable to act. The newer procedure is a more efficient one, and it is similar to the one used in the proposed revised Attorney Disciplinary Rules.

Section (b) is proposed to be broadened so that an "interested member" is also one whose impartiality might be questioned and one whose recusal is required by the Maryland Code of Judicial Conduct.

In section (c), the duties of the Executive Secretary are proposed to be clarified to include advice and assistance to the Commission.

Proposed amendments to section (d) make the procedure for the appointment of Investigative Counsel parallel to the procedure

for the appointment of Bar Counsel in proposed revised Rule 16-712 (a). Also, new language is proposed to be added to provide that Investigative Counsel can make recommendations to the Commission.

The proposed amendment to section (e) adds the requirement that a quorum must include one member from each category of membership. The constitutional amendments to Article IV, §§4A and 4B which pertain to the Judicial Disabilities Commission were approved in 1996. One of these expanded the number of Commission members from seven to eleven. Requiring representation from each category of membership not only provides a more equitable decision but is consistent with the expansion of the Commission.

The proposed amendment to section (h) provides for the judge's home address to be confidential. This protects the safety and privacy of the judge.

Mr. Lemmey pointed out that the language at the end of section (h) which reads "which shall remain confidential" should be taken out and moved to Rule 16-810, Confidentiality. The Committee agreed by consensus with this suggestion. There being no other changes, Judge Kaplan moved to adopt the Rule as amended, the motion was seconded, and it passed unanimously.

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

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-805 to make certain changes to the notice that is sent to a complainant under certain circumstances, to change the requirements for dismissal of a complaint, to clarify the procedure for an inquiry, to restate the objective of a preliminary investigation, to provide that the judge be notified of the contents of the complaint, and to provide for an extension of time for completing the preliminary investigation, and to make certain clarifying and stylistic changes, as follows:

Rule 16-805. COMPLAINTS; PRELIMINARY INVESTIGATIONS

(a) Complaints

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

Query to Committee:

(1) The word "complaint" is used in this section (and elsewhere) to mean both something that complies with the requirements of Rule 16-803 (f) and something else in writing that does not meet those requirements. Should a different term be used for the "something else," such as "a written communication containing allegations against a judge" or "written allegations"? Should the definition of "complainant" in Rule 16-803 (e) be amended to include a person who has filed a "something else," as well as a person who has filed a "complaint"?

(2) Subparagraph (a)(3) requires Investigative Counsel to provide a certain notice to a person who has filed "something else" -- does the Committee wish to add a provision elsewhere in the Rule to implement the substance of the notice?

(3) A notice to the complainant concerning confidentiality has been added to Rule 16-810 (a)(2). Should that notice be moved to this Rule? Also, should there be a provision added somewhere that allows the sanction of dismissal to be imposed in accordance with the notice?

(b) Dismissal Without Inquiry

If Investigative Counsel concludes that the **complaint** does not allege facts that constitute sanctionable conduct or disability and that no reasonable grounds exist to conduct a preliminary investigation, Investigative Counsel shall dismiss the **complaint** and notify the complainant, the Commission, and, upon request, the judge that the **complaint** has been dismissed.

(c) Inquiry

Upon receiving information from a complainant or from any other source indicating that a judge may have a disability or may have committed sanctionable conduct, Investigative Counsel may make an inquiry. Following the inquiry, Investigative Counsel shall dismiss the **complaint** in conformity with section (b) of this Rule or shall promptly number the matter as a complaint and undertake a preliminary

investigation in accordance with section (d) of this Rule.

Committee note: An inquiry may include obtaining additional information from the complainant, reviewing public records, obtaining transcripts of court proceedings, and communicating informally with the judge.

~~(b)~~ (d) Preliminary Investigation

(1) ~~If Investigative Counsel concludes that the complaint is frivolous on its face, Investigative Counsel shall dismiss the complaint and notify the complainant, the Commission, and, upon request, the judge of the action. Otherwise,~~ If a complaint is not dismissed in accordance with section (b) or (c) of this Rule, Investigative Counsel shall conduct a preliminary investigation to determine whether reasonable grounds exist to believe ~~the allegations of the complaint~~ that the judge may have a disability or may have committed sanctionable conduct. Investigative Counsel shall promptly inform the Commission that the preliminary investigation is being undertaken.

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

~~(3)~~ (2) Upon application by Investigative Counsel and for good cause, the Commission may authorize Investigative Counsel to issue a subpoena to obtain evidence during a preliminary investigation.

~~(4)~~ (3) Unless directed otherwise by the Commission for good cause, ~~Investigative Counsel,~~ before the conclusion of the

preliminary investigation, Investigative Counsel shall notify the judge who is the subject of the investigation (A) that Investigative Counsel has undertaken a preliminary investigation into whether the judge has a disability or has committed sanctionable conduct; (B) whether the preliminary investigation was undertaken on Investigative Counsel's initiative or on a complaint; (C) if the investigation was undertaken on a complaint, of the name of the person who filed the complaint and the contents of the complaint; (D) of the nature of the disability or sanctionable conduct under investigation; and (E) ~~that before the preliminary investigation is concluded, the judge may present to Investigative Counsel, in person or in writing, any information the judge may wish to present~~ of the judge's rights under subsection (d)(4) of this Rule. The notice shall be given by first class mail ~~and~~ or by certified mail requesting "Restricted Delivery -- show to whom, date, address of delivery" addressed to the judge at the judge's ~~last known home address~~ address of record.

~~(5)~~ (4) Before the conclusion of the preliminary investigation ~~and in accordance with the notice~~, Investigative Counsel shall afford the judge a reasonable opportunity to present, in person or in writing, such information as the judge chooses ~~to present~~.

~~(6)~~ (5) ~~Unless the time is extended by the Commission for good cause,~~ Investigative Counsel shall complete a preliminary investigation ~~(A) undertaken as the result of a complaint within 60 days after receiving the complaint and (B) undertaken on the initiative of Investigative Counsel~~ within ~~60~~ 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Commission shall extend the time for completing the preliminary investigation for an additional 30-day period. For failure to comply with the time requirements of this section, the Commission may dismiss any

complaint and terminate the investigation.

~~(c)~~ (e) Recommendation by Investigative Counsel

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

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

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

The proposed amendment to section (a) adds language clarifying that a complaint against a judge must comply with the definition in Rule 16-803 (f). There is also language added providing for notice to the complainant that if the complaint does not comply with the requirements of the Rule within 30 days after the date of notice, Investigative Counsel may dismiss the complaint. This is intended to help keep the system moving efficiently, and avoid the pitfalls of a complaint being filed so late that it is difficult for Investigative Counsel to prosecute and for the judge to defend.

In proposed new section (b), Dismissal Without Inquiry, the standard for dismissal of the complaint without inquiry or investigation is changed from "frivolous on its face" to

"does not allege facts that constitute sanctionable conduct or disability and that no reasonable grounds exist to conduct a preliminary investigation." This is a clearer definition as it refers to "disability," which is defined in Rule 16-803 (g), and "sanctionable conduct," which is defined in Rule 16-803 (i).

Proposed new section (c), Inquiry, clarifies the intent of current subsection (b)(1) that Investigative Counsel may initiate an inquiry upon receiving information from the complainant, as well as from any other source. Following an inquiry, Investigative Counsel must either dismiss the complaint or proceed with a preliminary investigation. A Committee note sets out examples of actions that Investigative Counsel may take during an inquiry.

If a complaint is not dismissed in accordance with section (b) or (c), Investigative Counsel must conduct a preliminary investigation in accordance with section (d). In the proposed amendment, the objective of the preliminary investigation is restated from a determination of "whether reasonable grounds exist to believe the allegations of the complaint" to "whether reasonable grounds exist to believe that the judge may have a disability or may have committed sanctionable conduct."

In subsection (d)(3), the proposed change adds to the notification that is sent to the judge a statement of the contents of the complaint which was filed. The Committee recommends deleting the duplicative language in part (E) and instead cross-referencing subsection (d)(4) where the same language appears. The change at the end of the subsection uses the new definition of "address of record" to specify where the notice is to be sent.

The proposed amendment to subsection (d)(4) contains stylistic changes only.

> In subsection (d)(5) the time for completing the preliminary investigation is proposed to be extended to 90 days, with a possible extension of time for completing the preliminary investigation for an additional 30-day period. Previously, no limit was placed on an extension. Imposing a limitation will set some boundaries as to how much time the investigation should take. At the request of the Investigative Counsel, the initial time period has been changed from 60 to 90 days. The Committee also added a new provision which allows the Commission to dismiss a complaint if the time requirements of subsection (d)(5) are not met.
>
> Proposed new language in section (e) refers to the time period in the previous section. There are also style changes in this section.

Mr. Bowen noted that the first query to the Committee on page 11 refers to the two different types of complaints. The Vice Chair asked if the proposed Attorney Discipline Rules make a distinction between a written communication and a valid complaint. Mr. Howell replied that the distinction is made in the Attorney Discipline Rules. Judge Dryden asked if Investigative Counsel opens a file if the complaint is not a real one. Mr. Lemmey answered that if something does not qualify as a complaint, no file is opened. His office gets many letters about how people were treated by judges.

Mr. Titus asked why the word "complaint" has to be defined. Mr. Lemmey responded that his office maintains a miscellaneous file. For management purposes, a file is opened, and then it is dismissed at the next Commission meeting if it does not qualify as a

"complaint." Mr. Maloney remarked that there could be a docketing system similar to the one used by the Attorney Grievance Commission when no prima facie case is made. Mr. Lemmey explained that he uses a file entitled "L.A." (lacks affidavit). He opens a file, and then he takes it to the Commission to dismiss. Judge Adkins pointed out that under the current rule, Investigative Counsel can dismiss a complaint that is frivolous on its face. Mr. Titus remarked that a letter, which is on its face not sufficient to charge misconduct, should not be considered a complaint. The Chair commented that in the attorney discipline area, a person turns in what he or she thinks is a complaint against an attorney. If the attorney fills out a judicial application which asks if there have been any complaints against the attorney, he or she can answer in the affirmative, explaining that it was dismissed. Melvin Hirshman, Esq., Bar Counsel, has stated that he does not consider these as complaints.

