

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

NOTICE OF PROPOSED RULES CHANGES

The Rules Committee has submitted its One Hundred Ninety-Ninth Report to the Court of Appeals, transmitting thereby a proposed revision of Title 18, Chapter 400 (Judicial Disabilities and Discipline).

The Committee's One Hundred Ninety-Ninth Report and the proposed Rules changes are set forth below.

Interested persons are asked to consider the Committee's Report and proposed Rules changes and to forward on or before February 19, 2019 any written comments they may wish to make to:

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**THE COURT OF APPEALS OF MARYLAND
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

Hon. ALAN M. WILNER, Chair
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January 17, 2019

The Honorable Mary Ellen Barbera,
Chief Judge

The Honorable Clayton Greene, Jr.

The Honorable Robert N. McDonald,

The Honorable Shirley M. Watts

The Honorable Michele D. Hotten

The Honorable Joseph M. Getty,
Judges

The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
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Your Honors:

The Rules Committee submits this, its One Hundred Ninety-Ninth Report, and recommends that the Court adopt the new Rules transmitted with this Report. The proposed Rules constitute a significant rewriting of the current Rules regarding the Judicial Disabilities Commission and the processing of complaints charging a judge with sanctionable conduct, impairment, or permanent disability (JDC Rules).

GENERAL COMMENTS

Reporter's Notes

The proposed Rules are in a somewhat unusual posture with respect to Reporter's Notes. As standard language in Rules Committee Reports indicates, Reporter's Notes are prepared mostly for the benefit of the Rules Committee in connection with its review of subcommittee drafts. They are a brief summary prepared by the Reporter of the proposed change, sometimes indicating its source. Unlike Committee Notes, they are not debated or approved by the Committee and are not regarded as an official comment on or interpretation of the proposed change. They have traditionally been included with the text of proposed



Rules transmitted to the Court, but they are not included with the Rules as adopted by the Court through its Rules Orders or as published on the Judiciary website or in commercial publications of the Maryland Rules. Unlike Committee Reports to the Court or the approved Minutes of Rules Committee meetings, they therefore have little or no value in establishing the legislative history of the Rules.

The Rules proposed in this Report present a special situation, for two reasons. First, they incorporate many changes that the Committee had approved in 2016 in connection with its 191st Report, and the Reporter's Notes prepared for the Committee's consideration of the *current* revisions did not include the Reporter's Notes summarizing those earlier changes. To attach the current Reporter's Notes, therefore, would be incomplete and potentially misleading.

Second, some of the Reporter's Notes prepared with respect to the Rules in this Report are quite lengthy and go well beyond mere summaries of the text but include substantial legal research and background information that the Court should consider and that ought to form part of the legislative history of these Rules and not disappear once the Rules are adopted. To achieve that objective, that material needs to be included in the text of this Report. Doing so would essentially duplicate major parts of the Reporter's Notes and substantially and unnecessarily lengthen this Report. The Committee therefore has opted not to include the Reporter's Notes in the Report but to put the relevant information that otherwise would be included in Reporter's Notes in the Report itself. If any member of the Court, or any member of the public, would like to see the Reporter's Notes, they certainly can be provided.

Presentation

This Report presents substantial changes to the current JDC Rules, both as to their text and organization. All of the Rule numbers have changed. They are therefore presented as new Rules rather than as amendments to the existing ones. Because the Court and the public have an interest in knowing what changes they make, they are presented as well through traditional underlining and strikeouts. That lengthier version is attached as **Appendix A**. The Court can decide which version it wishes to use for purposes of its open hearing.

General Background; Historical Perspective

The Rules Committee began working on an updating and reorganization of the JDC Rules in 2012 as part of a general reorganization and revision of all of the Rules dealing with judicial administration, judges, and attorneys that were then collected in Title 16 of the Maryland Rules and in various appendices to those Rules. Because of the pure bulk of the material - with strikeouts and underlining more than 2,000 pages - those revisions were presented to the Court in segments, as Parts I, II, and III of the Committee's 178th Report. The Rules in Part I, dealing with Judicial Administration, remained in Title 16. The Rules in Part II, dealing with judges, were placed in a new Title 18, and the Rules in Part III, dealing with attorneys, were placed in a new Title 19.¹

Part I was transmitted to the Court in April 2013; Part II was transmitted in June 2013. Hearings were held on those two Parts on July 2, 2013 and on October 17, 2013, respectively, but no action was taken on them at that time, as the plan was for the Court to make all three Parts effective at the same time, and Part III had not yet been completed.

Unfortunately, due to other more urgent matters, Part III, which was the lengthiest, was not completed and sent to the Court until March 2016, along with updating Supplements to Parts I and II. During the interim, the Committee considered some further changes to the JDC Rules recommended by the Chair of the Commission and Investigative Counsel, some of which were included in the 2016 Supplement to Part II. Following the submission of that Supplement, concerns regarding some of those changes were expressed by some former members of the Commission and Inquiry Board, and, at the Committee's request, the Court again deferred action on Part II in order to give the Committee an opportunity to consider those concerns. The Committee did so and agreed to some modifications.

A revised set of JDC Rules was submitted to the Court as part of the Committee's 191st Report on October 13, 2016. The proposed changes were posted on the Judiciary website, both prior to the Committee's consideration of them and upon their transmission to the Court, and no comments were received with respect to them. Just prior to the Court's scheduled hearing on the 191st Report, however, the Court granted a writ of mandamus

¹Existing Title 17, which deals with court-annexed alternative dispute resolution, was left intact.

in *In the Matter of Judge White*, 451 Md. 630 (2017) to consider whether certain alleged procedural deficiencies in proceedings against Judge White amounted to a deprivation of due process. At the Committee's request, the Court deferred action on the substance of that part of the 191st Report but, with renumbering, moved the current JDC Rules into Title 18.

The *White* case touched off expressions of concern by other judges and attorneys over the manner in which complaints against judges allegedly were being handled by Investigative Counsel, the Inquiry Board, and the Commission. Those concerns mounted and became even more vocal when the Commission referred to the Court its findings and recommendation in *In the Matter of Reese*, 457 Md. 656 (2018); 461 Md. 421 (2018). Those concerns, perhaps dormant earlier, had not previously been brought to the Committee's attention and had not been considered by the Committee. At the Committee's request, the Court, on May 8, 2018, remanded the JDC proposals in the 191st Report so that the Committee could take another look at them.

In its earlier work on the JDC Rules, the Committee had largely limited itself to consulting with the Chair of the Commission, the Chair of the Inquiry Board, Investigative Counsel, and some former members of the Commission and comparing the process to that used by Bar Counsel and the Attorney Grievance Commission. It had not been asked to do otherwise and, at the time, saw no reason to do otherwise. Upon the latest remand, however, the Committee greatly broadened the scope of its inquiry. It reviewed:

- Model Rules for Judicial Disciplinary Enforcement recommended by the American Bar Association (hereafter ABA Model Rules), a copy of which is attached as **Appendix B**;
- Rules and statutes adopted in other States;
- Relevant history of Art. IV, §§ 4A and 4B of the Maryland Constitution;
- Best practices and studies published in the 1999 *Handbook for Members of Judicial Conduct Commissions* by the American Judicature Society (now a component of the National Center for State Courts), a copy of which is attached as **Appendix C**;
- Proposals published by the Institute for the Advancement of the American Legal System, a research

center associated with the University of Denver, a copy of which is attached as **Appendix D**;

- Relevant case law in Maryland and elsewhere; and
- Decisions from Commissions in other States collected by the National Center for State Courts and posted periodically on the Judiciary website.

In addition, the Committee actively solicited, and received, written and oral comments from:

- The current and three former Chairs of the Commission;
- The Vice-Chair and Executive Secretary of the Commission;
- The current and former Investigative Counsel;
- The Chair of the Inquiry Board;
- Judges White and Reese and counsel for those judges;
- The President of the Maryland Circuit Judges Association;
- Attorneys from the law firm of Covington Burling, which acted as counsel for the Maryland Circuit Judges Association;
- The Committee's liaisons with the Maryland State Bar Association; and
- The Maryland-D.C.-Delaware Press Association, which includes the major newspapers in the region.

That material and those comments were considered by the Committee's Attorneys and Judges Subcommittee at three meetings, each lasting four hours or more, and by the full Committee at an open hearing.

Organization

In part because several new Rules are added, Chapter 400 is reorganized into six Divisions: General Provisions, Structure, Administrative Procedure, Disposition Other Than Filing of Charges, Filing of Charges; Procedure Before Commission, and Special Proceedings. The Committee has left room in each Division for possible new Rules to be added by reserving one or more Rule numbers at the end of each Division.

Major Policy Changes

The Committee is recommending many important changes to the JDC Rules in this Report, which will be discussed throughout.

There are six that the Committee wishes to call to the Court's attention up front:

- Deleting the authority of the Commission to issue a public reprimand; all reprimands issued by the Commission will be private ones. That is provided for in Rule 18-427.
- Providing procedures for dealing with judges where the conduct (or non-conduct) complained of results from an impairment - a physical, mental, or addictive condition that may not be permanent and, if properly recognized and treated, can be ameliorated or remedied. That is dealt with mostly in Rules 18-426 and 18-441.
- Attempting to deal with the consequence of vacancies and recusals. That is discussed in Rule 18-411 and presents a Maryland Constitutional issue for the Court.
- Giving judges the option of being advised of complaints upon their docketing rather than near the end of Investigative Counsel's investigation. That is noted in the discussion of Rules 18-403 and 18-422.
- Inclusion of a voluntary, confidential peer review process in Rule 18-423.
- Permitting the Commission to issue a reprimand or a dismissal with a letter of cautionary advice without the consent of the judge.

DIVISION I. (GENERAL PROVISIONS)

RULES 18-401 THROUGH 18-409.1

Rule 18-401 (Preamble; Function of this Chapter)

This Rule is new. It is a Preamble and states the function of the JDC Rules. The Rule is derived, in part, from interpretive provisions in the Code of Judicial Conduct (Rule 18-100.1 (b)), the ABA Model Rules (**Appendix B**), the 1999

Handbook for Members of Judicial Conduct Commissions (Appendix C), and provisions in the Rules adopted in other States. It is intended to articulate the overall function of the JDC Rules and provide general guidance for judges, Investigative Counsel, the Inquiry Board, and the Commission in carrying out that function in a fair and effective manner.

Rule 18-402 (Definitions)

This Rule is derived from current Rule 18-401, but includes three new definitions - of "censure," "impairment; impaired," and "reprimand." The definitions of "censure" and "reprimand" are derived, in part, from the Arizona judicial discipline Rules.

These new definitions introduce two of the major recommendations noted above - creating a new intermediate category of a judge's impairment and deleting the authority of the Commission to issue public reprimands.

With respect to impairment, at present the Commission may consider only two kinds of complaints about a judge - that the judge committed "sanctionable conduct," for which certain disciplinary sanctions are permissible, or that the judge has a "disability." Art. IV, § 4B of the Maryland Constitution defines "disability" as a condition that "is or is likely to become permanent" and for which mandatory retirement is the appropriate response. The element of likely permanence appears also in the definition of "disability" in current Rule 18-401 (h).