Mr. Lemmey said that he has a small office which has two sets of files, one for complaints with no affidavit attached, and one for complaints which have met the requirements, but are dismissed for other reasons. These are not considered as complaints in the context of a judicial nominating application. The Chair said that the Rule must give the Judicial Disabilities Commission latitude in how it operates. Judge Dryden suggested that the valid complaint could be referred to as a "verified sworn complaint." The Chair added that the real complaints comply with the requirements of Rule 16-803. Mr.

Maloney remarked that a complaint should not be docketed unless it was sufficient on its face to state a valid claim against a judge. The Chair commented that the procedure could be worked out and does not have to be in the Rules.

Mr. Maloney asked how the Commission handles the complaint "the judge misapplied the law." Mr. Lemmey said that most of the time he is successful in convincing people not to file a complaint in that situation. The Vice Chair suggested that the Rule should contain a notice provision, possibly in section (b), to the effect that if the complaint does not comply, there will be a dismissal without inquiry. Mr. Lemmey noted that the third query to the Committee covers this. The current practice is that the complaint that does not comply goes to an automatic dismissal docket and is dismissed at the next Commission meeting.

The Vice Chair suggested that the answer to the second query to the Commission as stated on page 11 of the proposed Judicial Disabilities Commission Rules is in the affirmative. Mr. Sykes commented that instead of using the word "complaint" to mean the initial communication, the word "allegation" could be used. All allegations would be sent to Investigative Counsel and would become a "complaint" when they meet the requirements of Rule 16-803 (f). The Vice Chair proposed that all complaints and allegations would be sent to Investigative Counsel. The Chair stated that he preferred the distinction between complaints that comply and those that do not.

Mr. Sykes pointed out that the definition of "complaint" does not require compliance. It could be defined as any allegation against a judge, and then in the operative section before a file is opened, it could provide that the complaint has to comply with the definitions section.

The Reporter suggested the term "formal complaint" to mean the one in compliance. Mr. Maloney proposed "docketed complaint." Ms. Ogletree pointed out that the term should be distinguished from an allegation, because the person who filed the initial communication believes that he or she has filed a "complaint." This is important from the standpoint of public relations.

Turning to section (d), Mr. Titus suggested that the first sentence could read as follows: "If a complaint is not dismissed in accordance with section (b) or (c) of this Rule, Investigative Counsel shall docket the complaint and conduct a preliminary investigation...". Mr. Howell added that from that point on, the complaint could be known as a "docketed complaint." The Vice Chair remarked that she did not see a problem with the word "complaint." Judge Adkins responded that the judicial nominating application is causing the problem. Mr. Maloney expressed the view that the term should be "docketed complaint." It would be a problem for Investigative Counsel if layers of filing requirements are added. Mr. Lemmey explained that he has a staff of one. He would need some way to keep track of all the paperwork. He has never heard of a

judge who was dissatisfied when his or her case was dismissed after a file was opened. Mr. Maloney pointed out that the problem is not how to add more files, but rather how to categorize them. The judge should not be required to list frivolous complaints on a judicial nominating application. Mr. Lemmey remarked that under the current practice, a judge would not list frivolous complaints. The Reporter added that the judge may not even know about those complaints. Mr. Maloney noted that Mr. Sykes had made the point that frivolous complaints do not deserve docketing. However, it may be appropriate to answer frivolous complaints. Mr. Sykes said that it is important to distinguish complaints which are baseless on their face from complaints which, on their face, do not allege sanctionable conduct but which should be looked into. If something is worth looking into, the complainant can be informed to file a formal complaint.

The Chair expressed the view that the name of the later complaint should be "formal complaint." Mr. Sykes suggested "verified complaint." Mr. Titus proposed that the initial communication should be termed "a communication alleging improper conduct by a judge," not using the word "complaint" at all. Mr. Sykes suggested "allegation." The Vice Chair remarked that these designations are difficult.

The Chair suggested that the first sentence of section (a) be deleted. Mr. Bowen suggested that the definition of the two

complaints could be put into Rule 16-803, as follows: "(1) a communication alleging disability or misconduct by a judge" and "(2) a complaint meeting the requirements of the Rule." Mr. Sykes observed that the requirements should not go into the definitions rule, but should go into the operative rule.

Mr. Lemmey commented that the first sentence of section (a) of Rule 16-805 is necessary, because it says that if a Commission member gets a complaint, it is mailed to Investigative Counsel. The Chair suggested that the first sentence could read as follows: "A person who wishes to complain about a judge shall contact Investigative Counsel." Mr. Titus suggested deleting the second sentence, but the Vice Chair responded that the second sentence deals with the real complaint and should stay in the Rule. Mr. Titus commented that the word "complaint" should not be used until a preliminary investigation is found to be warranted.

Judge Adkins asked about using the word "complaint" in section (b). Mr. Howell suggested that in place of the word "complaint," the word "communication" could be substituted. It is not really a "complaint" until Investigative Counsel so determines. An inquiry enables Investigative Counsel to contact the judge and the complainant. Mr. Sykes suggested including in section (b) language similar to the following: "An allegation against a judge shall be sent to Investigative Counsel. If the allegation constitutes a complaint as defined in Rule 16-803 (f), Investigative Counsel shall

open a file, promptly number the matter as a complaint ...".

Mr. Bowen expressed the opinion that the real complaint should be titled "complaint." Mr. Titus disagreed, because the public views the initial communication as a complaint. If a complaint is insufficient, it can be docketed and dismissed. A judge would not have to inform a judicial nominating commission about it. The Vice Chair inquired whether a judge has to respond to something that comes in but does not rise to the level of a complaint. Mr. Lemmey answered that the judge still has to respond. Judge Adkins is concerned about dismissal without inquiry. The Vice Chair pointed out that in this situation, the judge would know about the initial communication. Mr. Maloney commented that the attorney discipline system has a parallel procedure. Every complaint is not necessarily docketed. The goal is to reduce the number of reportable events.

The Vice Chair said that a consensus is needed as to distinguishing the two types of complaints. Mr. Titus suggested "undocketed" and "docketed" complaints. The Vice Chair responded that this is not a good designation, because it is not clear. It would be easier to distinguish if the initial complaint were called an "allegation." Mr. Bowen moved that the two types of complaints be named "complaint," which is a communication that a judge has a disability or has committed sanctionable conduct, and "formal complaint," which is a complaint meeting the formal requirements of being under affidavit and signed. The motion was seconded. The Vice

Chair commented that this solves the problem within the Rules, but does not solve the problem of the judicial nominating application which asks "Has a complaint been filed against you?" Mr. Bowen remarked that his proposed change is part of a substantive rule, and not a judicial nominating application.

The Vice Chair questioned whether the two designations would be used throughout the Judicial Disabilities Commission Rules. The Chair noted that it would work in Rule 16-805. Mr. Howell added that the designation works throughout the Rules with some adjustments. Mr. Sykes pointed out that a judge would have to report a frivolous formal complaint which had been dismissed. The Chair stated that what is important is that the complaint was frivolous. Judge Dryden added that the judicial nominating commission would understand.

The Chair called for a vote on Mr. Bowen's motion to use the terms "complaint" and "formal complaint." The motion passed unanimously.

The Vice Chair referred to the Reporter's third query on page 11 of the Judicial Disabilities Commission Rules. The Reporter said that the answer to the first two queries were "yes." The Vice Chair inquired as to who would make the request to notify the judge that the complaint was dismissed as section (b) provides. The judge may not know about the complaint in the first place. Mr. Titus observed that the judge does know. The Vice Chair said that the Rule makes it sound as if the judge always knows. The Reporter commented that the

meaning of this section is that if the judge knows about the complaint and the judge would like to be notified about its dismissal, the judge should be notified. It does not mean that the complainant can order that the judge be notified. The Reporter suggested that section (b) be amended to add the words "the judge's" between the words "upon" and "request." The Committee agreed by consensus to this change.

The Vice Chair questioned whether the word "may" in the third line of section (c) should be changed to the word "shall." Mr. Lemmey explained that the Preamble in Rule 16-813 provides that not every transgression of the Judicial Code of Conduct will result in disciplinary action. Sometimes he receives information about a rule violation, but the Commission chooses to take no action. Mr. Bowen noted that the second line of section (c) provides that the information indicates the judge may have disability, and not that the judge does have a disability. The Vice Chair suggested that the first sentence be reworded to give Investigative Counsel discretion. Mr. Sykes remarked that if the information raises a question about a judge, it is up to Investigative Counsel to investigate.

Mr. Titus suggested that in section (a) in the second line on page 11, the word "the" should be changed to the word "a," so that the second line reads: "information that a complaint must be verified...". The Committee agreed by consensus to this change.

Mr. Bowen referred to section (c) and asked what allows for

dismissal of a complaint. Mr. Titus inquired as to what constitutes a complaint. Judge Dryden responded that a definition of "complaint" had been agreed upon by the Committee. The Chair suggested that the end of the first sentence of section (c) should read as follows: "...Investigative Counsel shall close the file and dismiss any complaint in conformity with section (b) of this Rule ...". Mr. Howell commented that the new language presupposes that a formal complaint or verified complaint has been filed. The present language authorizes Investigative Counsel to initiate a preliminary investigation without a complaint. This is not an intended omission. The current language from subsection (b)(2) of Rule 16-805 is: "Upon receipt of information from any source indicating that a judge has a disability or has committed sanctionable conduct, Investigative Counsel, without a complaint, may make an inquiry, and following the inquiry, may undertake a preliminary investigation." The possibility that an inquiry could result in dropping the investigation has been eliminated. The Vice Chair responded that the new language did not eliminate this. Mr. Howell said that Investigative Counsel may hear a reliable piece of information and then begin an investigation after the initial inquiry without a complaint. The Chair suggested that section (c) read as follows: "Upon receiving information from a complainant or from any other source indicating that a judge may have a disability or may have committed sanctionable conduct, Investigative Counsel may open a file and make an inquiry. Following

the inquiry, Investigative Counsel shall (1) close the file and dismiss any complaint in conformity with section (b) of this Rule or (2) proceed as if a formal complaint had been filed and undertake a preliminary investigation in accordance with section (d) of this Rule." The Vice Chair inquired about these options when information comes both from a complainant and from another source. Mr. Bowen noted that this ambiguity can be cured by eliminating the language "a complainant or from" in the first line, and eliminating the word "other" in the second line. The Committee agreed by consensus to these changes.

The Chair said that the Committee note makes clear what Investigative Counsel can do at the inquiry level without a preliminary investigation, including authorizing talking to a judge rather than writing a formal letter.

The Chair drew the Committee's attention to section (d). The Vice Chair noted the use of the word "complaint." The Chair said that in section (d) it does not matter if it is a complaint or a formal complaint. The Vice Chair observed that the word "complaint" includes a "formal complaint." The Chair asked about the time periods in section (d). Mr. Lemmey replied that the Subcommittee had listened to the Commission's concerns. Within reason, the time periods are appropriate. The Reporter pointed out that in subsection (d)(5), the Commission may, but does not have to, dismiss for failure to comply with the time requirements. The Vice Chair noted that that

is the only potential sanction. Investigative Counsel can apply for an extension of time to 30 days beyond the original 90, but some cases may take longer than this. Mr. Lemmey remarked that a further investigation is possible which would allow another 60 days and a reasonable extension of time past that.

The Vice Chair moved that the Rule be approved as amended, the motion was seconded, and it passed unanimously.

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

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-806 to add certain provisions concerning the notice to a judge of a further investigation, to provide that Investigative Counsel must show good cause for a subpoena to be issued, to delete a certain provision concerning immunity, to provide an extension of time for Investigative Counsel to complete a further investigation, to provide that the report of Investigative Counsel be completed within a certain time, and to make certain clarifying and stylistic changes, as follows:

Rule 16-806. FURTHER INVESTIGATION

(a) Notice to Judge

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

the investigation (1) that the Commission has authorized the further investigation, (2) of the specific nature of the disability or sanctionable conduct under investigation, ~~including each Canon of Judicial Conduct allegedly violated by the judge,~~ 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 ~~and by certified mail addressed to the judge at~~ to the judge's ~~last known home~~ address of record, or (2) if previously authorized by the judge, by first class mail to an attorney designated by the judge. ~~If authorized by t~~The Commission, for good cause, ~~Investigative Counsel~~ may defer the giving of notice, but ~~if notice is deferred,~~ notice must be given ~~a reasonable time~~ not less than 30 days before Investigative Counsel makes a recommendation as to disposition.

(b) Subpoenas

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

(2) On motion of the judge or the person served with the subpoena filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the circuit court for the county in which the subpoena was served or, if the judge under investigation is a judge serving on that

circuit court, another circuit court designated by the Commission may enter any order permitted by Rule 2-510 (e). Upon a failure to comply with a subpoena issued pursuant to this Rule, the court, on motion of Investigative Counsel, may compel compliance with the subpoena.

(3) To the extent practicable, a subpoena shall not divulge the name of the judge under investigation. Files and records of the court pertaining to any motion filed with respect to a subpoena shall be sealed and shall be open to inspection only upon order of the Court of Appeals. Hearings before the circuit court on any motion shall be on the record and shall be conducted out of the presence of all persons except those whose presence is necessary.

~~(4) The Commission, in accordance with Md. Constitution, Art. IV, §4B (a), may grant immunity from prosecution or from penalty or forfeiture to any person compelled to testify and produce evidence.~~

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

(c) Completion ~~and Recommendation~~

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

(d) Recommendation by Investigative Counsel

~~Upon completion,~~ Within the time for completing a further investigation, Investigative Counsel shall report the results of the investigation to the Commission in the form that the Commission requires. As part of the report, Investigative Counsel shall

recommend that (1) any complaint be dismissed and the investigation terminated, (2) the judge be offered a private reprimand or a deferred discipline agreement, or (3) charges be filed ~~and the Commission conduct a formal proceeding~~.

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

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

In section (a), the word "promptly" is proposed to be added to the first sentence, concerning notification to a judge that the Commission has authorized a further investigation. A reference to "each Canon of Judicial Conduct allegedly violated" is deleted, and the word "specific" added before the phrase "nature of the disability or sanctionable conduct." A 30-day time period for the judge to file a written response has been added to make the procedure more efficient. After concluding that first class mail is sufficient, the Committee recommends deleting the requirement that the notice also must be given by certified mail. Instead of Investigative Counsel being able to defer the giving of notice, the Committee recommends that the authority to do so should rest with the Commission. The Committee has substituted a time period of not less than 30 days before Investigative Counsel's recommendation as to disposition in place of the original more vague period of "a reasonable time" before the recommendation.

The proposed amendment to subsection (b)(1) adds the requirement of good cause shown before the Commission authorizes Investigative Counsel to issue a subpoena. The phrase "last known home address" is changed to the defined term "address of record."

Subsection (b)(4) is proposed to be deleted. Because the Commission may grant

immunity at any stage of the proceeding — not just during the "further investigation" phase — procedures pertaining to the granting of immunity by the Commission are now set out in section (b) of proposed new Rule 16-810.1, Immunity.

Section (c) is rewritten to add the requirement that if additional time is needed to complete a further investigation, Investigative Counsel is to file an application with the Commission requesting an extension within the original 60-day period allowed for the further investigation.

The provisions of current section (c) pertaining to the report of Investigative Counsel are moved to a new section (d). Language is added to clarify that Investigative Counsel's recommendations are to be part of the report to the Commission and that the report, including recommendations, be given to the Commission within the time allowed for completion of the further investigation.

The Vice Chair pointed out that the notice to the judge is given by first class mail, but the service by certified mail has been taken out. She asked why this was removed from section (a) of Rule 16-806, but was not taken out of Rule 16-805 (d)(3). Mr. Lemmey responded that the prior provision is the judge's first notice. The Vice Chair asked why certified mail is necessary in the prior rule, and Mr. Lemmey answered that it establishes that the notice was received. Judge Dryden commented that the judge will already know about serious charges. He asked if there should be an outer limit on the reasonable time standard for a further investigation. The Chair suggested that it could extend to a date certain. Mr. Titus proposed

one or more 60-day periods. Mr. Howell pointed out that the Subcommittee was of the opinion that the time periods should be capped, so the process does not go on forever. There is no sanction for an endless time period. The judge is in the spotlight and has a right to have the matter completed expediently.

Mr. Titus suggested that at the end of section (c) in place of the language "for a reasonable time", a time limit should be added. Judge Vaughan expressed the view that it might be better to leave it open to cover the situation where a judge absconds. The Chair commented that the Commission can take care of this situation.

Judge Adkins noted that in both Rules 16-805 (d)(5) and 16-806 (c), Investigative Counsel may apply to the Commission for a time extension. Since the Commission meets once a month, Judge Adkins expressed her concern that the period for investigation may have to be extended further. These provisions could be read by attorneys to mean that the decision to extend must be made at a Commission meeting. The Vice Chair commented that other rules allow time extensions outside of the time provided. Judge Adkins remarked that the Committee already discussed that it may take 90 to 100 days to get a transcript. Judge Dryden observed that a judge under investigation wants the proceedings to move quickly. Mr. Johnson remarked that even if a time period is not met, there is no sanction. The Vice Chair pointed out that subsection (d)(5) of Rule 16-805 provides that for failure to comply with the time requirements, the

Commission may dismiss any complaint and terminate the investigation. She suggested that the same language be added to section (c) of Rule 16-806. The Committee agreed by consensus to make this change.

The Vice Chair moved that in both subsection (d)(5) of Rule 16-805 and section (c) of Rule 16-806, language be added permitting Investigative Counsel to file outside of the time frame if there is good cause. The motion was seconded, and it did not pass on a vote of two in favor, four opposed. The Chair commented that the Judicial Disabilities Commission Rules protect the public. A person who does not deserve to be a judge ought to be removed. He asked for another vote on the Vice Chair's motion. Mr. Howell expressed his disagreement with the motion. There are already extensions, and there would be very few situations where more time would be needed. No compelling need exists to further the delay. The Vice Chair hypothesized a situation where Investigative Counsel would be temporarily out of work for some reason, and more time would be necessary. Mr. Sykes commented that the Appellate Rules have a provision to extend time. Mr. Howell remarked that the Subcommittee was aware of this. The Chair called for another vote, and the motion was defeated with one in favor. Mr. Titus commented that Rule 1-204 would apply to the extension of time.

Judge Kaplan moved that the Rule be approved as amended. The motion was seconded, and it passed unanimously.

The Chair presented Rule 16-807, Disposition Without

Proceedings on Charges, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-807 to reorganize section (a), to allow a judge to reject a warning, to change the standard for admitting a reprimand in subsequent disciplinary proceedings, to make certain changes to the required contents of a deferred discipline agreement, to provide that the terms of the deferred discipline agreement are confidential except as provided in the agreement, to state that a deferred discipline agreement does not constitute discipline or a finding of sanctionable conduct, and to provide a
termination provision, as follows:

Rule 16-807. DISPOSITION WITHOUT PROCEEDINGS ON CHARGES

(a) Dismissal

(1) Evidence Fails to Show Disability or Sanctionable Conduct

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

(2) Sanctionable Conduct Not Likely to be Repeated

If the Commission determines that any sanctionable conduct that may have been committed by the judge is not likely to be repeated and was not sufficiently serious to warrant discipline, ~~T~~the Commission may accompany a dismissal ~~under subsection (a)(2) of this Rule~~ with a warning against ~~further~~ future sanctionable conduct. The contents of the warning are private and confidential, but the Commission has the option of notifying the complainant of the fact that a warning was given to the judge. At least 30 days before a warning is issued, the Commission shall mail to the judge a notice that states (A) the date on which it intends to issue the warning (B) the content of the warning, and (C) whether the complainant is to be notified that a warning was given. The judge may reject the warning by filing with the Commission before the intended date of issuance of the warning, a written rejection. If the warning is not rejected, the Commission shall issue it on or after the date stated in the initial notice to the judge. If the warning is rejected, the warning shall not issue and shall have no effect. The Commission may either dismiss the complaint or take any other action not inconsistent with these Rules.

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

(b) Private Reprimand

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

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

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

(C) the judge, in writing on a copy of the reprimand retained by the Commission, (i) waives the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals and the right to challenge the findings that serve as the basis for the private reprimand, and (ii) agrees that the reprimand ~~shall not be protected by confidentiality~~ may be admitted in any subsequent disciplinary proceeding against the judge to the extent such evidence is relevant to the charges at issue or the sanction to be imposed.