Cases have arisen, however, in which a judge may be suffering from a physical, mental, or addictive condition that significantly interferes with the judge's ability to discharge his or her judicial duties which, in turn, may generate a complaint of sanctionable conduct, but which may be treatable and, if properly treated, will not likely become permanent and thus not constitute a disability within the meaning of Art. IV, § 4B. The Committee believes it important to take account of this gap and, principally through the device of a conditional diversion agreement, provide a reasonable and effective remedy that will allow and encourage the judge to get the help he or she needs without imposing punitive sanctions and yet protect the public and assure an orderly operation of the court on which the judge sits.

With respect to reprimands and censures, Art. IV,

§ 4B(a)(2) of the Constitution authorizes the Commission, upon a finding that a judge has committed sanctionable conduct, to "issue a reprimand" to the judge or to recommend to the Court of Appeals that it "censure" that judge. Neither term is defined in the Constitution or in the implementing statutes. See Code, Courts Art. §§ 13-401 through 13-403. Current Rule 18-406 (b) permits the Commission, after an investigation but before any charges are filed, to issue a *private* reprimand, provided the judge effectively consents to it by waiving his or her right to challenge it. Rule 18-407 (j) permits the Commission, after charges and a hearing, to issue a *public* reprimand, of which there is no direct review by the Court of Appeals, or to recommend to the Court a censure, which only the Court can issue, and, by the filing of exceptions, the judge can challenge. See *In the Matter of the Honorable Pamela J. White*, 451 Md. 630 (2017).

Concerns have been expressed regarding the distinction, if any, between a public reprimand and a censure. Definitionally, there seems to be no real distinction between them. *Black's Law Dictionary* (8th ed.) defines the noun form of "censure" as "an official reprimand or condemnation" and the verb form as "to reprimand." Both are public; both constitute discipline based on a finding of sanctionable conduct. The only apparent distinction is that the Commission is empowered to issue a public reprimand on its own volition and, if it does so, there is no direct right of review in the Court of Appeals. *White, supra*. If, after charges have been filed and a hearing has been held on those charges, the Commission recommends a censure, the judge may file exceptions and is entitled to a hearing on those exceptions. See Md. Const., Art. IV, § 4B(b)(1).²

Prior to 1974, the Commission had no power to issue any sanction against a judge. Its only authority, apart from investigating complaints, was to recommend to the Court of Appeals the removal or retirement of a judge. Following the Court's decision in *In re Diener and Broccolino*, 268 Md. 659 (1973), the Legislature proposed, and the voters ratified, a Constitutional amendment that gave the Commission the power to issue a reprimand and to recommend to the Court a censure. See

² It well may be that, if the Commission recommends a censure and the Court finds sanctionable conduct, the Court may itself issue a public reprimand rather than a censure. Section 4B(b)(1) permits the Court, upon a finding of misconduct, to "censure or otherwise discipline the judge" (emphasis added), which conceivably could include a reprimand.

1974 Md. Laws, Ch. 886. The Legislature did not retain its committee files at that time, so, other than the Senate and House Journals there is no direct archival history as what the intended distinction was between a public reprimand and a censure, other than who could issue them.

Persuasive guidance, however, is provided by proceedings of the Maryland State Bar Association (MSBA) at its January 1974 annual meeting that occurred just before the 1974 Legislative Session, a Report of the Commission on Judicial Reform, which was created by Executive Order of Governor Mandel in June 1972, and one aspect of the direct legislative history reflected in the House of Delegates Journal for the 1974 Session.

MSBA had created a Special Committee on Judicial Selection and Tenure, which made a Report to that meeting regarding the proposed Constitutional Amendment. The Committee was a knowledgeable and politically astute one. Among its members were John H. Briscoe, the Speaker of the House of Delegates; William S. James, the President of the Senate; and John C. Eldridge, then the Governor's Chief Legislative Officer. In its Report, the Committee stated:

"The proposal would empower the Commission on Judicial Disabilities to reprimand a judge. The Constitution currently authorizes the Commission only to make recommendations for disciplinary action to the Court of Appeals. The Committee believes it important for the Commission itself to have the power to reprimand a judge and that this power should be formally granted. The Commission has had some complaints about the conduct of judges which amounted to minor lapses in proper judicial demeanor. A formal record of the investigation of incidents such as these should, we feel, be maintained by the Commission for appropriate use in a recommendation to the Court of Appeals if a judge continues to be involved in minor infractions. Examples of such minor infractions are lateness in opening court with consequent inconvenience to witnesses, juries and counsel and occasional caustic remarks to witnesses or parties. Such conduct repeated often enough certainly would justify disciplinary action by the Court of Appeals; but the first instance would not."

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

With respect to censure, the Committee advised:

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

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

The Constitutional Amendment was presented as House Bill 922 (1974) which, with one typographical correction, was passed overwhelmingly by the House of Delegates. The Senate added amendments striking the authority of the Commission to issue a reprimand and substituting authority to issue a censure. The House refused to concur in those amendments, however, whereupon the Senate receded, and the bill passed as originally written (with the one typographical correction).

The MSBA endorsement of the proposed Amendment, for the reasons stated by the Special Committee, was supported by the then-existing Commission on Judicial Reform that had been created by Gubernatorial Executive Order in June 1972. In its Final Report dated December 31, 1974, the Commission recounted that, one of the recommendations it had made to the 1974 General Assembly was its "complete agreement" with the MSBA Special Committee's statement regarding the proposed changes to Art. IV, § 4B, which it quoted. See Final Report, at 31. That approval was significant. Among the members of the Judicial Reform Commission were four members of the Legislature, two of whom, Delegates Joseph Owens and Wallace Hutton, were the sponsors of House Bill 922.³

At the time, there was no provision for dismissal of a complaint accompanied by a warning or letter of cautionary advice. That was not added until 1995. The conception in 1974 seemed to be that a reprimand would be private and not in the nature of actual discipline. That changed. Current Rule 18-406 (b) makes clear that a private reprimand, though private, does constitute discipline. The "one free bite" for which the

³ Delegate Owens was the Chair of the House Judiciary Committee, to which House Bill 922 was eventually referred.

private reprimand was initially intended, is now achieved through a dismissal accompanied by a warning (or letter of cautionary advice) or through a deferred discipline agreement (conditional diversion agreement), neither of which constitutes discipline.

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

One exception is in current Rule 18-409 (b)(3), which allows the Commission, upon request, to disclose to the Chief Judge of the Court of Appeals information regarding any completed proceeding that did not result in dismissal, including a reprimand. That was added at the Court's request in 2016, as it may bear on decisions whether to recall a retired judge, whether to designate a judge as an administrative judge, or consider the judge for some other appointment. The other exception is in current Rule 18-409 (proposed Rule 18-407), permitting the Commission, subject to certain conditions, to disclose to judicial nominating commissions and appointing authorities information regarding completed proceedings that did not result in dismissal of the complaint.

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

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

(a)(3) provides that, after the filing of a response to charges alleging sanctionable conduct, the charges and all subsequent proceedings shall be open to the public.

As will be seen in proposed new Rule 18-427, the Committee proposes to give a judge three options when presented with a proposed (private) reprimand: (1) make no response or affirmatively waive any right to oppose it, in which event the Commission may proceed to issue the reprimand; (2) agree not to contest the facts underlying the recommendation but request an on-the-record but nonpublic hearing before the Commission on whether, upon those facts, a reprimand is an appropriate disposition; or (3) contest the facts underlying the recommendation, in which event, absent some other agreed resolution, charges would be filed, the matter would be referred to the Inquiry Board, and, upon the Board's Report, a full public evidentiary hearing would be conducted by the Commission. The first two options would preserve the privacy of the reprimand, if one is issued. Under the third option, if the Commission finds that the judge has committed sanctionable conduct essentially as alleged, it may recommend to the Court of Appeals that the judge be censured. The judge would then have the full right to a hearing before the Commission and review by the Court of Appeals, but the minimum sanction, if one is imposed, would be a censure rather than a reprimand.

Rule 18-403 (Right to Attorney)

This Rule is new but merely expressive of what exists. It is derived from ABA Model Rule 9. There is one aspect that bears mention. Current Rule 18-404 (e)(4) requires that Investigative Counsel inform a judge "before the conclusion of the preliminary investigation" that he or she had undertaken an investigation and whether it was based on a complaint. Until the decision in the *White* case, Investigative Counsel was not notifying judges until that time, shortly before completion of the investigation, and, if the complaint was to be dismissed outright, no notice at all was given to the judge.

Some judges were not upset by that and did not want to know earlier about a complaint, especially since 90 percent or more of the complaints were being dismissed. The basis for this view seems to be (1) that the judges do not want to suffer from the angst of knowing that a complaint had been filed against them if it was going to be dismissed, and (2) judges did not want to be aware of frivolous complaints filed solely to disqualify the judge from sitting in a pending case. Other judges wanted

notice immediately upon the filing (or docketing) of a complaint, in part so that they could obtain counsel and engage with Investigative Counsel earlier in the process and in part so that, if they subsequently applied for another judicial position, they could respond accurately, when asked by a nominating commission or appointing authority whether there had ever been a complaint filed against them, that they were not aware of any. After the *White* decision was announced, the Commission, on its own, reversed its policy and started sending notice to all judges upon the filing of a complaint. It is not clear whether there is a majority for either view.

The Committee, in an attempt to please everyone and set a clear standard, is proposing a way in which judges can inform the Commission in advance whether they want immediate notice of a complaint. If they do so, subject to any protective order, Investigative Counsel must give that notice. With one exception, if no such request is received, Investigative Counsel can continue to send no notice if the complaint is dismissed or give the notice whenever he or she wishes, so long as it is before the conclusion of the investigation. That is provided for in Rule 18-422.

The one exception, also included in Rule 18-422, is when, as part of her/his investigation, Investigative Counsel receives authorization to issue a subpoena, either for testimony or the production of documents. At the request of some judges, the Committee is recommending that, after the subpoena has been served, the judge be notified of it, sent a copy of the subpoena, and have the right to seek a protective order with respect to it. Receiving a copy of a subpoena without any prior or contemporary notice that a complaint was filed certainly would be puzzling to the judge. Just as a matter of common sense, the judge should receive notice of the complaint contemporaneously with notice of the subpoena, even if earlier notice was not requested.

A cross reference to that Rule is provided in Rule 18-403 so that judges will understand that their right to the assistance of an attorney, as a practical matter, cannot be implemented until they become aware that a complaint has been filed and, if they do not request early notice, they cannot complain that their right has been infringed.

Rule 18-404 (Service of Documents)

This Rule makes two changes. Current Rule 18-407 (b) provides that charges against a judge may be served by any means reasonably calculated to give actual notice. At the request of the Maryland Circuit Judges Association, the Committee recommends that charges be served by certified mail, restricted delivery and by first class mail. The Committee proposes adding that, unless otherwise agreed in writing, all other documents to be served on the judge, Investigative Counsel, the Board, or the Commission be served electronically at an address furnished by them. That has become the norm for the service or delivery of documents other than initial pleadings (MDEC filings, financial disclosure statements, filings under the Attorney Information System (Rule 19-801, effective January 1, 2019), tax returns, etc.).

Rule 18-405 (*Ex Parte* Communications)

This Rule is new. It is derived, in part, from ABA Model Rule 10, discipline Rules in Arizona, North Carolina, and Washington, Md. Rule 18-102.9, and discussion in the *Handbook for Members of Judicial Conduct Commissions (Appendix C)*, p. 34. The issue of whether the Commission, the Inquiry Board, and Investigative Counsel have engaged in inappropriate *ex parte* communications concerning the handling of complaints against judges was raised with the Committee, and, although the Committee was in no position to determine whether or to what extent assertions to that effect were true, the judges, the Commission, the Inquiry Board, and Investigative Counsel agreed before the subcommittee that some guidance would be helpful.