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

(c) Deferred Discipline Agreement

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

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

(B) The judge, in the agreement, (i) agrees to the specified conditions, (ii) waives the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals, and (iii) agrees that the deferred discipline agreement ~~shall not be protected by confidentiality in any subsequent disciplinary proceeding against the judge~~ may be revoked for noncompliance.

(2) The Commission shall direct Investigative Counsel to monitor compliance with the conditions of the agreement and may direct the judge to document compliance. If,

after written notice by Investigative Counsel to the judge of the nature of any alleged failure to ~~satisfy~~ comply with a condition and, after affording the judge a minimum 15-day opportunity to present any information or explanation that the judge chooses, the Commission finds that the judge has failed to satisfy a material condition of the agreement, the Commission may revoke the agreement and proceed with any other disposition authorized by these rules. The agreement shall specifically authorize the Commission to proceed in accordance with this ~~paragraph~~ subsection.

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

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

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

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

Subsection (a)(1) is proposed to be amended by deleting the language, "and terminate the proceeding" as unnecessary and reorganizing the provision, so that subsection (a)(1) focuses on the situation where the evidence fails to show that the judge has a

disability or has committed sanctionable conduct.

Subsection (a)(2) focuses on the situation where the Commission determines that any sanctionable conduct that may have been committed by the judge is not likely to be repeated and was not serious enough to warrant discipline. The proposed amendment expands on the warning provision of the current Rule by adding that the contents of the warning are private and confidential, but the Commission has the option of notifying the complainant of the fact that a warning was given to the judge. The Subcommittee recommended the addition of a provision that allows a judge to reject a warning, but the Subcommittee could not agree as to whether the judge should be able to reject the warning in all cases or only in those cases where the complainant is to be notified. The Subcommittee presented both alternatives to the Rules Committee.

For the reasons stated on pages 8-11 of the April 14, 1999 Memorandum from the Commission on Judicial Disabilities to the Rules Committee concerning proposed amendments to Maryland Rules 16-803 through 16-813 and the Statement of Commission Member William J. Boarman presented to the Rules Committee at its April 16, 1999 meeting, the Commission opposed both alternatives. An additional concern expressed about the proposed alternatives is the potentially reduced utility of the Commission warning procedure as a means of improving judicial performance in the area of gender bias.

Proponents of the amendment are concerned about the consequences of a warning that is issued without the judge having had an opportunity to reject the warning or a due process right to contest it. Even though a Committee note following section (a) provides that a warning "is not a reprimand and does not constitute discipline," consequences of a warning can include the repetition of all allegations (including unfounded allegations)

in the media when the news of a dismissal with a warning is reported and the negative connotation of the warning when an honorable judge discloses it to a Judicial Nominating Commission and the Governor after the judge has applied for appointment to a higher court. Of greater import than the impact of the current warning provision on any individual judge is its chilling effect on the independence of the judiciary as a whole. "An independent and honorable judiciary is indispensable to justice in our society." Rule 16-813, Maryland Code of Judicial Conduct, Canon 1. The possibility of warnings that cannot be rejected or contested being issued as a result of judicial actions that may or may not constitute sanctionable conduct adversely affects the independence of all judges.

By a vote of nine to nine, with the tie broken by the Chair, the Rules Committee voted to approve the alternative that allows a judge to reject a warning in all cases. Of the nine members voting against the amendment, six were opposed to both of the alternative amendments to subsection (a)(2).

In section (b), a proposed amendment to subsection (b)(1)(C) narrows the use of a reprimand in subsequent disciplinary proceedings. The current Rule provides that the reprimand is not protected by confidentiality in any subsequent disciplinary proceeding against the judge. The proposed language provides that the judge agrees that the reprimand may be admitted in any subsequent disciplinary proceeding against the judge to the extent such evidence is relevant to the charges at issue or the sanction to be imposed.

Subsection (c)(1) is substantially the same as the current Rule except that at the end of Part (B), the provision that the judge agrees that the deferred discipline agreement is not protected by confidentiality in any subsequent disciplinary proceeding is proposed to be deleted and a provision that the judge agrees that the agreement may be revoked for

noncompliance is proposed to be added. The Subcommittee believes that the fact that a deferred discipline agreement was worked out should not be used in a later disciplinary proceeding, but if a judge does not comply with the terms of an agreement, appropriate discipline should ensue.

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

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

Subsection (c)(4) is new. It sets out a termination provision consistent with current practice.

Judge Adkins said that the Commission had proposed a minor modification to subsection (a)(2), and a copy of the modification had been distributed to the Committee. Under the latest draft of the Rule, the Commission felt that for it to decide to offer a warning, it would be backed into a corner if the judge's conduct were not serious enough to be sanctionable. Adding a right to reject the warning (which the Commission opposes) would then preclude the Commission from charging someone. The Commission would never offer a warning. Under the Commission's draft, if the judge rejects a

warning, there remains the option of charging the judge.

The Vice Chair moved to accept the Commission's amendment, the motion was seconded, and it passed unanimously.

Turning to subsection (b)(1)(C), Mr. Bowen suggested that the language "such evidence" should be changed to the language "that it." The Committee agreed by consensus to this change. Judge Adkins commented that the Commission disagrees with the limitation on the use of reprimands. They had the impression that their objections had been overruled at earlier Subcommittee meetings. The Chair asked what the limitation is. Mr. Howell noted that at the end of subsection (b)(1)(C), the Rule provides for admission of a reprimand to the extent it is relevant to the charges at issue or the sanction to be imposed. Judge Adkins asked if "relevance" means that it has to be a repeat violation. The Committee answered in the negative.

Judge Adkins hypothesized that a judge, who has been intemperate on multiple occasions, may be subject to a deferred discipline agreement for counseling in which the judge participates, but the problem still exists. Would 10 acts of intemperateness qualify for relevant evidence? The Chair said that if a judge has to agree to later admissibility regardless of relevance every time a reprimand is issued, it is not fair. This is a rule of relevance. Mr. Titus observed that a specific example of relevance is persistent conduct. Mr. Sykes remarked that the reprimand may not be relevant to the charges or the sanction. Judge Dryden commented that it is

always relevant to the sanction. Mr. Sykes pointed out that the sanction is one alternative. The Rule does not say "admit if it is relevant;" it says "admit to the extent relevant." If the reprimand happened ten years ago, it may not be sensible to admit it in a current case.

The Vice Chair observed that this is only relevant to sanctions. The reprimand is not admitted into evidence until the Commission determines that there has been misconduct. Mr. Howell said that this has no bearing on the investigatory stage. Until charges have been filed, there is no determination of the relevance of the prior reprimand. He asked if the Rule should be changed. Mr. Sykes noted that a reprimand is always relevant, and he asked why the new language is needed. Senator Stone pointed out that the prior language is broader. The Chair said that the reprimands are only used in rare cases, and if the language is removed, a judge will be foreclosed from a relevancy objection.

The Vice Chair moved to approve the Rule as amended, the motion was seconded, and it passed unanimously.

After the lunch break, the Chair presented Rule 16-808, Proceedings Before Commission, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-808 to reorganize it, to delete a certain reference to the Canons of Judicial Conduct, to delete the requirement of service by certified mail, to increase the number of copies of a response that must be filed, to lengthen the period for the hearing to be scheduled, to provide for a prompt hearing, to lengthen the time for providing a list of witnesses and documents, to make certain changes concerning discovery, to add a certain provision concerning the issuance of subpoenas, to add a time requirement for the filing of a motion for recusal, to make certain changes concerning the amendment of charges and responses, to require the use of the rules of evidence in Title 5 of the Maryland Rules, to permit the parties to submit proposed findings of fact and conclusions of law, to delete the public reprimand, and to provide for a discipline by consent procedure, as follows:

Rule 16-808. PROCEEDINGS BEFORE COMMISSION

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

After considering any recommendation of Investigative Counsel and upon a finding by the Commission of probable cause to believe that a judge has a disability or has committed sanctionable conduct, the Commission may direct Investigative Counsel to initiate proceedings against the judge by filing with the Commission charges that the judge has a disability or has committed sanctionable conduct. The charges shall (1) state the specific nature of the alleged disability or sanctionable conduct~~,~~ ~~including each Canon of Judicial Conduct allegedly violated by the judge~~, (2) specify

the alleged facts upon which the charges are based, and (3) state that the judge has the right to file a written response to the charges within 30 days after service of the charges.

(b) Service; Notice

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

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

(c) Response

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

(d) Notice of Hearing

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

~~(h)~~ (e) 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 a subpoena for the attendance of witnesses and for the production of designated documents and other tangible things, to present evidence and argument, and to examine and cross-examine witnesses.

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

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

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

(2) Not later than ~~10~~ 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) The taking of depositions and other discovery is governed by Chapter 400 of Title 2, except that the Chair of the Commission may limit the scope of discovery, enter protective orders permitted by Rule 2-403, and have the same powers with respect to discovery as the court has under Title 2, Chapter 400.

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

examination pursuant to Rule 2-423.

~~(g)~~ (h) Amendments

At any time before ~~its decision~~ the hearing, the Commission on motion ~~of Investigative Counsel or the judge or on its own initiative~~ may allow amendments to the charges or the response. ~~The charges or the response may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing, except that, if the amendment changes the character of the disability or sanctionable conduct alleged, the consent of the judge and Investigative Counsel is required.~~ If an amendment to the charges is made any later than 30 days prior to the commencement of the hearing, the judge, upon request, shall be given a reasonable time to respond to the amendment and to prepare and present any defense.

~~(e)~~ (i) Hearing

(1) ~~Upon the filing of a response or upon expiration of the time for filing it, the Commission shall notify the judge of the time and place of a hearing. If the hearing is on a charge of sanctionable conduct, the Commission shall also notify the complainant. The notices shall be mailed at least 30 days before the date set for the hearing.~~ At a hearing on charges, the applicable provisions of Rule 16-806 (b) shall govern subpoenas.

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

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

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

~~(4)~~ (5) The hearing shall be conducted in accordance with the rules of evidence in ~~Code, State Govt. Art., §10-213~~ Title 5 of these rules.

~~(5)~~ (6) The proceedings at the hearing shall be stenographically ~~or electronically~~ recorded. Except as provided in section ~~(j)~~ (k) of this Rule, the Commission is not required to have a transcript prepared. The judge may, at the judge's expense, have the recording of the proceedings transcribed.