It is evident that some *ex parte* communications are necessary in order for the parties to discharge their responsibilities, and the Rules directly or implicitly authorize such communications, mostly with respect to administrative matters. Rule 18-405, with the gloss of the Committee Note that follows the text, permits those kinds of communications. What it precludes are *ex parte* communications with Investigative Counsel or the judge that reasonably could leave the impression, intended or unintended, of an attempt to influence the nature, scope, or conduct of an investigation or recommendation by Investigative Counsel or a proceeding or decision by the Inquiry Board or the Commission.

The Commission opposed this Rule, claiming that it was sometimes necessary for Investigative Counsel to meet privately

with the Commission to explain or clarify what is in his or her written report to the Commission. The Committee was deeply concerned about those private meetings, of which no record is made, comparing it to a private meeting between a judge and a State's Attorney for the latter to explain the allegations in an indictment. The Committee suggests that, if some explanation or clarification is necessary, the Commission either direct Investigative Counsel, in writing, to file a Supplemental Report that at least will be of record or permit the judge to participate in the discussion.

Rule 18-406 (Standard of Proof)

Clear and convincing evidence is the current standard of proof. See Rule 18-407 (j). That provision is moved to a separate General Provisions Rule.

Rule 18-407 (Confidentiality)

This Rule is derived from current Rule 18-409. Some of the changes were approved by the Committee in 2016 and submitted to the Court in the 191st Report. In summary, the Committee recommends that, except as permitted by other Rules, the following items or information remain non-disclosable:

- In addition to the judge's home address, which is non-disclosable under the current Rule, other personal identifying information relating to the judge that is not otherwise public;
- All proceedings regarding an impairment or disability of the judge; and
- Except to the extent admitted into evidence before the Commission, Investigative Counsel's work product, proceedings before the Board, including any peer review proceeding, materials reviewed by the Board, deliberations of the Board or Commission, and records of those deliberations.

The Committee recommends that the following information be public or may be disclosed by the Commission:

- Upon the first to occur of the judge's resignation or voluntary retirement, the filing of a response to charges by the judge, or expiration of the time for filing a response, charges alleging sanctionable

conduct and all proceedings before the Commission on those charges;

- Unless otherwise ordered by the Court of Appeals, the record of Commission proceedings filed with the Court and proceedings in the Court on charges of sanctionable conduct;
- A brief explanatory statement necessary to correct inaccurate or misleading information from any source about the Commission's process or procedures;
- To the Chief Judge of the Court of Appeals, upon her or his request, whether a complaint is pending against a judge and the disposition of any complaint that was filed against the judge during the preceding five years;
- To law enforcement agencies, information regarding criminal activity on the part of the judge;
- Information regarding health and safety concerns to applicable health or law enforcement agencies and to individuals who may be affected by those concerns;
- A disposition imposed against a judge on charges of impairment or disability to the applicable administrative or chief judge of the court on which the judge serves or to the Court of Appeals if the judge is a senior judge;
- To a judicial nominating commission or appointing authority, upon written application, information about any completed proceeding that did not result in dismissal of a complaint or a conditional diversion agreement that has been satisfied; and
- Statistical reports, including the number of complaints received, investigations undertaken, and dispositions made within each category of disposition, provided that, if a disposition has not been made public, the identity of the judge involved may not be disclosed or be readily discernible.

Rule 18-408 (Costs)

This Rule is new. It is derived from Rule 19-709 applicable in attorney grievance cases. It would allow, but not require, the Court of Appeals to assess reasonable and necessary costs, excluding attorneys' fees, in favor of the prevailing party in cases under Chapter 400 and, if it does so, to determine who is

the prevailing party. Section (b) defines the items that may be assessed as costs. Several other States - Delaware, Minnesota, Missouri, and New Jersey - have a Rule on costs, but they vary widely. Perhaps because of the lack of such a Rule, the Court has not been assessing costs in JDC cases, as it does in Attorney Grievance matters.

The Commission opposed this Rule for budgetary reasons. The Maryland Circuit Judges Association supported it but recommended that it apply only when the judge is the prevailing party and that it include attorneys' fees. The Rule was prompted, in part, by complaints from judges about the cost of defending proceedings brought against them. The Committee believed that the Rule, by applying to both sides, could have a salutary purpose in discouraging "scorched earth" litigation of these proceedings.⁴

Rule 18-409 (Use of Allegations from Dismissed Case)

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

In its Commentary to Model Rule 18, the ABA notes that a judge should not be forever subject to disciplinary action based on a complaint that has been investigated and dismissed and that it is unfair to use inadequately supported complaints even to support a pattern of misconduct. The Commentary also suggests some factors to consider in determining whether to reinvestigate earlier allegations.

Rule 18-409.1 (Subpoenas)

The authority of the Commission, or the Chair of the Commission, to issue or authorize the issuance of subpoenas is mentioned in Art. IV, § 4B(a)(1) of the Constitution, Code, §

⁴ At the Courts request, the Committee has under review issues regarding the assessment of costs for transcripts in Attorney Grievance cases. That request was received after the Committee approved Rule 18-408. Whatever the Committee may recommend regarding access to transcripts and the assessment of costs in AGC cases may or may not be potentially applicable to JDC cases as well. The Court may wish to consider deferring consideration of Rule 18-408 pending any further recommendations of the Committee.

13-401 of the Courts Article, and proposed Rules 18-411 (g), 18-422 (a), 18-424 (b), 18-433, and 18-434 (which are derived from current Rules 18-404 (e) (2), 18-405 (b), 18-407 (g), and 18-407 (f) and (i)). Those provisions either contain gaps or are inconsistent in some respects, including (1) whether the Commission actually issues the subpoena or merely authorizes the issuance and, if the latter, who actually issues it, (2) whether good cause must be shown, (3) if the request is by Investigative Counsel for an investigative subpoena, whether the judge must be notified and sent a copy of the request and the subpoena, (4) whether Commission or Commission-authorized subpoenas must comply with Rule 2-510 (c) and are subject to the Uniform Interstate Depositions and Discovery Act (see Code, Title 9, Subtitle 4 of the Courts Article), and (5) whether the judge, Investigative Counsel, or the subject of the subpoena can object to or move to quash the subpoena and, if so, how that is done and the procedure for resolving the issue.

Rule 18-409.1 attempts to deal with some of those issues. It makes a clear distinction between investigative subpoenas requested by Investigative Counsel and subpoenas to compel testimony and the production of evidence in proceedings after charges have been filed, requiring a showing of good cause for the former but not the latter. For investigative subpoenas, it tracks the relevant procedures applicable to Bar Counsel subpoenas approved by the Court in 2016 (Rule 19-712). For subpoenas issued after charges have been filed, it incorporates the procedures applicable to subpoenas in Circuit Court civil proceedings (Rule 2-510).

In light of the Constitutional and statutory provisions, the Rule requires authorization nominally by the Commission for all subpoenas but permits the Chair of the Inquiry Board to exercise that authority on behalf of the Commission for investigative subpoenas and the Chair of the Commission to exercise that authority for deposition and "trial" subpoenas issued after charges have been filed. The reason for allowing the Chair of the Inquiry Board to act for the Commission with respect to investigative subpoenas is to keep the Commission members, to the extent practicable, away from any involvement in the scope or conduct of the investigation. After charges are filed, the Chair of the Commission functions in a manner similar to that of a Circuit Court judge with respect to resolution of disputes or enforcement issues arising out of subpoenas in a Circuit Court civil proceeding.

The question was raised whether there should be a Rule governing subpoenas directed at non-Maryland residents, either with respect to depositions or testimony before the Commission. The Committee decided not to craft such a Rule but to leave any issues that may arise regarding those kinds of subpoenas to existing law. See, for example, the Uniform Interstate Depositions and Discovery Act (Code, Title 9, Subtitle 4 of the Courts Article).

DIVISION 2. (STRUCTURE)

RULES 18-411 AND 18-412

Rule 18-411 (Judicial Disabilities Commission)

This Rule is derived from Current Rule 18-402 but makes several changes.

Under current Rule 18-402 (a), the Commission members choose the Chair and Vice Chair and set the terms for those positions. The Committee believes that the Court of Appeals should select the Chair and Vice Chair from among the judicial members of the Commission and that the judges so selected should serve as such at the pleasure of the Court. That is the approach with respect to the Attorney Grievance Commission. See Rule 19-702 (d).

Apart from mere consistency, because the Chair has important administrative duties and presides over Commission proceedings, the Committee believes that the persons serving in that position should be a judge and that he or she should be selected by the Court, which has a general interest in assuring that proper procedures are followed.

The question was raised whether a Rule should require an orientation program for newly appointed members of the Commission, particularly public members. The Committee saw no need for a Rule requiring that but has no objection to the Commission, with such assistance as it may find useful and available, devising such a program on its own.

Subsection (d)(2) provides some greater specificity with respect to the duties of the Executive Secretary. Section (e) makes the Commission's choice of Investigative Counsel subject to approval by the Court. That is consistent with Rule 19-703, subjecting the appointment of Bar Counsel to approval by the

Court. It also requires that Investigative Counsel have substantial trial experience and familiarity with the Code of Judicial Conduct and the JDC Rules. Several judges made the point that judges, particularly trial judges, often work under stressful and challenging conditions and that Investigative Counsel should have some appreciation of that fact and take it into account when reviewing complaints dealing with judicial behavior. The Committee believes that selecting someone with substantial trial experience should provide that appreciation but has no objection to the Commission devising a reasonable orientation program for Investigative Counsel. There are publications available that can provide a useful basis for such a program.

Suggestions were made that members of the Commission, particularly the public members, should have some orientation in judicial proceedings. The Committee did not favor a Rule to that effect but, as with Investigative Counsel, had no objection to the Commission devising a reasonable orientation program for new members.

Section (f), dealing with a quorum, presents a set of related issues. Article IV, § 4A of the Constitution creates a Commission of 11 members appointed by the Governor with the advice and consent of the Senate. Three members must be judges, one from an appellate court, one from a circuit court, and one from the District Court; three must be attorneys who have practiced law for at least seven years; and five must be members of the public who are neither a judge nor admitted to practice law. The four-year term of a member terminates automatically if the member ceases to have the required status. Current Rule 18-403 (e) provides that the presence of a majority of the members constitutes a quorum for the transaction of business "provided that at least one judge, one lawyer, and one public member are present."

The Committee is unaware that there has been a problem of fewer than a majority of the members being available. Situations have arisen, however, in which two of the three judges have recused themselves, and, by reason of vacancies or recusals, the prospect exists for there to be no incumbent judge (or attorney, or conceivably public member) able to participate, in which event there would be no quorum and no ability of the Commission to transact any business. To deal specifically with that prospect, the Committee recommends adding to the requirement of at least one judge, one attorney, and one public member the condition "unless by reason of vacancies or recusals,

the presence of at least one judge, one attorney, and one public member is not possible."