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

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

~~(j)~~ (k) Record

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

(1) make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding, state its recommendations as to ~~retirement or as to censure, removal, or other appropriate discipline~~ the appropriate sanction, and enter those findings and recommendations in the record in the name of the Commission;

(2) cause a transcript of all proceedings at the hearing conducted by the Commission to

be prepared and included in the record;

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

(4) file with the Court of Appeals the entire hearing record in the proceedings including the transcript of all testimony, all exhibits and other papers filed in the proceeding, and any dissenting or concurring statement by a Commission member, certified by the Chair of the Commission; and

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

(l) Discipline By Consent

At any time after the filing of charges alleging sanctionable conduct and before a decision by the Commission, the judge and Investigative Counsel may enter into an agreement that shall be made public in which the judge (1) admits to all or part of the charges in exchange for a stated sanction; (2) agrees to take the corrective or remedial action provided for in the agreement; (3) admits the truth of all facts constituting sanctionable conduct, as set forth in the agreement; (4) consents to the stated sanction; (5) states that the consent is freely and voluntarily given; and (6) waives the right to further proceedings before the Commission and subsequent proceedings before the Court of Appeals. The agreement shall be submitted to the Commission, which shall either reject or approve the agreement. If the agreement calls

for discipline other than a reprimand, the agreement shall be submitted to the Court of Appeals for approval. If the stated sanction is rejected by the Commission or the Court of Appeals, the proceeding shall resume as if no consent had been given. All admissions and waivers contained in the agreement are withdrawn and may not be admitted into evidence. The agreement shall remain confidential and privileged until the Commission or the Court of Appeals approves it and imposes the stated sanction upon the judge.

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

Note: The entire text of the current rule is shown in this draft; however, to facilitate comparison of the current text with the proposed new text, the current sections have been moved out of sequence in the draft. The sections of the current rule appear in the following order: (a), (b), (c), (h), (f), (d), (g), (e), (i), (j).

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

The proposed amendments to Rule 16-808 include a substantial reorganization of it.

In section (a), the reference to "each Canon of Judicial Conduct" is proposed to be deleted. In place of the deleted language is a reference to the "specific" nature of the alleged disability or sanctionable conduct.

Section (b) is proposed to be amended so that the method of service of charges is up to the Commission. The Committee believes that the retained language requiring the method of service to be "appropriate in the circumstances and reasonably calculated to give actual notice" is sufficient.

In section (c) the number of copies of the judge's response is proposed to be increased to 11 because the number of Commission members was increased by Constitutional amendment.

Section (d) is derived from subsection (e)(1) of current Rule. The amendment requires a hearing notice to be mailed at least 60, rather than 30, days before a hearing unless the judge agrees to an earlier date.

Section (e) is substantially the same as section (h) of the current Rule.

In section (f), the proposed amendment adds the right to a prompt hearing on the charges.

Section (g) is derived from section (d) of the current Rule.

Subsection (g)(1) is substantially the same as subsection (d)(1) of the current Rule, except the defined term "Commission record" is used to describe the materials that the judge may inspect.

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

Subsection (g)(3) is new. It is patterned after Rules 16-766 and 16-746 (b) of the proposed revised Attorney Disciplinary Rules, and provides a mechanism to handle discovery.

Subsection (g)(4) is new. It is patterned after Rule 16-746 (c), of the proposed revised Attorney Disciplinary Rules.

Section (h) is derived from section (g) of the current Rule. The second sentence is proposed to be deleted so that charges may not be amended after a hearing has begun.

Section (i) is derived from section (e) of the current Rule.

Subsection (i)(1) is new. It provides that subpoenas are governed by Rule 16-806 (b).

Subsections (i)(2) and (i)(3) are substantially the same as subsections (e)(2) and (e)(3) of the current Rule.

New subsection (i)(4)is proposed to be added because of the expanded recusal provision in Rule 16-804 (b) and to notify the judge that a motion or suggestion for recusal shall be filed not less than 30 days prior to the hearing.

In subsection (i)(5), which is derived from subsection (e)(4) of the current Rule, the Committee recommends an amendment which would require the use of the Title 5 in hearings before the Commission. After substantial debate on the issue of whether to retain the current reference to the rules of evidence in Code, State Government Article, §10-213 (see, e.g., pp. 12-16 of the April 14, 1999 Memorandum from the Commission on Judicial Disabilities to the Rules Committee concerning proposed amendments to Maryland Rules 16-803 through 16-813) or amend the reference to the rules of evidence in Title 5 of the Maryland Rules (see, e.g., the April 19, 1999 Memorandum from H. Thomas Howell, Esq. to the Rules Committee on revised Rule 16-808 (h)(5)[now relettered (i)(5)]), the Committee by a vote of 13 to 2 recommends adoption of the proposed amendment. This comports with the recommendation of the American Bar Association that judicial rules of evidence be followed in judicial disciplinary proceedings.

Subsection (i)(6) is substantially the same as subsection (e)(5) of the current Rule, except that the phrase "or electronically" is proposed to be deleted. The Committee believes that the expense of a stenographic record in the few cases that reach the stage of a hearing before the Commission is money well spent in

light of concerns about the quality of some electronic records.

Subsection (i)(7) is new. The initial proposed language provided that the Chair of the Commission shall instruct the Commission as to the applicable law and that the parties may submit written requests for instructions at or before the close of the evidence. The Commission was not in favor of this provision, and the proposed new subsection was redrafted to provide the option that, with the approval of the Chair of the Commission, the parties may submit proposed findings of fact and conclusions of law. This allows the parties to clarify their positions to the Commission.

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

Section (k) is derived from section (j) of the current Rule.

Subsections (k)(1) through (k)(3) are substantially the same as subsections (j)(1) through (j)(3) of the current Rule.

In subsection (k)(4), the word “hearing” is proposed to be inserted before the word “record,” to distinguish this record from the defined term “Commission record.” Also, language borrowed from Rule 7-206 (a) is proposed to be added so that the subsection more clearly identifies the contents of the record that is transmitted to the Court of

Appeals.

Subsection (k)(5) is derived from subsection (j)(5) of the current Rule, with the service provisions amended to refer to section (b) of the Rule. Section (b) provides for notice by any means the Commission deems appropriate which is reasonably calculated to give actual notice.

Section (l) is new. It is derived from Rule 16-782, Consent to Discipline or Inactive Status, one of the proposed revised Attorney Discipline Rules. The consent procedure has worked very well in attorney discipline proceedings, and its addition to the Judicial Disabilities Commission Rules is recommended.

The Vice Chair asked why the Subcommittee is recommending the deletion of the service provisions in section (b). The language "reasonably calculated" is used to acquire jurisdiction over the judge and is very important. Mr. Klein noted that under this standard, the Commission always has to think about how to give notice. The Chair commented that a more formal procedure is not necessary. Mr. Lemmey said that he liked the initial change to section (b), and that he could work with any version.

The Chair noted that judges do not like service by certified mail. A judge can be questioned as to the method of service he or she prefers. Mr. Klein said that he was not wedded to the crossed-out language, but he asked if the full Commission has to determine the method of service. Mr. Lemmey answered that it is not necessary that the full Commission determine service, but rather Investigative Counsel or the Chair of the Commission can do so. The Reporter

commented that a standing order may be acceptable; if there is a problem, the full Commission can look at it. The Chair suggested that the first sentence of section (b) read as follows: "Service of the charges may be made upon the judge by any means of service reasonably calculated to give actual notice." The Committee agreed by consensus to this change.

The Vice Chair questioned the reasoning in section (g) for allowing only the Commission Chair to order otherwise for good cause. The Chair responded that this is for administrative ease, rather than the full Commission having to make the decisions. The Vice Chair pointed out that the introductory language to section (g) should not apply to subsection (g)(1). Mr. Sykes agreed, noting that it would make no sense if the Commission Chair did not allow the judge to inspect the record and copy all evidence. Mr. Lemmey suggested that the introductory language could be moved to a point after subsection (g)(1). The Vice Chair suggested that it go before subsection (g)(2), and the Committee agreed by consensus with this suggestion.

The Chair pointed out that in subsections (g)(2),(3), and (4), the same problem exists. The Chair of the Commission cannot take away certain rights of the judge, such as the right to see a file and a witness list. He suggested that the introductory language be: "Unless a different schedule is established by the Chair of the Commission", which would indicate that the Chair only decides upon the schedule. The Vice Chair noted that this could not modify all of

section (g) because subsection (g)(1) does not contain a schedule. The Chair commented that the Commission Chair's discretion to establish schedules is a matter of style. Mr. Bowen moved that the introductory language be deleted. The time period in subsection (g)(2) has already been extended, so the Chair's discretion to establish schedules can be built into subsections (g)(3) and (g)(4). The motion was seconded, and it carried unanimously.

Mr. Titus expressed his concern about a recent case in which the public notice of the hearing in the Maryland Register laid out the details of the entire case. He asked if language could be added to Rule 16-808 to make clear that this will not happen again. The Vice Chair inquired if the current rule has any language to this effect. Mr. Titus replied that it does not. The Reporter commented that the proceedings are open to the public. Mr. Titus remarked that a liberal reading of the Maryland Open Meetings Act could allow the entire case to be published. Senator Stone asked if the Commission hearings are subject to the Open Meetings Act, and Judge Vaughan answered that they are not. Mr. Titus said that they are open by rule. He expressed the view that the only information that should be in the Maryland Register is just a bare bones statement about the case.

Ms. Scherr explained that in the case to which Mr. Titus referred, a fair summary could not be written, so the decision was made to put all of the information in, rather than edit it. Mr.

Titus commented that the Commission misread the Rule. Mr. Sykes asked which Rule bears on this. When courts open cases to the public, the complaint is not printed. Mr. Titus stated that the Rule does not contemplate anything being printed other than the name of the case.

The Chair questioned whether the Rule should be changed. Judge Adkins said that if the Rules Committee intends to prohibit publication of the charges, this should be stated somewhere in the Rules. Otherwise, members of the Commission might decide that the case merits publication of the charges.

Mr. Titus moved to add an additional sentence to section (d) which would read: "The Commission may publish notice of the date, time, and place of the hearing." The Vice Chair noted that the charges are not confidential. Mr. Lemmey commented that if no charges are published at all, some reporters may ask for them, and this would provide even more coverage of the case. The Reporter suggested that after Mr. Titus' proposed language, the following language could be added: "but the Commission shall not cause the text of the charges to be published."