That addition would resolve the quorum issue, but not in the best manner, either for the judge or the public. The clear intent of the Constitution, implemented in the current Rule, was that the Commission, or any panel of the Commission, contain at least one representative from each group, and the Committee searched for a way to achieve that objective in the face of vacancies or recusals that prevent it. One way, of course, would be a Constitutional amendment that would allow for a substitute from the missing class to be appointed, but, absent a special Statewide election, that would take two years to achieve. Article IV, § 4B(a)(5) of the Constitution *directs* the Court of Appeals to "prescribe by rule the means to implement and enforce the powers of the Commission and the practice and procedure before the Commission." Understanding fully that the Constitutional authority for its alternative proposal is open to question, the Committee presents for the Court's consideration the proposed language in subsection (f)(2):

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

The authority for this proposal is based on a liberal interpretation of § 4B(a)(5), the requirement of the judge's written consent, and an acceptance of a Constitutional intent that any panel of the Commission must contain at least one member of each group and that the Commission not be stymied by the lack of such composition due to recusals or vacancies that the Commission, on its own, is unable to remedy. If this proposal is adopted, the judge would have the choice of consenting to a replacement chosen by the Court or, pursuant to subsection (f)(1), proceeding with a panel that is missing a member of a class.

Finally, section (h) makes the retention of Commission records subject to a retention schedule approved by the Chief Judge of the Court of Appeals, which is consistent with the Rules dealing with retention schedules of the courts. That

requirement is added as well to other Rules with respect to records maintained by the Inquiry Board and Investigative Counsel.

Rule 18-412 (Judicial Inquiry Board)

This Rule is derived from current Rule 18-403. Several changes are proposed. It is important to note that there is no provision for the Board either in the Constitution or by statute. It was created by the Court of Appeals by Rule. The current Rule permits the Commission to appoint the Board and for the Commission Chair to designate the Chair and Vice Chair of the Board. The Committee proposes that the Court itself should appoint and have the authority to replace the members of the Board and to designate the Chair and Vice Chair of the Board. The Board was created to remove the Commission from involvement in the investigatory function, and that is better achieved, at least in perception, if not in reality, by having the Board independently appointed by the Court and not subject to "political" control by the Commission or the Chair of the Commission.

DIVISION 3. ADMINISTRATIVE PROCEDURE

RULES 18-421 THROUGH 18-424

Rule 18-421 (Complaints; Procedure on Receipt)

This Rule is derived from current Rule 18-404 but contains several changes, some of which were included in the Committee's 191st Report. The basic procedure for the review and investigation by Investigative Counsel of complaints filed with the Commission remains intact. Subject to section (f) [current Rule 18-404 (d)], in order to trigger an investigation there must be a complaint, and to constitute a complaint there must be a communication in writing, under oath, that alleges facts which, if true, would constitute a disability, impairment, or sanctionable conduct. See Rule 18-402 (h). A provision has been added in section (c)(1) to permit a complainant whose communication is not under oath to correct that omission.

The proposed Rule eliminates the concepts of "formal complaints" and "preliminary investigations." If the communication does not satisfy the requirements of Rule 18-402 (h), it is not a complaint. The investigation by Investigative Counsel on a complaint is not a preliminary one. Unless the

Board or Commission directs a further investigation, it is the only one conducted by Investigative Counsel. No substantive change is intended.

Section (d), dealing with stale complaints, is new. The issue of stale complaints was raised with the Committee. Connecticut has a statute that prohibits a complaint from being filed later than one year after the alleged conduct occurred, was discovered, or with reasonable care should have been discovered or, at the latest, three years after the alleged conduct occurred. The Committee did not believe that the Court, by Rule, could establish that kind of statute of limitations. Section (d) is derived from the Massachusetts approach (Mass. Judicial Conduct Rule 6E), which provides that, when a complaint alleges conduct that occurred more than one year prior to the date the complaint was filed, the Executive Director shall make a recommendation to the Commission whether there exists good cause to investigate the complaint. If the Commission finds no good cause, it may dismiss the complaint. The Massachusetts Rule provides no standard for determining good cause.

Because discretion in determining whether and how to proceed with a complaint is built into the Maryland system, both in the Constitution and throughout the Rules, the Committee believes that the Massachusetts approach is permissible and feasible, provided some standard is set.⁵ Section (d) provides a general standard - the weighing of prejudice to the judge against the seriousness of the alleged misconduct - and the limitation that the weighing process is not applicable if the complaint alleges criminal conduct that, upon conviction, would subject the judge to imprisonment for more than 18 months. The Committee believes that staleness should be measured generally by three years rather than one year.

Rule 18-422 (Investigation by Investigative Counsel)

Rule 18-422 was derived from part of current Rule 18-404 but contains several changes, some of which were included in the Committee's 191st Report. One change, in subsection (a)(4), was discussed above in connection with Rule 18-403, to give judges the option of receiving notice of complaints upon their being docketed and, even if that option is not chosen, of receiving notice contemporaneously with notice of service of a subpoena.

⁵ Art. IV, § 4B states that the Commission "has the power" to investigate complaints against judges. It does not say that the Commission *must* investigate every complaint.

Concern was expressed to the Committee about extensions of time for the completion of Investigative Counsel's investigation - that they were being granted by the Board too frequently and that there was no record as to why they were being granted. The standard in the current Rule is "good cause." The Committee recommends in subsection (a)(6) that an extension be in a written order that articulates the basis of the good cause and that it be approved by the Board, with the approval Chair of the Commission. The Committee believes that, while the Board should have the direct approval authority for extensions, the Commission, through its Chair, does have an interest in monitoring such extensions. That requirement is repeated in other Rules providing for an extension of time to complete some task.

Current Rule 18-404 (f) requires that all recommendations by Investigative Counsel go to the Board. In its 191st Report, the Committee posited that recommendations for outright dismissal, without a letter of cautionary advice, go directly to the Commission. The Commission, and ultimately the Board, agreed to that proposal. The reasons for it were that (1) there was likely to be no opposition to such a recommendation and therefore nothing for the Board to consider, (2) the data for the two immediately preceding fiscal years showed that outright dismissals constituted the majority of dispositions and that the Board had not objected to any of them, (3) since the Commission had to approve them in any event, there was no reason to plague the Board with reviewing 200+ of them, but (4) if the Commission had any question or concern regarding such a recommended dismissal, it could refer the matter to the Board for review. Before the Subcommittee, the Commission and Board withdrew their approval of that approach but gave no reasons for the belated opposition. The Committee continues to believe that there is no reason for a double level of review, with its attendant delay, of unopposed recommendations for outright dismissal.

Rule 18-423 (Proceedings Before Board; Review by Commission)

This Rule is derived from part of current Rule 18-404 but most of the recommended changes were included in the Committee's 191st Report. The major change is the provision for a peer review process. Unlike the process in attorney grievance cases, this process would be entirely voluntary, informal, and confidential.

Subsection (d)(2)(D) adds the requirement that appendices and memoranda attached to the Board's Report to the Commission be sent to Investigative Counsel and the judge. The Committee believes that, although the judge is not entitled to have access to material that constitutes Investigative Counsel's work product or that is subject to a protective order, all other information submitted to the Commission bearing on a decision whether to proceed with the filing of charges should be available to the judge.

Rule 18-424 (Further Investigation)

This Rule is derived in part from current Rule 18-405. Most of the changes were included in the Committee's 191st Report. Those concerning investigative subpoenas are included in the consolidated Rule 18-409.1.

DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

RULES 18-425 THROUGH 18-428

Rule 18-425 (Dismissal of Complaint)

This Rule is derived from current Rule 18-406. Most of the changes were included in the Committee's 191st Report. One of them was to change the "warning" that could be attached to a dismissal to a "letter of cautionary advice," which better expresses the remedial function of the letter, and to permit the Commission to issue a dismissal accompanied by such a letter without the consent of the judge. A dismissal with a letter will not constitute discipline; the letter will be private and non-disclosable. The Committee Note following subsection (b)(1) sets forth the function of a dismissal with a letter and the circumstances in which that disposition may be appropriate. The complainant would be notified only that the complaint was brought to the judge's attention and that no public action was taken against the judge.

Rule 18-426 (Conditional Diversion Agreement)

This Rule is derived in part from current Rule 18-406 (c), which uses the term "deferred discipline agreement." The Committee believes that is an inappropriate term, as the expectation is that the judge will comply with the conditions and there will be no discipline. "Conditional diversion agreement" is the term used in the attorney grievance context

and seems more descriptive. Most of the changes were included in the Committee's 191st Report.

Section (a) and the Committee Note that follows describe when this kind of disposition is appropriate, including a situation of remediable impairment. Even in situations short of an impairment, the Committee notes for the Court's and the Commission's attention a pilot mentorship program adopted by the California Commission on Judicial Performance in 2016 for judges who have demonstrated a pattern of poor demeanor but who appear to be amenable to reform. See *Judicial Conduct Reporter*, National Center for State Courts, Vol. 40, No. 3 (Fall 2018) at 10-13. Such a program, if found useful, could be implemented through conditional diversion agreements.

At the request of some judges, the Committee proposes to allow the Commission to designate a monitor other than Investigative Counsel but recommends that, if a monitor other than Investigative Counsel is selected at the judge's request, the judge would have to bear the cost.

A conditional diversion agreement does not constitute discipline, and the terms of the agreement will remain private. The complainant will be notified only that such an agreement was proposed and accepted. Until such time as the conditions have been fully satisfied, however, the case remains open. Upon satisfaction of the conditions, the proceeding will be terminated.

Rule 18-427 (Reprimand)

This Rule is new. It completely rewrites current Rule 18-406 (b). The changes and the reason for them are discussed above in connection with Rule 18-402. There would be no more public reprimands issued by the Commission. All reprimands will be private, and the judge's consent will not be required. The Commission and Investigative Counsel will retain a copy of the reprimand and may consider it if relevant in any further proceeding against the judge. Section (a) sets forth when a reprimand may be appropriate.

As noted earlier, if Investigative Counsel offers a reprimand, the judge will have three choices: (1) consent or make no timely response, in which event the Commission may issue

the reprimand forthwith⁶; (2) agree not to challenge the underlying facts in support of the proposed reprimand but seek an on-the-record but non-public hearing before the Commission to argue whether a reprimand is an appropriate disposition; or (3) contest the underlying facts, in which event the case would be referred to the Board and follow the normal path. If charges are filed, the judge will have an evidentiary hearing before the Commission, but a reprimand will be "off the table." If the Commission finds sanctionable conduct that justifies discipline, the most lenient recommendation would be a censure by the Court of Appeals. By filing timely exceptions, the judge would be entitled to a hearing in the Court.

Rule 18-428 (Retirement as a Disposition)

This Rule is new and should be read in conjunction with Rule 18-441. Together, they address the problem of how to deal with an impaired or disabled judge. There is a gap in the current Rules in that regard. The Rule applies to retirement ordered by the Court of Appeals pursuant to the Chapter 400 Rules and not to a voluntary retirement by the judge. Art. IV, § 4B(a)(2) authorizes the Commission to recommend retirement "in an appropriate case." Section 4B(b)(1) is more specific. It authorizes the Court, upon a recommendation of the Commission, to retire a judge from office "upon a finding of disability which is or is likely to become permanent and which seriously interferes with the performance of the judge's duties." Section (b) of Rule 18-428 states with some greater specificity when retirement is an appropriate option.

Section (c), which provides that a judge retired under the Rule may not be recalled to sit in any court but retains all other retirement benefits, needs to be read in conjunction with Art. IV, §§ 4B(b)(3) and 3A. Section 4B(b)(3) provides that a judge retired under § 4B has "all the rights and privileges prescribed by law for other retired judges." Section 3A permits any retired judge, *upon approval by the Court of Appeals*, to be assigned to sit temporarily in any court other than an Orphans' Court. The Committee sees no inconsistency between the Rule and those Constitutional provisions. Because of the requirement of

⁶ One of the concerns expressed to the Committee regarding a requirement that the judge consent to a reprimand was that it forces the judge to admit to having committed sanctionable conduct. The judge may accept that there is sufficient evidence from which that finding could be made - the equivalent of an *Alford* situation - but not wish to admit "guilt." Under the proposed Rule, the judge could choose simply not to respond to the offer.

Court of Appeals approval, recall is not a right or privilege prescribed by law, and, if the judge has been found to be permanently unable to perform the duties of a judge, there could be no basis for the judge asserting a right to be recalled.

DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

RULES 18-431 THROUGH 18-438

Rule 18-431 (Filing of Charges)

This Rule is derived from part of current Rule 18-407, which has been split into several separate Rules. It incorporates some changes that were included in the 191st Report. The one major new change is to provide for the confidentiality of charges of impairment or disability.

Rule 18-432 (Procedural Rights of Judges)

This Rule is new but is derived from part of current Rule 18-407. It lists in one place the procedural rights of judges in defending against charges.

Rule 18-433 (Discovery)

This Rule is new but is derived, in part, from current Rule 18-407 and incorporates changes included in the Committee's 191st Report. There are several new changes. Subsection (a)(3) confirms a ruling in *White* that Investigative Counsel has an obligation to respond to discovery requests from the judge but places a reciprocal obligation on the judge as well. Subsection (a)(4) imposes a continuing duty on the parties to supplement disclosable information. Subsection (a)(5) is new and is taken from ABA Model Rule 22. It requires the Commission to preclude a party from calling a witness, other than a rebuttal witness, or otherwise presenting evidence upon findings that (1) the witness or evidence was subject to disclosure, (2) the party failed to disclose the witness or evidence in a timely manner, and (3) that failure was prejudicial to the other party.

Also new is section (c), which is an overarching *Brady*-type requirement that Investigative Counsel disclose all evidence of which he or she is aware that (1) directly negates any allegation in the charges, (2) would be admissible to impeach a witness intended to be called by Investigative Counsel, or (3) would be admissible to mitigate a permissible sanction. Section

(c) was derived from ABA Model Rule 22 and comparable Rules in Arizona, Delaware, and Minnesota. The Committee believes it is an important assurance of basic fairness.

Rule 18-434 (Hearing on Charges)

This Rule is new but is derived from current Rule 18-407 (i) and incorporates changes included in the Committee's 191st Report. The Court's attention is called to one issue that was raised by some of the judges but not addressed in the Rule. Section (f) carries over the current provision that Title 5 of the Maryland Rules - the Rules of Evidence - shall generally apply in proceedings before the Commission. The issue was raised in the *White* and *Reese* cases whether expert testimony should be allowed in sanctionable conduct cases.

The Court did not decide that issue, and it was raised before the Committee in two different ways. The judges argued to the subcommittee that the Rule should specifically allow expert testimony. The subcommittee rejected that request, and the judges asked the Committee to approve a Rule creating a presumption that such testimony should be allowed. The Committee declined that request as well, preferring to leave any decision regarding the allowance of expert testimony for determination by the Court in an adjudicatory proceeding, rather than by Rule. The issue is a fair one that may be raised in a Comment contesting the Committee's decision, and the Committee believes it helpful to state the basis for its view.

The issue of whether expert testimony is allowable in judicial discipline cases has been litigated in several States. The consensus is that (1) if the Rules governing disciplinary proceedings provide that the Rules of Evidence apply, that includes the Rules dealing with expert testimony, but (2) under those Rules, the allowance of expert opinion evidence is generally discretionary, and (3) it is not an abuse of discretion for the Commission to disallow such opinion evidence on whether the judge committed a violation of the applicable Code of Judicial Conduct because such evidence would not be helpful to the members of the Commission, including public members. See *In re Assad*, 185 P.3d 1044 (Nev. 2008); *In re Boardman*, 979 A.2d 1010 (Vt. 2009); *Disciplinary Counsel v. Gaul*, 936 N.E.2d 28 (Ohio 2010); *In re Flanagan*, 690 A.2d 865 (Conn. 1997); and *cf.* Greenstein and Scheckman, *The Judicial Ethics Expert*, 33 Judicial Conduct Reporter, No. 1 (2011). Those cases support the Committee's view that there is no right to have expert testimony admitted and that the issue of whether

it should be allowed in a given case should be resolved in an adjudicative context rather than by a Rule. The Committee is unaware of any decision to the contrary, and none was cited to the Committee.

Those decisions, in the Committee's view, are correct for several reasons. The judges argued that expert testimony would be helpful, particularly to the public members, in defining the "standard of care" to which judges should be held. In the context of disciplinary proceedings, "standard of care" has two separate aspects. Ultimately, the Code of Judicial Conduct, which contains both the general and specific "dos" and "don'ts" for judges, constitutes the basic standard of care. Under each of the Rules in that Code are official interpretive Comments approved by the Court.

To the extent the issue of sanctionable conduct in a case depends on the interpretation of those provisions, it is an issue of law, and expert opinions on ultimate issues of law, other than the law of another jurisdiction, generally are not allowed. *Franch v. Ankney*, 341 Md. 350, 361 (1996); *WSSC v. Utilities*, 365 Md. 1, 49 (2001); *Henson v. State*, 212 Md. App. 314, 327 (2013). To the extent the issue of whether the judge violated a Code of Judicial Conduct provision depends on the credibility of witnesses or the weighing of evidence, that, too, is not a proper subject for an expert opinion, because it is peculiarly in the province of the triers of fact based on their own perceptions.

A secondary aspect of "standard of care" with respect to sanctionable conduct is what criteria should apply in determining when a clear error of law committed by the judge, which, by itself, does not constitute sanctionable conduct, may be regarded as sanctionable for other reasons. That aspect was discussed by Judge Watts in her concurring opinion in *Reese*. Citing *In re DiLeo*, 83 A. 3d 11 (N.J. 2014) and cases referred to therein, Judge Watts noted that courts, in an adjudicatory context, had developed several different standards. That too, however, is an issue of substantive law for determination initially by the Commission and ultimately by the Court of Appeals, as to which an expert's opinion would hardly be helpful and, if there are conflicting opinions, may indeed be confusing.

Rule 18-435 (Commission Findings and Action)

This Rule is new. It was derived in part from current Rule 18-407. Some of the changes were included in the Committee's 191st Report. Section (b), dealing with impairment, is new.

Rule 18-436 (Consent to Disposition)

This Rule is derived in part from current Rule 18-407 (1) but incorporates changes included in the Committee's 191st Report and has been reorganized to accommodate changes to other Rules. A new provision in section (b) incorporates an analogy to an *Alford* plea by allowing a judge, without admitting the charge, to admit that there is sufficient evidence from which the Commission could sustain all or part of the charges.

Rule 18-437 (Proceedings in Court of Appeals)

This Rule is derived from current Rule 18-408 but incorporates changes included in the Committee's 191st Report. A new section (h) confirms the confidentiality of proceedings related to the impairment or disability of the judge. Subject to that, and to the shielding of any other confidential information by the Court, a new section (i) expressly permits public inspection of the record filed with the Court.

That last provision addresses a request by the news media for a Rule permitting inspection of the transcript of proceedings before the Commission. The Commission was concerned about the logistics of providing that inspection at its office. To the extent that the proceeding was limited to a charge of sanctionable conduct, the record filed with the Court, including the transcript, is a public record, and that is where the inspection should occur. There was no intent to preclude the Commission from allowing the public to read a transcript of a sanctionable conduct proceeding in its possession or, if the transcript is in electronic format, from giving a link to it.

Rule 18-438 (Suspension of Execution of Discipline)

This Rule is new and, with one modification, is derived from proposed Rule 18-416 transmitted as part of the Committee's 191st Report. It addresses the situation when the Court, upon a finding of sanctionable conduct, suspends a judge but then suspends execution of all or part of the suspension subject to conditions set by the Court. The judge, in effect, is on a form of probation. The current Rules make no provision for how that

"probation" is to be monitored or how to deal with an alleged violation. This Rule fills in that gap. The one change from the 2016 proposal is to permit the Commission, in its discretion, to select a monitor other than Investigative Counsel.

DIVISION 6. SPECIAL PROCEEDINGS

RULES 18-441 AND 18-442

Rule 18-441 (Cases of Alleged or Apparent Disability or Impairment)

This Rule is new. It is derived in part from ABA Model Rule 27 and from Rules in other States. It addresses special issues in disability and impairment cases, which may be initiated as such or converted from what may have begun as a sanctionable conduct case. Section (a) makes clear that, except as provided in this Rule, proceedings in disability and impairment cases shall be in accordance with the other Rules in the Chapter.

Section (b) lists various ways in which a claim of disability or impairment may arise. Section (c) confirms the confidentiality that attaches to impairment and disability cases. Section (d) addresses the situation in which a judge, by reason of physical or mental disability or impairment, may be unable to defend him/herself, even in a sanctionable conduct case. That is not addressed in the current Rules. Section (e) permits the Court of Appeals, upon a Report from the Commission, to place a judge with an apparent impairment or disability on administrative leave as an interim measure. Section (f) gives the Commission the authority to gather certain information once a judge's physical or mental condition becomes an issue.

Rule 18-442 (Interim Suspension or Administrative Leave Upon Indictment)

This Rule is new. It is derived from ABA Model Rule 15, Rules adopted in other States, and Rule 19-738, dealing with attorneys who have been charged with criminal activity. There is no express provision for interim suspensions in the Constitution, but if a judge is indicted for what is defined as a serious crime, that authority would seem to be necessary. The Rule gives the Court of Appeals that authority upon a Report

from the Commission and subject to the ability of the judge to contest such a ruling by filing a motion for reconsideration.

Respectfully submitted,

Alan M. Wilner
Chair

AMW:cmp

cc: Suzanne C. Johnson, Clerk

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

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MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-401. PREAMBLE; FUNCTION OF THIS CHAPTER

(a) Code of Judicial Conduct

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

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

Cross reference: See Rule 18-100.4.

(b) Function of This Chapter

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

(A) enforcing standards of judicial conduct;

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

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

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

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

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

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

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

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

Source: This Rule is new.

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CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-402. DEFINITIONS

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

(a) Address of Record

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

Cross reference: See Rule 18-407 (a)(1) concerning confidentiality of a judge's home address.

(b) Board

"Board" means the Judicial Inquiry Board appointed pursuant to Rule 18-412.

(c) Censure

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

(d) Charges

"Charges" means the charges filed with the Commission by Investigative Counsel pursuant to Rule 18-431.

(e) Commission

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

(f) Commission Record

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

(g) Complainant

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

(h) Complaint

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

Committee note: The complainant may comply with the affidavit requirement of this section by signing a statement in the following form: "I solemnly affirm under the penalties of perjury

that the contents of the foregoing paper are true to the best of my knowledge, information, and belief." It is not required that the complainant appear before a notary public.

(i) 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.