Mr. Sykes said that the proceedings open up after service on the judge, and this may be too soon. It might be preferable for the proceedings to open up at the hearing or somewhat later before the hearing is set. The Vice Chair commented that the reason for the changes to the Rules is that the public believes in opening the

system for the discipline of judges. Her preference is to leave this issue up to the Commission. The suggested wording seems to add to the secrecy of the proceedings. Mr. Titus observed that no court requires a public notice in the newspaper with all of the details of the case. The matter could become public once the response is filed. The Vice Chair pointed out that notice of the hearing comes a while after charges and the response. Mr. Sykes inquired if the public would be satisfied if the proceedings are open after a response by the judge is filed, or the time for the response has expired. There could be a mandatory provision requiring public notice of the time, place, and date of the hearing as well as the name of the judge.

Judge Adkins questioned whether the Commission could release the charges to the newspaper, and Mr. Lemmey answered in the affirmative. Judge Adkins expressed the view that publication of the charges should not be prohibited. The Chair said that although the publication of the charges is an internal Commission decision, many find it offensive. Mr. Sykes observed that to be fair, the judge's response should be published, also, although that would be require too much to be printed. Mr. Lemmey commented that they do not have to publish the charges, but the concern is that the public wants to know. Mr. Titus responded that anyone wishing to find out about the case can look at the file.

The Vice Chair pointed out that the Rule does not make clear that the public notice to be issued is to be in the Maryland

Register. The Chair suggested that the added language read as follows: "The Commission shall also publish in the Maryland Register a notice that sets forth only the name of the judge, and the date, time, and place of the hearing." The Chair suggested that a second sentence could be added which reads as follows: "The notice shall not state the specific nature of the charges." Senator Stone disagreed with the addition of the second sentence. The Chair commented that he did not like including the word "only" in the new language. The Vice Chair suggested deleting the word "only."

The Chair suggested that the second sentence could read as follows: "Unless the Chair of the Commission orders otherwise, the public notice shall not state the specific nature of the charges." It may be appropriate to publish the charge, such as when a judge absconds or does not answer the charges. Mr. Sykes observed that the Commission performs a mixture of prosecutorial and judicial functions. Anyone can see the file, and should be able to do so to avoid the Commission looking one-sided. Judge Dryden suggested that a Committee note could be added providing that the public has access to the charges and the judge's response. The Reporter suggested the addition of a cross reference to Rule 16-810, Confidentiality. The Committee agreed by consensus to Judge Dryden's and the Reporter's suggestions.

Mr. Lemmey noted that after public charges have been filed, only the charging document is public, and not the file. The Vice

Chair asked if the word "only" is to be included in the proposed new language of section (d). Judge Adkins replied that if that is the intention of the Committee, it should be included. The Committee agreed by consensus to this.

Turning to section (h), the Vice Chair pointed out that the second sentence is being deleted. The language of the deleted sentence is close to that of Rule 4-204, Charging Document--Amendment, which is the criminal rule. The Reporter's note states that the reason for the deletion is that charges may not be amended after a hearing has begun. The purpose of the deletion must be broader than that. Mr. Titus remarked that the Rule locks the charges in as of 30 days before the hearing. The Chair inquired as to what happens if the judge responds within 30 days. Mr. Titus asked if there would be an automatic continuance, and Judge Adkins answered that this is implied. Mr. Titus pointed out that if Investigative Counsel amends the charges one day before the hearing, the Commission would decide whether to postpone or hold the hearing, using an abuse of discretion standard.

Turning to section (j), the Chair noted a change in subsection (k)(4). Judge Adkins commented that in subsection (k)(1), the language concerning retirement has been taken out. The Chair noted that a recommendation that a judge retire is a sanction. Mr. Sykes said that more than recommendations would be needed in the record. He suggested that subsection (k)(1) read as follows: "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." The Committee agreed by consensus to this change.

Mr. Lemmey commented that section (l) refers in the third sentence to "discipline other than a reprimand." He asked if the Court of Appeals must approve discipline that is less than a reprimand. Senator Stone suggested that the language in the third sentence could be: "discipline more severe than a reprimand." Mr. Lemmey noted that lesser forms of discipline include a warning or a stay with conditions. The Vice Chair suggested the language "more serious than a reprimand." The Committee agreed by consensus to the language "more severe than a reprimand."

The Vice Chair asked if the full Commission knows when a judge decides to enter into a discipline by consent agreement. Mr. Lemmey replied that when a case is resolved short of charges and a hearing, the entire Commission is informed. The Vice Chair commented that if the Court of Appeals were to decide that the sanction given the judge was wrong, the whole Commission knows that the judge consented to having committed sanctionable conduct. When the case goes back to the Commission, instructing them to disregard the consent agreement has the same inherent problem as instructing the jury to disregard inadmissible evidence already heard by the jury. The judicial discipline situation may be even worse, since the judge already

admitted the sanctionable conduct.

The Chair asked how often this situation would occur. Mr. Lemmey answered that it does not occur very often. The way the Rule is written is that it takes place after public charges. Most of the consent work is done prior to public charges. The Chair said that the problem pointed out by the Vice Chair could be solved if the discipline agreements go straight to the Court of Appeals for policing. Then the Commission will not know about the admission. The agreement could be submitted to the Court of Appeals, and if it is rejected, the proceedings would resume. Judge Vaughan asked if this would create a problem with the public's perception of judicial discipline. Mr. Sykes noted that section (l) provides that the agreements shall be made public. Mr. Dean expressed the view that the agreements should be confidential before they go to the Court of Appeals. Mr. Sykes suggested that the language in the first sentence of section (l) which reads "that shall be made public" should be deleted. The Committee agreed by consensus with this suggestion.

Mr. Bowen suggested that the following language be added to the end of section (l): "after which the agreement is made public." Some of the matters sent to the Court may be trivial. The Chair responded that not very many are trivial. Mr. Bowen remarked that with the addition of the "more severe" language, he had assumed that some cases would be trivial. The Chair pointed out that the Commission has the power to reprimand without further involvement of

the Court of Appeals. Judge Vaughan observed that in a hearing before the Commission, the witnesses may be weak. This is similar to a settlement in a civil case before the Commission makes its decision. The Committee agreed by consensus to Mr. Bowen's suggested language.

The Chair said that this allows the possibility of an agreement during a hearing before the decision. The Vice Chair questioned the "more severe" language," asking if an agreement to go to therapy is more or less severe than a reprimand. This is too complicated to define. The Commission should not be involved in the consent proceeding if there is the possibility of a retrial. She suggested that the second and third sentences of section (l) be combined, as follows: "The agreement shall be submitted to the Court of Appeals, which shall either reject or approve the agreement." In the remainder of section (l), the language "the Commission or" should be deleted. The Committee agreed by consensus to these changes.

Mr. Titus moved to approve the Rule as amended. The motion was seconded, and it carried unanimously.

The Chair presented Rule 16-809, Proceedings in Court of Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-809 to require expedited consideration of any case in which exceptions are filed, to require a hearing in each case, to allow the Court to obtain certain additional information, to require the Court to make an independent review of the findings and conclusions of the Commission, to delete current section (f), and to add a certain Committee note, as follows:

Rule 16-809. PROCEEDINGS IN COURT OF APPEALS

(a) Exceptions

The judge may except to the findings, conclusions, or recommendation of the Commission by filing with the Court of Appeals eight copies of exceptions within 30 days after service of the notice of filing of the record. 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.

(b) Response

The Commission shall file eight copies of a response within 15 days after service of the exceptions. Unless the Commission appoints another counsel for the purpose, it shall be represented in the Court of Appeals by its Executive Secretary. A copy of the response shall be served on the judge in accordance with Rules 1-321 and 1-323.

(c) Expedited Consideration

The Clerk of the Court of Appeals shall docket for expedited consideration any case in which exceptions were filed.

~~(c)~~ (d) ~~Hearing~~ Schedule; Hearing

Upon expiration of the time for filing

exceptions, if no exceptions are filed the Court shall set a hearing. If exceptions are filed, upon the filing of a response or the expiration of the time for filing it, the Court shall set a schedule for filing ~~memoranda~~ briefs in support of the exceptions and response and a date for a hearing. The hearing ~~on exceptions~~ shall be conducted in accordance with Rule 8-522. ~~If no exceptions are 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) Additional Information

If the Court of Appeals desires an expansion of the record or additional findings, it shall remand the case to the Commission with appropriate directions and withhold action pending receipt of the additional filing. The Court may also order additional briefs or oral arguments as to the entire case or specified issues.

~~(d)~~ (f) Review of Record; Disposition

In every case, the Court of Appeals shall review the entire record filed pursuant to Rule 16-808 (k) to determine whether sanctionable conduct or disability of the judge has been proven by clear and convincing evidence. The Court shall give due regard to the opportunity of the Commission to assess the credibility of witnesses. The Court shall review de novo the Commission's conclusions of law. The Court of Appeals may accept, reject, or modify the findings and conclusions of the Commission. The Court ~~of Appeals~~ may (1) impose the sanction recommended by the Commission or any other sanction permitted by law~~;~~ or (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).

~~(e)~~ (g) Decision

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. Unless the case is remanded to the Commission, the record shall be retained by the Clerk of the Court of Appeals.

Query to Committee: With the addition of section (e) and the deletion of subsection (f)(3), should the "remand" portion of the last sentence of section (g) be amended?

~~(f) Interested Member of the Court of Appeals~~

~~A judge who is a member of the Court of Appeals shall not participate in any proceeding in that court in which the disability or sanctionable conduct of that judge is in issue.~~

Committee note: Former section (f) of this Rule contained a provision that a judge of the Court of Appeals shall not participate in any proceeding in that court in which the disability or sanctionable conduct of that judge was in issue. This was deleted because of the implication that this is the only situation where a judge cannot sit, and because Canon 3C, Maryland Code of Judicial Conduct (Rule 16-813) pertains to recusal of judges.

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

Rule 16-809 was accompanied by the following Reporter's Note.

Proposed new section (c), patterned upon Rule 25A (1) of the ABA Model Rules for Judicial Disciplinary Enforcement, requires expedited consideration of any case in which exceptions are filed.

In section (d), the language providing that, in certain circumstances, the Court may decide the matter without a hearing is proposed

to be deleted. The Committee believes that there should be a hearing in all cases that are serious enough to have reached the Court of Appeals.

Proposed new section (e) is based upon Rule 25B (2) and (3) of the ABA Model Rules for Judicial Disciplinary Enforcement. It gives the Court of Appeals the flexibility to acquire more information in a particular case.

Section (f) is proposed to be amended to require the Court of Appeals to make a de novo review of the findings and conclusions of the Commission and to allow the Court more options for disposition. The first three sentences of the amendment are patterned after Rule 16-769 (b) (Alternative 1) in the proposed revised Attorney Disciplinary Rules. The fourth sentence is new and allows the court to accept, reject, or modify the findings and conclusions of the Commission. Subsection (f)(3) is deleted as unnecessary, in light of the addition of new section (e) and the other amendments of section (f).

The section of the Rule pertaining to recusal of an interested member of the Court of Appeals is proposed for deletion, and a Committee note that references the broader recusal provisions of Canon 3 C of the Maryland Code of Judicial Conduct is proposed in lieu thereof.

Mr. Sykes asked what the standard of review is in section (f). It does not seem to be "clearly erroneous" or "de novo." The Vice Chair noted that the first sentence is de novo review, but she had a problem with the language in the second sentence that the Court shall give due regard to the opportunity of the Commission to assess the credibility of the witnesses. The Chair responded that it is difficult to state the standard of review more clearly. The language

in section (f) comes from language in Court of Appeals cases. The review is not strictly sufficiency of the evidence. Mr. Sykes pointed out that the standard is not clear. The Chair said that the intent is a de novo review or a review parallel to de novo. This is parallel to the first of the two alternate standards presented in the proposed Attorney Discipline Rules. With rejection by the Rules Committee of panelization, the review should be de novo.

The Vice Chair suggested that the Committee look at the two alternatives in the proposed Attorney Discipline Rules. The Chair presented the two alternatives which are, as follows:

Alternative 1

> In every case, the Court of Appeals shall review the entire record to determine whether misconduct has been proven by clear and convincing evidence. The Court shall give due regard to the opportunity of the hearing judge to assess the credibility of witnesses.

Alternative 2

> In every case, the Court of Appeals shall review the entire record to determine whether the evidence is sufficient to establish that the findings of fact on issues of misconduct are supported by clear and convincing evidence. The Court shall give due regard to the opportunity of the hearing judge to assess the credibility of witnesses and shall not set aside any finding of fact unless clearly erroneous.

Mr. Sykes noted that Alternative 1 is the same as the standard of review in section (f).

Turning to section (g), Mr. Titus asked if in the second

sentence, the language "[u]nless the case is remanded to the Commission" is necessary. The Chair suggested that it could be removed. The Vice Chair pointed out that the existing Rule has this language. The Chair suggested that the introductory language could be "[u]nless the Court orders otherwise." Mr. Sykes responded that there would have to be an order in every case. The Committee decided to leave the existing language in the Rule.

The Vice Chair suggested that the language in the Committee note at the end of the Rule be put into a Reporter's note. The Committee agreed by consensus to this change.

Judge Kaplan moved that the Rule be approved as amended. The motion was seconded, and it carried unanimously.

The Chair presented Rule 16-810, Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-810 to add a new provision in subsection (a)(1) providing for a certain notification to the complainant, to expand the information provided to certain agencies in subsection (b)(3)(A), and to make certain clarifying and stylistic changes, as follows:

Rule 16-810. CONFIDENTIALITY

(a) Generally

Except as otherwise expressly provided by these rules, proceedings and information relating to a complaint or charges shall be confidential or open to the public, as follows:

(1) ~~Before Service of Charges~~ Complaints and Investigations

~~Before service of charges upon the judge, a~~All proceedings ~~by and before the Commission~~ under Rules 16-805 and 16-806 shall be confidential~~, including all information relating to a complaint~~. A complainant shall be notified that a violation of this subsection may be the basis for dismissal of the complaint.

(2) Upon Service of Charges

Upon service of charges alleging sanctionable conduct, whether or not joined with charges of disability, the charges and all subsequent proceedings before the Commission on them shall be open to the public. If the charges allege only that the judge has a disability, the charges and all proceedings before the Commission on them shall be confidential.

(3) Work Product and Deliberations

Investigative counsel's work product and records not admitted into evidence before the Commission, the Commission's deliberations, and records of the Commission's deliberations shall be confidential.

(4) 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 shall be open to the 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 unfairness to a judge or any public misperception about the Commission or about actual or possible proceedings before it.

(3) 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 complaints or charges that did not result in dismissal, including reprimands and deferred discipline agreements; and

(ii) The ~~mere fact that a complaint is pending~~ date any pending complaints were filed or any pending investigations were initiated and the general nature of the complaint.

(B) Restrictions

When the Commission furnishes information to an applicant under this section, the Commission shall furnish only one copy of the material and it shall be furnished under seal. As a condition to receiving the material, the applicant shall agree (i) not to copy the material or permit it to be copied; (ii) that when inspection of the material has been completed, the applicant shall seal and return the material to the Commission; and (iii) not to disclose the contents of the material or any information contained in it to anyone other than another member of 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, 402, and 403.

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

Rule 16-810 was accompanied by the following Reporter's Note.

The proposed amendment to section (a) adds the language, "open to the" before the word

"public," indicating that the public is permitted to find out about the proceedings and related information, but this does not necessarily have to be publicized.

In subsection (a)(1), the focus is changed from "[b]efore service of charges" to "[a]ll proceedings under Rule 16-805 and 16-806." This clarifies that all complaints and investigations are confidential, and accordingly, the tagline to the subsection is changed. The second sentence is added in order to notify the complainant that, by invoking the Commission's jurisdiction, the complainant is expected to comply with the confidentiality provisions of this Rule and is subject to the sanction of dismissal of the complaint in the event of unexcused violation.

In subsections (a)(2) and (a)(4) the language "open to the" is added before the word "public," which is consistent with the change in the introductory clause of section (a).

Subsection (b)(3)(A)(ii) is changed so that applicants from a judicial nominating commission, a Bar Admission authority, or the governmental entities listed in subsection (b)(3)(A) should be apprised of the date the pending complaints were filed, the date any pending investigation was initiated, and the general nature of the complaint, instead of being told only that a complaint is pending.

Judge Vaughan questioned the title of the Rule because part of it pertains to public matters. Mr. Titus suggested that the title be changed to "Public Access," and the Committee agreed by consensus to this change. Mr. Sykes suggested that section (a) could be reorganized to provide which proceedings and information are open and which are confidential. Mr. Titus remarked that the Style Subcommittee can take care of that.

The Vice Chair said that she did not like the reference to other proceedings in subsection (a)(1). She asked if the formal complaint is confidential, and Ms. Knox replied that everything is public after charges are filed. The Vice Chair noted that if all is public, then the sentence providing that all proceedings are confidential is not accurate. Mr. Lemmey added that a formal complaint is confidential, except at the hearing. Mr. Sykes remarked that the Style Subcommittee can restyle this provision.

Mr. Titus moved that the tagline of subsection (a)(2) should be changed, and that subsection (a)(2) should read as follows: "Upon service of charges alleging sanctionable conduct, whether or not joined with charges of disability, and the filing of a response or expiration of the time for filing a response, the charges and all subsequent proceedings...". The motion was seconded. The Vice Chair expressed the opinion that she was opposed to closing public access. Mr. Titus explained that up until this point, the judge has been unable to explain his or her situation, and this would give the judge a chance to file publicly before the media gets into the act. The Vice Chair commented that the newspapers never seem to be interested in the judge's response.

The Chair called for a vote on Mr. Titus' motion, and it passed, with one opposed.

Turning to subsection (b)(3)(A), Mr. Titus said that he was not sure about the meaning of the written application. The Reporter

responded that this is an application from a judicial nominating commission, a Bar Admission authority, or a government agency to the Judicial Disabilities Commission to get information about a judicial applicant's record. Mr. Sykes clarified that the applicant is the nominating commission. Judge Adkins suggested that the applicant could be named the "entity applying." Mr. Titus expressed his preference for "applying or requesting entity" and not "applicant."

Mr. Sykes pointed out that the judge approves the release of the information. However, whether the judge approves the release or not, these provisions apply. Mr. Titus noted that subsection (b)(3)(A)(ii) provides for information being given as to the "general nature of the complaint." Mr. Sykes noted that the complaints and investigations are pending, meaning not disposed of. The Vice Chair asked if subsection (ii) allows disclosure of a non-formal complaint. The Chair suggested that the word "formal" be added before the word "complaint" in both places in subsection (ii). Mr. Sykes asked about disclosure of disciplinary action based on an investigation even though no formal complaint was filed. The Vice Chair expressed the view that the deleted language is better.

Judge Kaplan commented that the word "proceeding" would be better in subsection (ii) than the word "complaint." Mr. Sykes said that it has to be more than proceedings, it has to be a formal complaint. The Vice Chair suggested that the deleted language be put back in with the addition of the word "formal" before the word

"complaint." Subsection (b)(3)(A)(ii) would read: "The mere fact that a formal complaint is pending." The Committee agreed by consensus to this change.

The Vice Chair asked if subsection (b)(2) means that the Commission is entitled to release confidential information. The Reporter answered that under certain circumstances it can, such as if someone is giving out false or misleading information. The Vice Chair asked if the information can be released, even if the judge is opposed. The Reporter answered in the affirmative. Mr. Lemmey explained that sometimes people put out misinformation about a case. A complainant who files a complaint on Tuesday, but gave incorrect information to the press on Monday is an example. The Commission needs some ability to explain. Judge Adkins pointed out that what the judge does is public, but the Commission's activities are private, and they never have an opportunity to explain their actions.

The Chair suggested that subsection (b)(2) end with the word "Commission" the second time it appears. Mr. Lemmey disagreed. Judge Adkins said that if the judge's attorney is distorting the truth in the press, the Commission ought to be able to correct the misperception. The Chair commented that the concern is responding to unfair or inaccurate information furnished by a judge. The Vice Chair remarked that her problem is the permanent release of confidential information. Judge Adkins commented that the Honorable

Glenn Harrell, Associate Judge of the Court of Special Appeals, and former Commission Chair, had said that one of the difficult aspects of the job as Chair is the secrecy of the proceedings. People complain about the Commission, but the Commission is unable to respond. This Rule is not designed to undo confidentiality; it is an outlet for unusual situations.