Cross reference: See Md. Const., Art. IV, §4B.

(j) Impairment; Impaired

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

(k) Judge

"Judge" means (1) a judge of the Court of Appeals, the Court of Special Appeals, a circuit court, the District Court, or an orphans' court, and (2) includes a senior judge.

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

(l) Reprimand

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

(m) Sanctionable Conduct

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

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

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

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

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

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

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-403. RIGHT TO ATTORNEY

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

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

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-404. SERVICE OF DOCUMENTS

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

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

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-405. *EX PARTE* COMMUNICATIONS

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

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

Source: This Rule is new and is based in part on ABA Model Rules for Judicial Disciplinary Enforcement, Rule 10.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-406. STANDARD OF PROOF

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

Source: This Rule is based on former Rule 18-407 (j) and ABA Model Rules for Judicial Disciplinary Enforcement, Rule 7.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

RULE 18-407. CONFIDENTIALITY

(a) Generally

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

(1) Judge's Address and Identifying Information

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

(2) Complaints; Investigations; Disposition Without Charges

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

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

Charges alleging sanctionable conduct and all subsequent proceedings before the Commission on those charges shall be open to the public upon the first to occur of (A) the resignation or voluntary retirement of the judge, (B) the filing of a response by the judge to the charges, or (C) expiration of the time for filing a response. Charges alleging disability or impairment and all proceedings before the Commission on them shall be confidential.

(4) Work Product; Proceedings; Deliberations

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

(5) Proceedings in the Court of Appeals

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

Court on charges of disability or impairment shall be confidential. An order of retirement by the Court shall be public.

(b) Permitted Release of Information by Commission

(1) Written Waiver

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

(2) Explanatory Statement

The Commission may issue a brief explanatory statement necessary to correct any inaccurate or misleading information from any source about the Commission's process or procedures.

(3) To Chief Judge of Court of Appeals

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

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

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

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

level of confidentiality of the information otherwise required by the Rules in this Chapter.

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

The Commission may provide (A) information involving criminal activity, including information requested by subpoena from a grand jury, to applicable law enforcement and prosecuting officials, and (B) information regarding health and safety concerns to applicable health agencies and law enforcement officials, and to any individual who is the subject of or may be affected by any such health or safety concern.

(5) Finding of Disability or Impairment

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

(6) Nominations; Appointments; Approvals

(A) Permitted Disclosures

Upon a written application made by a judicial nominating commission, a Bar Admission authority, the President of the United States, the Governor of a state, territory,

district, or possession of the United States, or a committee of the General Assembly of Maryland or of the United States Senate which asserts that the applicant is considering the nomination, appointment, confirmation, or approval of a judge or former judge, the Commission shall disclose to the applicant:

(i) Information about any completed proceedings that did not result either in dismissal of the complaint or in a conditional diversion agreement that has been satisfied; and

(ii) Whether a complaint against the judge is pending.

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

(B) Restrictions

Unless the judge waives the restrictions set forth in this subsection, when the Commission furnishes information to an applicant under this section, the Commission shall furnish only one copy of the material, which shall be furnished under seal. As a condition to receiving the material, the applicant shall agree that (i) the applicant will not copy the material or permit it to be copied; (ii) when inspection of the material has been completed, the applicant will seal and return the material to the Commission; and (iii) the applicant will not 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., Art. IV, § 4B, see Code, Courts Article, §§ 13-401 through 13-403.

(c) Statistical Report

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

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-408. COSTS

(a) Generally

The Court of Appeals may assess reasonable and necessary costs in favor of the prevailing party in proceedings under this Chapter. If the Court assesses costs, the Court shall determine who is the prevailing party.

(b) Costs defined

Costs include:

(1) court costs;

(2) reasonable and necessary fees and expenses paid to an expert witness who testified in a proceeding before the Commission pursuant to Rule 18-434;

(3) reasonable and necessary travel expenses of a witness who (A) is not an expert witness, and (B) testified in a proceeding before the Commission pursuant to Rule 18-434;

(4) reasonable and necessary costs of a transcript of proceedings before the Commission pursuant to Rule 18-434;

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

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

(f) (1) (B); and

(7) other reasonable and necessary expenses, excluding attorneys' fees, incurred in prosecuting or defending against charges filed in proceedings before the Commission pursuant to Rule 18-434.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-409. USE OF ALLEGATIONS FROM DISMISSED CASE

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

Source: This Rule is new and is derived in part from ABA Model Rules for Judicial Disciplinary Enforcement, Rule 18.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1. GENERAL PROVISIONS

Rule 18-409.1. SUBPOENAS

(a) Investigative Subpoenas

(1) Authorization; Issuance

(A) Upon application by Investigative Counsel, the Chair of the Board, on behalf of the Commission, may authorize Investigative Counsel to issue a subpoena to compel the attendance of witnesses and the production of designated documents or other tangible things at a time and place specified in the subpoena if the Chair finds that the subpoena is necessary to and in furtherance of an investigation being conducted by Investigative Counsel pursuant to Rule 18-422 or 18-424.

(B) Upon authorization, Investigative Counsel may issue the subpoena.

(2) Contents

A subpoena shall comply with the requirements of Rule 2-510 (c), except that to the extent practicable, a subpoena shall not identify the judge under investigation. A subpoena to compel attendance of a witness shall include or be accompanied by a

notice that the witness (A) has the right to consult with an attorney with respect to the assertion of a privilege or any other matter pertaining to the subpoena and (B) may file a motion for judicial relief under Rule 2-510.

(3) Service

A subpoena shall be served in accordance with Rule 2-510. Promptly after service of a subpoena on a person other than the judge under investigation and in addition to giving any notice required by law, Investigative Counsel shall serve a copy of the subpoena upon the judge under investigation pursuant to Rule 18-404.

Cross reference: For examples of other notice required by law, see Code, Financial Institutions Article, § 1-304, concerning notice to depositors of subpoenas for financial records; Code, Health General Article, § 4-306 concerning disclosure of medical records; and Code, Health General Article, § 4-307, concerning notice of a request for issuance of compulsory process seeking medical records related to mental health services.

(4) Objection

The person served with the subpoena or the judge under investigation may file a motion in the circuit court for the county in which the subpoena was served for any order permitted by Rule 2-510 (e). The motion shall be filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance.

(5) Enforcement

On the motion of Investigative Counsel, the Commission may enforce compliance with a subpoena by invoking the aid of the circuit court for the county where the person not complying with the subpoena resides or carries on a business.

Cross Reference: Rule 18-411 (g) (4).

(6) Confidentiality

Any paper filed in court with respect to a subpoena shall be sealed upon filing and shall be open to inspection only by order of the court. A hearing before the court on any motion shall be on the record and shall be conducted out of the presence of all individuals other than Investigative Counsel, the judge, and those individuals whose presence the court deems necessary.

(7) Recording of Statements

All statements by the subpoenaed witness shall be under oath and shall be contemporaneously recorded stenographically or electronically.

(b) Subpoenas issued pursuant to Rule 18-433 or 18-434

The Chair of the Commission, on behalf of the Commission, may authorize the Executive Secretary 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. To the extent otherwise relevant, the provisions of Rule 2-510 (c), (d), (e), (f), (g), (h), (i), (j),

Rule 18-409.1

and (k) shall apply to subpoenas issued pursuant to this section. References to a court in those Rules shall mean the Chair of the Commission, on behalf of the Commission. If a subpoena was issued at the request of Investigative Counsel, promptly after service of the subpoena on a person other than the judge, Investigative Counsel shall serve a copy of it upon the judge pursuant to Rule 18-404.

Committee note: The intent of section (b) is that the Executive Secretary issues an authorized subpoena and provides it to the party who requested it for service.

Source: This Rule is new and is derived in part, from Rule 19-712.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 2. STRUCTURE

RULE 18-411. JUDICIAL DISABILITIES COMMISSION

(a) Chair and Vice Chair

The Court of Appeals shall designate a judicial member to serve as a Chair of the Commission and another judicial member to serve as Vice Chair. The Vice Chair shall perform the duties of the Chair whenever the Chair is disqualified or otherwise unable to act. The Chair and Vice Chair shall serve in those capacities at the pleasure of the Court.

(b) Compensation

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

(c) Recusal

A member of the Commission shall not participate as a member in any discussion, disposition, or proceeding in which (1) the member is a complainant, (2) the member's disability, impairment, or sanctionable conduct is in issue, (3) the member's

impartiality might reasonably be questioned, (4) the member has personal knowledge of disputed evidentiary facts involved in the proceeding, or (5) the recusal of a judicial member would otherwise be required by the Maryland Code of Judicial Conduct.

Cross reference: See Md. Const., Art. 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.

(d) Executive Secretary

(1) Appointment; Compensation

The Commission may select an attorney as Executive Secretary. The Executive Secretary shall serve at the pleasure of the Commission and receive the compensation set forth in the budget of the Commission.

(2) Duties

The Executive Secretary shall: (A) receive documents that are filed with the Commission and maintain the records of the Commission; (B) prepare the agenda of meetings of the Commission and before each meeting send to each Commission member a copy of the agenda and meeting materials; (C) attend meetings of the Commission and the Inquiry Board, keep minutes of those meetings, and retain the minutes, subject to the retention schedule approved by the Chief Judge of the Court of Appeals; (D) serve as attorney to the Commission; (E) serve as liaison to the

Board and to Investigative Counsel; and (F) have such other administrative powers and duties assigned by the Commission, other than duties committed to Investigative Counsel by these Rules.

(e) Investigative Counsel; Assistants

(1) Appointment; Compensation

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

(2) Duties

Investigative Counsel shall have the powers and duties set forth in the Rules in this Chapter and shall report and make recommendations to the Board and the Commission as required under these Rules or directed by the Commission. All reports and recommendations shall be in writing and maintained as a record of Investigative Counsel and the recipient.

(3) Additional Attorneys and Staff

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

(f) Quorum

(1) Generally

The presence of a majority of the members of the Commission constitutes a quorum for the transaction of business, provided that at least one judge, one attorney, and one public member are present unless, by reason of vacancies or recusals, the presence of at least one judge, one attorney, and one public member is not possible. At a hearing on charges held pursuant to Rule 18-434, a Commission member is present only if the member is physically present. Under all other circumstances, a member may be physically present or present by telephone, video, or other electronic conferencing. Other than adjournment of a meeting for lack of a quorum, no action may be taken by the Commission without the concurrence of a majority of members of the Commission.

(2) Special Designation of Substitute Member

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

(g) General Powers of Commission

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

- (1) administer oaths and affirmations;
- (2) issue subpoenas and compel the attendance of witnesses and the production of evidence;
- (3) require persons to testify and produce evidence by granting them immunity from prosecution, penalty, or forfeiture; and
- (4) in case of contumacy by any person or refusal to obey a subpoena issued by the Commission, invoke the aid of the circuit court for the county where the person resides or carries on a

business.

(h) Records

The Commission shall keep a record of all documents filed with the Commission and all proceedings conducted by the Commission concerning a judge, subject to a retention schedule approved by the Chief Judge of the Court of Appeals.

(i) Annual Report

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

(j) Request for Home Address

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

Cross reference: See Rules 18-402 (a) and 18-407 (a).