Mr. Lemmey presented a scenario where a judge signed a private reprimand admitting misconduct. Six months later the judge tells the newspaper that the Commission treated him or her unfairly. The Commission should be able to answer these charges. The Chair suggested that subsection (b)(2) read, as follows: "The Commission may issue a brief explanatory statement necessary to correct any public perception about actual or possible proceedings before the Commission." This alerts the judge that the Commission can correct any misperceptions. The Committee agreed by consensus to this change.

The Vice Chair moved that the Rule be approved as amended. The motion was seconded, and it carried unanimously.

The Chair presented Rule 16-810.1, Immunity, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

ADD new Rule 16-810.1, as follows:

Rule 16-810.1. IMMUNITY

(a) Immunity From Civil Liability

(1) Official Conduct

Members of the Commission, Investigative Counsel, Executive Secretary, and their employees and designees shall be absolutely immune from suit and civil liability for any conduct or communication in the course of their official duties.

(2) Communications With Disciplinary Authorities

Communications with the Commission, Investigative Counsel, Executive Secretary, and their employees and designees relating to alleged sanctionable conduct or incapacity, including testimony or statements given in a disciplinary action, proceeding, or investigation, shall be absolutely privileged, and no claim or action predicated thereon shall be instituted or maintained. A complainant or witness shall be immune from suit and civil liability for any communication that is privileged under this section.

Committee note: Subsection (a)(2) of this Rule does not give immunity with respect to a communication with a person other than the Commission, Investigative Counsel, Executive Secretary, and their employees and designees, even if the communication is identical to a communication that is privileged under this section.

(b) Immunity From Prosecution, Penalty, and Forfeiture

In accordance with Md. Constitution, Art. IV, §4B (a), upon written request or on its own initiative, the Commission may, at any

stage of the proceedings, grant immunity from prosecution or from penalty or forfeiture to any person and order the person to testify, answer, or otherwise provide information, notwithstanding the person's claim of privilege against self-incrimination. If the Commission grants immunity to a person, the Commission shall inform the person in writing of the scope of the immunity the person will receive. No person who has been granted immunity under this section shall refuse to answer or provide information on the basis of the privilege against self-incrimination.

Cross reference: See Code, Courts & Jud. Proc. Art. §13-401 - 403.

Source: This Rule is new.

Rule 16-810.1 was accompanied by the following Reporter's Note.

This Rule is new.

Section (a) is patterned after proposed new Rule 16-724, Immunity from Civil Liability, in the proposed revised Attorney Disciplinary Rules.

Subsection (a)(1) provides for immunity from suit for the Commission, Investigative Counsel, Executive Secretary, and other members of the staff in the course of their official duties. This is based on the principle of prosecutorial immunity which includes immunity for investigatory activities prior to a prosecution.

The Committee proposes the addition of subsection (a)(2) to encourage complainants and witnesses to participate fully in judicial disciplinary proceedings without fear of retaliation. It is based in principle on Article IV, §4B of the Maryland Constitution which, in subsection (a)(1)(ii), allows the Commission to grant immunity from prosecution

to witnesses and, in subsection (a)(3), provides that all proceedings before the Commission are confidential and privileged, except as provided by rule of the Court of Appeals or as ordered by the Court of Appeals.

Section (b) sets out the procedures by which the Commission may grant immunity from prosecution, penalty, and forfeiture and compel a person to provide information. This section expands upon current Rule 16-806 (b)(4), which is proposed to be deleted. New Rule 16-810.1 (b) makes clear that the Commission may grant immunity at any stage of the proceedings. Except where a grant of immunity is on the Commission's own initiative, a request for immunity must be in writing. All grants of immunity must be in writing and specify the scope of the immunity.

The Vice Chair inquired as to whether this is a new rule, and the Chair answered that it is. The Rule is in accord with Article IV, §4B of the Maryland Constitution. There being no changes, the Rule was approved as presented.

The Chair presented Rule 16-813, Maryland Code of Judicial Conduct, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-813 to add a preamble and to delete Canon 6B, as follows:

Rule 16-813. MARYLAND CODE OF JUDICIAL CONDUCT

PREAMBLE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct consists of broad statements called Canons, specific rules set forth in Sections under each Canon, and Commentary. The text of the Canons and the Sections is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules.

It is not intended that every transgression of the Code will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. The purpose of the Code would be subverted if the Code were invoked for mere tactical advantage in a proceeding. The Code is intended to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

CANON 1

Integrity and Independence of the Judiciary

. . .

CANON 6

~~Compliance~~ Applicability

A. This Code of Judicial Conduct applies to each judge of the Court of Appeals, the Court of Special Appeals, the Circuit Courts, the District Court and the Orphans' Courts.

Committee note: Sec. 6 A is derived from current Md. Ethics Rule 14 a.

~~B. Violation of any of the provisions of this Code of Judicial Conduct by a judge may be regarded as conduct prejudicial to the proper administration of justice within the meaning of Maryland Rule 16-803 (g) of the Rules concerning the Commission on Judicial Disabilities.~~

~~Committee note: Sec. 6 B is derived from current Md. Ethics Rule 15, which provides that a violation of an Ethics Rule is conduct prejudicial to the proper administration of justice. Whether the violation actually is or is not prejudicial conduct is to be determined by the Court of Appeals of Maryland. Article IV, Sec. 4 B of the Md. Constitution gives that~~

~~Court the authority to discipline any judge upon recommendation of the Commission on Judicial Disabilities. This disciplinary power is alternative to and cumulative with the impeachment authority of the General Assembly.~~

~~C.~~ B. This Code of Judicial Conduct applies to each judge of one of those courts who has resigned or retired, if the judge is subject to and approved for recall for temporary service under Article IV, Section 3A of the Constitution, except that Canon 4 C (Civil and Charitable Activities); Canon 4 D (Financial Activities) — paragraphs (1), (2), and (3); Canon 4 G (Fiduciary Activities); and Canon 4 H (Arbitration) do not apply to any such former judge.

Committee note: Sec. 6 ~~C~~ B is derived from current Md. Ethics Rule 14 b. (1).

Paragraph C of the Compliance Section of the ABA Code exempts a retired judge subject to recall from only one provision of the ABA Code: The provision which prohibits a judge from serving on a governmental commission concerned with matters other than improvement of the law, legal system, or the administration of justice.

. . .

Source: This Rule is ~~former~~ derived from Rule 1231.

Rule 16-813 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 16-813 adds a preamble and deletes Canon 6 B.

The proposed Preamble is derived from the Preamble of the 1990 American Bar Association ("ABA") Code of Judicial Conduct. The Subcommittee has incorporated the substance of much of the ABA Preamble, removing some language and changing the order of some of the paragraphs. One of the paragraphs that was

> deleted addresses the use of the words "shall," "should," and "may" in the Code. This paragraph was deleted because the Maryland Code of Judicial Conduct is derived primarily from the 1972 ABA Code (which has no preamble) and the Md. Ethics Rules that were in effect prior to the adoption of the Maryland Code, neither of which consistently use the words "shall," "should," and "may" in the manner set out in the Preamble to the 1990 ABA Code. The Subcommittee believes that while a comprehensive review of the Maryland Code of Judicial Conduct in light of the 1990 ABA Code may be desirable, such review should not delay adoption of the proposed changes to Rule 16-813 and the Rules concerning the Commission on Judicial Disabilities.
>
> The Canons of the Maryland Code of Judicial Conduct are unchanged except for the deletion of Canon 6B, the substance of which has been incorporated in the definition of "sanctionable conduct." See Rule 16-803 (i)(1).

The Chair explained that this was added by the Subcommittee and is based on the Preamble of the 1990 American Bar Association (ABA) Code of Judicial Conduct. One of the paragraphs which was deleted was the one pertaining to the use of the words "shall" and "should." It was deleted because the Maryland Code of Judicial Conduct is primarily derived from the 1972 ABA Code, which has no preamble, and the Maryland Ethics Rules, which were in effect prior to the adoption of the Maryland Code. Neither of these use the words "shall" and "should" in the manner set out in the 1990 ABA Code.

Mr. Lemmey remarked that the Preamble is very helpful in dealing with the public. It provides in the third paragraph: "It is

not intended that every transgression of the Code will result in disciplinary action."

There being no changes to Rule 16-813, the Rule was approved as presented.

Agenda Item 3. Consideration of a proposed amendment to Rule 13-102 (Scope).

Mr. Sykes presented Rule 13-102, Scope, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 13 - RECEIVERS AND ASSIGNEES

CHAPTER 500 - GENERAL PROVISIONS

AMEND Rule 13-102 to provide that the rules in Title 13 do not apply to the estate of a receiver appointed pursuant to the terms of a security agreement under certain circumstances, as follows:

Rule 13-102. SCOPE

. . .

(b) No Application

The rules in this Title do not apply to the estate of:

(1) a receiver appointed pursuant to the terms of a mortgage or deed of trust pending foreclosure who takes charge of only the property subject to that mortgage or deed of trust; ~~or~~

(2) a receiver appointed pursuant to the

terms of a security agreement who takes charge of only the property subject to that agreement; or

~~(2)~~ (3) a person appointed for purposes of enforcement of health, housing, fire, building, electric, licenses and permits, plumbing, animal control, or zoning codes or for the purpose of abating a public nuisance.

. . .

Rule 13-102 was accompanied by the following Reporter's Note.

> The Probate/Fiduciary Subcommittee recommends this amendment to Rule 13-102 to exempt from the scope of the rules in Title 13 the estate of a receiver appointed pursuant to the terms of a security agreement who takes charge of only the property subject to that agreement. This estate is similar to the estate of a receiver appointed pursuant to a mortgage or deed of trust pending foreclosure, which is exempted under subsection (b)(1) of the Rule.

Mr. Sykes explained that the Probate/Fiduciary Subcommittee is recommending this amendment, because the members were of the opinion that it is not necessary for a receiver appointed pursuant to the terms of a security agreement who takes charge of only the property subject to that agreement to be subject to all of the Receivership Rules. Mr. Sykes moved to approve the amendment to Rule 13-102, the motion was seconded, and it passed unanimously.

The Chair adjourned the meeting.