Source: This Rule is derived from former Rule 18-402 (2018).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 2. STRUCTURE

RULE 18-412. JUDICIAL INQUIRY BOARD

(a) Creation and Composition

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

(b) Compensation

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

(c) Chair and Vice Chair

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

(d) Recusal, Removal, or Replacement

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

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

(e) Quorum

The presence of a majority of the members of the Board constitutes a quorum for the transaction of business, so long as at least one judge, one attorney, and one public member are present. A member of the Board may be physically present or present by telephone, video, or other electronic conferencing. Other than adjournment of a meeting for lack of a quorum, no action may be taken by the Board without the concurrence of a majority of the members of the Board.

(f) Records

Subject to a retention schedule approved by the Chief Judge of the Court of Appeals, the Board shall keep a record of all documents filed with the Board and all proceedings conducted by the Board concerning a judge.

Source: This Rule is derived from former Rule 18-403 (2018).

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CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 3. ADMINISTRATIVE PROCEDURE

RULE 18-421. COMPLAINTS; PROCEDURE ON RECEIPT

(a) Referral to Investigative Counsel

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

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

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

Committee note: Section (b) of this Rule does not preclude Investigative Counsel from communicating with the complainant or making an inquiry under section (f) of this Rule in order to clarify general or ambiguous allegations that may suggest a disability, impairment, or sanctionable conduct. Outright dismissal is justified when the complaint, on its face, complains only of conduct that clearly does not constitute a disability,

impairment, or sanctionable conduct.

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

(1) Except as provided by section (f) of this Rule, the Commission may not act upon a written allegation of disability, impairment, or misconduct, unless it is a complaint. If a written allegation, liberally construed, alleges facts indicating that a judge may have a disability or impairment or may have committed sanctionable conduct but is not under oath or supported by an affidavit, Investigative Counsel, if possible, shall (A) inform the complainant that the Commission acts only upon complaints under oath or supported by an affidavit, (B) provide the complainant with an appropriate form of affidavit, and (C) inform the complainant that unless a complaint under oath or supported by an affidavit is filed within 30 days after the date of the notice, the matter may be dismissed.

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

dismissal.

(d) Stale Complaints

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

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

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

Committee note: In contrast to dismissal of a complaint under Rule 18-423 (f)(3), which requires action by the Commission, Investigative Counsel may dismiss an allegation of disability, impairment, or sanctionable conduct under this Rule when, for the reasons noted, the allegation fails to constitute a complaint. Subject to sections (c) and (f) of this Rule, if there is no cognizable complaint, there is no basis for conducting an

investigation.

(e) Opening File on Receipt of Complaint

Subject to section (f) of this Rule, Investigative Counsel shall docket each properly filed complaint by opening a numbered file on the complaint and promptly in writing (1) acknowledging receipt of the complaint and (2) explaining to the complainant the procedure for investigating and processing the complaint.

(f) Inquiry

Upon receiving information from any source indicating that a judge may have a disability or impairment or may have committed sanctionable conduct, Investigative Counsel may open a file and make an inquiry. An inquiry may include obtaining additional information from a complainant and any potential witnesses, reviewing public records, obtaining transcripts of court proceedings, and communicating informally with the judge. Following the inquiry, Investigative Counsel shall (1) close the file and dismiss any complaint in conformity with subsection (a) (2) of this Rule or (2) proceed as if a complaint had been properly filed and undertake an investigation in accordance with Rule 18-422.

Source: This Rule is derived from former Rule 18-404 (a) through (d) (2018).

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RULE 18-422. INVESTIGATION BY INVESTIGATIVE COUNSEL

(a) Conduct of Investigation

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

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

(2) Investigative Subpoena

The issuance of an investigative subpoena is governed by Rule 18-409.1 (a).

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

(3) Grant of Immunity

Upon application by Investigative Counsel and for good cause, the Commission may grant immunity to any person from prosecution, or from any penalty or forfeiture, for or on account

of any transaction, matter, or thing concerning which that person testifies or produces evidence, documentary or otherwise.

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

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

(4) Notice to Judge

(A) Upon Opening of File

Judges may request the Commission to inform them in writing immediately upon the opening of a file pertaining to them pursuant to Rule 18-421 (e) or (f). The request shall be in writing. If such a request is received, Investigative Counsel shall comply with that request unless the Board authorizes a delay in providing the notice upon a finding that there is a reasonable possibility that immediate notice may jeopardize an investigation by Investigative Counsel or cause harm to any person. The notice shall be accompanied by a copy of the complaint.

(B) Upon Service of Investigative Subpoena

Upon service of an investigative subpoena pursuant to Rule 18-409.1, Investigative Counsel shall (i) serve a copy of the subpoena upon the judge under investigation as required under Rule 18-409.1 (a)(3) and (ii) unless notice was given to the

judge pursuant to subsection (a)(4)(A) of this Rule, include that notice with a copy of the subpoena.

(C) Prior to Conclusion of the Investigation

Subject to subsection (a)(4)(F) of this Rule, unless notice has been given to the judge pursuant to subsection (a)(4)(A) or (B) of this Rule, it shall be given before conclusion of the Investigation.

(D) Content

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

(E) Service

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

the judge's address of record.

(F) Exception

Notice shall not be given under this Rule if Investigative Counsel determines, prior to the conclusion of the investigation, that the recommendation of Investigative Counsel will be dismissal of the complaint without a letter of cautionary advice and the judge had not been given notice of the opening of the file pursuant to subsection (a)(4)(A) or (B) of this Rule.

Committee note: If, pursuant to subsection (a)(4)(A) or (B) of this Rule, the judge had received notice of the opening of a file, the judge also must be given notice that the complaint was dismissed or that any inquiry by Investigative Counsel pursuant to Rule 18-421 (f) was terminated.

(5) Opportunity of Judge to Respond

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

(6) Time for Completion

Investigative Counsel shall complete an investigation within 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Board, with the approval of the Chair of the

Commission, may extend the time for completing the investigation for a reasonable period. An order extending the time for good cause shall be in writing and shall articulate the basis of the good cause. The Commission may dismiss any complaint and terminate the investigation for failure to comply with the time requirements of this section.

(b) Report and Recommendation by Investigative Counsel

(1) Duty to Make

Upon completion of an investigation, Investigative Counsel shall make a report of the results of the investigation in the form that the Commission requires.

(2) Contents

Investigative Counsel shall include in the report or attach to it any response or other information provided by the judge pursuant to subsection (a)(5) of this Rule. The report shall include a statement that the investigation indicates probable sanctionable conduct, probable impairment, probable disability, any of them, or none of them, together with one of the following recommendations, as appropriate:

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

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

- (C) a conditional diversion agreement;
- (D) a reprimand;
- (E) the filing of charges; or
- (F) retirement of the judge based upon a finding of disability.

(3) Recipient of Report

(A) If the recommendation is dismissal of the complaint without a letter of cautionary advice, the report and recommendation shall be made to the Commission. Upon receipt of the recommendation, the Commission shall proceed in accordance with Rule 18-425.

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

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

(c) Records

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

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

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

(a) Review of Investigative Counsel's Report

The Board shall review the reports and recommendations made to the Board by Investigative Counsel and any matters referred to it by the Commission pursuant to these Rules.

Cross reference: See Rule 18-425 (a).

(b) Informal Meeting with Judge; Peer Review

(1) Generally

The Board may meet informally with the judge.

(2) Peer Review

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

(B) The discussion may occur in person or by telephone or

other electronic conferencing but shall remain informal and confidential. The peer review panel (i) shall have no authority to make any findings or recommendations, other than to the judge; (ii) shall make no report to Investigative Counsel, the Board, or the Commission; and (iii) may not testify regarding the conference with the judge before the Commission or in any court proceeding.

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

(c) Further Investigation

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

(d) Board's Report to Commission

(1) Contents

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

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

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

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

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

(E) retirement of the judge pursuant to Rule 18-428; or

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

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

(2) Time for Submission of Report

(A) Generally

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

(B) Extension

Upon a written request by the Chair of the Board, the

Chair of the Commission may grant a reasonable extension of time for submission of the report. An order extending the time shall be in writing and shall articulate the nature of the good cause.

(C) Failure to Submit Timely Report

If the Board fails to submit a report within the time allowed, the Chair of the Commission shall direct Investigative Counsel to create and submit a report that conforms to the requirements of subsections (d)(1) and (2) of this Rule, subject to Rule 18-422 (b)(2), and refer the matter to the Commission, which may proceed, using the report as submitted by Investigative Counsel in accordance with this provision.

(D) Copy to Investigative Counsel and Judge

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

(e) Filing of Response

Investigative Counsel and the judge may file with the Commission a written response to the Board's report and recommendation. Unless the Chair of the Commission, Investigative Counsel, and the judge agree to an extension, any response shall be filed within 30 days after the date the Commission transmitted copies of the report and recommendation to

Investigative Counsel and the judge.

(f) Action by Commission on Board Report and Recommendation

(1) Review

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

(2) Appearance by Judge

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

Committee note: This review and any appearance by the judge is not an evidentiary hearing. That is provided for in Rule 18-434 after charges have been filed. It is only for the Commission to determine whether to direct that charges be filed against the judge or some other action set forth in subsection (f)(3) should be taken.

(3) Disposition

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

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

(B) remand the matter to the Board for further consideration and direct the Board to file a supplemental report

within a specified period of time;

(C) dismiss the complaint pursuant to Rule 18-425, with or without a letter of cautionary advice;

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

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

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

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

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RULE 18-424. FURTHER INVESTIGATION

(a) Notice to Judge

Upon a directive for a further investigation by the Board pursuant to Rule 18-423 (c) or by the Commission pursuant to Rule 18-423 (f) (3), Investigative Counsel promptly shall (A) provide the notice and opportunity to respond required by Rule 18-422 (a) (4) and (5) if such notice and opportunity have not already been provided, and (B) notify the judge at the judge's address of record that the Board or Commission has directed a further investigation.

(b) Investigative Subpoenas

(1) Issuance

The issuance of an investigative subpoena is governed by Rule 18-409.1 (a).

(2) Notice to Judge

Promptly after service of the subpoena and in addition to any other notice required by law, Investigative Counsel shall provide to the judge a copy of the subpoena and notice of the

service of the subpoena. The notice to the judge shall be sent by first class mail to the judge's address of record or, if previously authorized by the judge, by any other reasonable method.

(3) Motion for Protective Order

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

(4) Failure to Comply

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

(5) Confidentiality

(A) Subpoena

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

(B) Court Files and Records

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

(C) Hearings

Hearings before the circuit court on any motion filed with respect to a subpoena shall be on the record and shall be conducted out of the presence of all individuals except those whose presence is necessary.

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

(c) Time for Completion of Investigation

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

(d) Report and Recommendation

(1) Duty to Make

Within the time for completing the further investigation, Investigative Counsel shall make a report of the results of the investigation to the Board or Commission, whichever authorized the further investigation, in the form the Commission requires.

(2) Contents

Unless the material already has been provided, Investigative Counsel shall include in the report or attach to it any response or other information provided by the judge pursuant to section (a) of this Rule or Rule 18-422 (a) (5). The report shall include a statement that the investigation indicates probable disability, probable impairment, probable sanctionable conduct, any of them, or none of them, together with one of the following recommendations:

- (A) dismissal of any complaint, without a letter of cautionary advice;
- (B) dismissal of any complaint, with a letter of cautionary advice;
- (C) a conditional diversion agreement;
- (D) a reprimand;
- (E) the filing of charges; or
- (F) retirement of the judge based upon a finding of disability.

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

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DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

RULE 18-425. DISMISSAL OF COMPLAINT

(a) Without Letter of Cautionary Advice

If, after an investigation by Investigative Counsel, the Commission concludes that the evidence fails to show that the judge has a disability or impairment or has committed sanctionable conduct, it shall dismiss the complaint without a letter of cautionary advice and notify the complainant, the judge, and the Board. If the Commission is unable to make that conclusion based on a recommendation by Investigative Counsel pursuant to Rule 18-422 (b) (3), it shall refer the matter to the Board for its review under Rule 18-423.

(b) With Letter of Cautionary Advice

(1) When Appropriate

If the Commission determines that any sanctionable conduct that may have been committed by the judge will be sufficiently addressed by the issuance of a letter of cautionary advice, the Commission may accompany a dismissal with such a letter.

Committee note: A letter of cautionary advice may be appropriate

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

(2) Notice to Judge

The Commission shall notify the judge of the dismissal with cautionary advice.

(3) Confidentiality

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

(4) Not a Form of Discipline

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

Source: This Rule is derived in part from former Rule 18-406 (a) (2018) and is in part new.

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Rule 18-426. CONDITIONAL DIVERSION AGREEMENT

(a) When Appropriate

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

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

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

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

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

(b) Compliance

The Commission shall direct Investigative Counsel or some other person to monitor compliance with the conditions of the agreement and may direct the judge to document compliance. Investigative Counsel shall give written notice to the judge of the nature of any alleged failure to comply with a condition of the agreement. If, after affording the judge at least 15 days to respond to the notice, the Commission finds that the judge has failed to satisfy a material condition of the agreement, the Commission may revoke the agreement and proceed with any other disposition authorized by these Rules. If, upon request of the judge, a monitor other than Investigative Counsel is appointed,

all reasonable expenses of the monitor shall be assessed against the judge.

(c) Not a Form of Discipline

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

(d) Notice to Complainant; Confidentiality

The Commission shall notify the complainant that the complaint has resulted in an agreement with the judge for corrective or remedial action. Except as permitted in Rule 18-407, the terms of the agreement shall remain confidential and not be disclosed to the complainant or any other person unless the judge consents, in writing, to the disclosure.

(e) Termination of Proceedings

Until the conditions of the agreement have been fully satisfied, the complaint remains open. Upon notification by Investigative Counsel that the judge has satisfied all conditions of the agreement, the Commission shall terminate the proceedings.

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

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Rule 18-427. REPRIMAND

(a) When Appropriate

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

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

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

(b) Procedure

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

(2) Within 30 days after service of the notice, the judge shall serve notice on Investigative Counsel that the judge (A) will not oppose that disposition, (B) will not contest the facts

underlying the recommendation but requests a hearing before the Commission on whether a reprimand is a proper disposition, or (C) will contest the facts underlying the recommendation.

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

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

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

(c) Form of Discipline

A reprimand constitutes a form of discipline.

(d) Retention of Copy

Investigative Counsel and the Commission shall retain a copy of the reprimand and may consider it if relevant in any subsequent proceeding against the judge.

(e) Notice to Complainant

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

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

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DIVISION 4. DISPOSITION OTHER THAN FILING OF CHARGES

Rule 18-428. RETIREMENT AS A DISPOSITION

(a) Applicability

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

(b) When Appropriate

Retirement of a judge may be an appropriate disposition upon a determination that (1) the judge suffers from a disability, as defined in Rule 18-402 (i), and (2) any alleged conduct that otherwise may constitute sanctionable conduct was predominantly the product of that disability and did not involve misconduct so serious that, if proven, would justify suspension or removal of the judge from office or, in light of the circumstances, would justify a censure.

(c) Effect

(1) Retirement under this Rule is permanent. A judge who is retired under this Rule may not be recalled to sit on any court,

but the judge shall lose no other retirement benefit to which he or she is entitled by law.

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

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

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

RULE 18-431. FILING OF CHARGES

(a) Direction by Commission

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

(b) Content of Charges

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

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

(c) Service; Notice

The charges shall be served upon the judge pursuant to Rule 18-404. A return of service of the charges shall be filed with the Commission. Upon service, the Commission shall notify any complainant that charges have been filed against the judge. Cross reference: See Md. Const., Art. IV, § 4B (a).

(d) Response

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

(e) Notice of Hearing

(1) Generally

Upon the filing of a response or, if no response is filed upon expiration of the time for filing one, the Commission shall schedule a hearing and notify the judge of the date, time, and place of the hearing. Unless the judge has agreed to an earlier hearing date, the hearing shall not be held earlier than 60 days after the notice was sent.

(2) Sanctionable Conduct

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

(3) Disability or Impairment

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

Cross reference: See Rule 18-407 (a)(3) concerning the time for posting on the Judiciary website.

(f) Extension of Time

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

(g) Amendment

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

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

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Rule 18-432. PROCEDURAL RIGHTS OF JUDGES

The judge has the right to:

- (1) conduct discovery pursuant to Rule 18-433;
- (2) receive a prompt hearing on the charges in accordance with Rule 18-434;
- (3) procure the issuance of subpoenas for the attendance of witnesses and for the production of documents and other tangible things;
- (4) present evidence and argument; and
- (5) examine and cross-examine witnesses.

Source: This Rule is new.

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DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

Rule 18-433. DISCOVERY

(a) Generally

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

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

Cross reference: For the issuance of subpoenas pertaining to discovery proceedings, see Rule 18-409.1 (b).

(3) Investigative Counsel and the judge have the obligation to respond to the other's discovery requests addressed to them.

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

(5) The Commission shall preclude a party from calling a witness, other than a rebuttal witness, or otherwise presenting evidence upon a finding, after the opportunity for a hearing if one is requested, that (1) the witness or evidence was subject to

disclosure under this Rule, (2) the party, without substantial justification, failed to disclose the witness or evidence in a timely manner, and (3) failure was prejudicial to the other party. For purposes of this Rule, the parties are Investigative Counsel and the judge against whom charges have been filed.

(b) Open File

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

(c) Exculpatory Evidence

Whether as part of the disclosures pursuant to section (b) of this Rule or otherwise, no later than 30 days prior to the

scheduled hearing, Investigative Counsel shall disclose to the judge all statements or other evidence of which Investigative Counsel is aware that (1) directly negates any allegation in the charges, (2) would be admissible to impeach a witness intended to be called by Investigative Counsel, or (3) would be admissible to mitigate a permissible sanction.

(d) Witnesses

No later than 30 days prior to the scheduled hearing, Investigative Counsel shall provide to the judge the names and addresses of all persons, other than a rebuttal witness, Investigative Counsel intends to call at the hearing. No later than 25 days prior to the scheduled hearing, the judge shall provide to Investigative Counsel the names and addresses of all persons, other than a rebuttal witness, the judge intends to call at the hearing.

Source: This Rule is in part derived from former Rule 18-407 (g) (2018) and is in part new.

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DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

Rule 18-434. HEARING ON CHARGES

(a) Bifurcation

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

(b) Subpoenas

Upon application by Investigative Counsel or the judge, the Commission shall issue subpoenas to compel the attendance of witnesses and the production of documents or other tangible things at the hearing in accordance with Rule 18-409.1 (b).

(c) Non-Response or Absence of Judge

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

(d) Motion for Recusal

Except for good cause shown, a motion for recusal of a member of the Commission shall be filed at least 30 days before the hearing. The motion shall specify with particularity the

reasons for recusal.

(e) Role of Investigative Counsel

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

(f) Evidence

Title 5 of the Maryland Rules shall generally apply.

(g) Recording

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

(h) Proposed Findings

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

Source: This Rule is new.

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

Rule 18-435. COMMISSION FINDINGS AND ACTION

(a) Finding of Disability

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

(b) Finding of Impairment

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

(c) Finding of Sanctionable Conduct

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

Appeals.

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

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

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

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

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

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

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

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

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

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

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

(f) Confidentiality upon Finding as to Disability or Impairment

If the Commission has made a finding that the judge is or is not disabled or impaired, the Commission's findings of fact, conclusions of law, and recommendation shall remain confidential, except that the Commission may notify the complainant of the finding pursuant to 18-425, 18-426, and 18-427.

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

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DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

Rule 18-436. CONSENT TO DISPOSITION

(a) Generally

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

- (1) a conditional diversion agreement pursuant to Rule 18-426;
- (2) a reprimand pursuant to 18-427;
- (3) suspension or removal from judicial office; or
- (4) retirement from judicial office pursuant to Rule 18-428.

(b) Form of Consent

(1) Generally

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

(2) If Charges Directed to Be Filed

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

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

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

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

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

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

(F) a waiver by the judge of the right to further proceedings before the Commission and, unless the Court orders otherwise, to participate in subsequent proceedings before the Court of Appeals.

Committee note: If the agreement is entered into after charges were filed and the agreed disposition is one that only the Court of Appeals can make, the agreement must be submitted to the Court for approval under section (c), but under that section, the waiver is deemed withdrawn if the Court rejects the agreement. It is possible that the Court will want to have argument on the question of whether to approve the agreement, and, if it does so, the waiver should not prevent the judge from participating in that argument.

(3) If Charges Not Yet Directed to Be Filed

Unless the consent is to a dismissal accompanied by a letter of cautionary advice or a reprimand, if the agreement is

executed before charges have been directed to be filed, it shall contain a statement by the Commission of the charges that would have been filed but for the agreement and the consents and admissions required in subsection (b) (2) of this Rule shall relate to that statement.

(c) Submission to Court of Appeals

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

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

Rule 18-436

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

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DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

RULE 18-437. PROCEEDINGS IN COURT OF APPEALS

(a) Expedited Consideration

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

(b) Exceptions

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

(c) Response

The Commission shall file a response within 15 days after service of the exceptions in accordance with Rule 20-405. The Commission shall be represented in the Court of Appeals by its

Executive Secretary or such other attorney as the Commission may appoint. A copy of the response shall be served on the judge in accordance with Rules 1-321 and 1-323.

(d) Memoranda

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

(e) Hearing

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

(f) Disposition

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

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

(g) Order

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

(h) Confidentiality

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

(i) Public Inspection

Subject to section (h) or any other shielding of confidential material by the Court of Appeals, the Court shall permit public inspection of the record filed with it.

Source: This Rule is former Rule 18-408 (2018).

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CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

Rule 18-438. SUSPENSION OF EXECUTION OF DISCIPLINE

(a) Authority

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

(b) Monitoring Compliance

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

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

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

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

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

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

(c) Response; Hearing

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

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

Source: This Rule is new.

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TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 6. SPECIAL PROCEEDINGS

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

(a) In General

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

(b) Initiation

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

(1) by a complaint alleging that the judge is disabled or impaired, or by an inquiry into such a status commenced by Investigative Counsel pursuant to Rule 18-421 (f);

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

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

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

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

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

(c) Confidentiality

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

(d) Inability to Defend

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

(e) Interim Measure

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

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

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

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

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

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

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

Source: This Rule is new. It is derived, in part, from ABA Model Rules for Judicial Disciplinary Enforcement, Rule 27.

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CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 6. SPECIAL PROCEEDINGS

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

(a) Definition

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

(b) Interim Suspension

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

(c) Administrative Leave

Upon notice by the Commission that a judge has been

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

(d) Reconsideration

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

Source: This Rule is new.