

BACKGROUND PAPER 95-5

**JUDICIAL DISCIPLINE
COMMISSIONS**

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JUDICIAL DISCIPLINE COMMISSIONS

INTRODUCTION

In 1960, California became the first state to establish a judicial conduct review organization--the Commission on Judicial Qualifications (now called the Commission on Judicial Performance). By 1980, all 50 states and the District of Columbia had established their own judicial conduct systems that encompass discipline of judges. Prior to this time, the methods of removing judges from office (impeachment, legislative removal, and recall) for judicial misconduct were rarely used because they were cumbersome, time-consuming and costly. Across the country, few judges have been removed from office except for flagrant judicial misconduct. In Nevada, no district court judge or Supreme Court justice has been removed from office by one of these methods.

In 1968, the Subcommittee for the Study of the Nevada Court Structure¹ recommended the formation of a commission for the discipline and removal of judges modeled after the California commission. In its *Report to the Legislative Commission*, the Subcommittee suggested that this commission should provide a confidential means whereby:

[T]he performance of judges can be weighed by an informed and impartial commission, which has proven to be more effective than an election by the people in actually removing judges who have either lost their qualifications through disability or, in the rare instance, become temperamentally unfit to continue in that post. This is true for the simple reason that the ordinary voter has no means of evaluating the performance of a judge through his own knowledge (Subcommittee Report, 1968, p. 33).

During the 57th and 58th Legislative Sessions, the Legislature approved amendments to Article 6, Section 21 of the *Nevada Constitution* (*Statutes of Nevada 1973*, page 1956 and *Statutes of Nevada 1975*, page 1932) creating the Commission on Judicial Discipline with the authority to censure, retire, or remove justices of the Supreme Court and district court judges. The voters approved this amendment in 1975.

¹The Legislative Commission created the Subcommittee for the Study of the Nevada Court Structure in 1967 pursuant to Senate Concurrent Resolution No. 18 (*Statutes of Nevada 1967*, page 1800) directing the Legislative Commission to study the Nevada court structure, including the method of handling juveniles, and report to the 1969 Legislature. The Subcommittee's report is contained in *Bulletin No. 74, Nevada's Court Structure*, December 1968 by the Legislative Commission.

Although the 1975 amendment did not include lower court judges, the Commission has exclusive jurisdiction over the censure, involuntary retirement, and removal of justices of the peace and municipal court judges under *Nevada Revised Statutes* (NRS) 1.440. The section also allows the Supreme Court the authority to appoint two justices of the peace or municipal judges to sit on the Commission for proceedings against justices of the peace and municipal court judges, respectively. Ballot Question No. 1, which was passed during the 66th and 67th Legislative Sessions (*Statutes of Nevada 1991*, page 2590 and *Statutes of Nevada 1993*, page 2969, respectively) amends the *Nevada Constitution* to include the existing practice regarding lower court judges, in addition to expanding the authority of the Commission regarding methods of discipline. The voters approved Ballot Question No. 1 in the 1994 General Election.

STRUCTURE AND OPERATION OF THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

Membership of the Nevada Commission on Judicial Discipline (Commission) is composed of two justices or judges appointed by the Supreme Court, two members of the State Bar of Nevada appointed by its Board of Governors, and three persons who are not members of the legal profession appointed by the Governor. The forms of discipline the Commission may impose are limited to the following:

- Suspension pending a determination of the Commission proceedings;
- Censure;
- Removal for willful misconduct, or willful or persistent failure to perform the duties of the office, or habitual intemperance; or
- Retirement for advance age which interferes with the proper performance of judicial duties, or for mental or physical disability which prevents the proper performance of judicial duties and which is likely to be permanent in nature.

In addition to extending the jurisdiction of the Commission to lower court judges, Ballot Question No. 1 allows the Commission to utilize "other forms of discipline." According to this constitutional amendment, the Supreme Court is responsible for providing rules governing the other forms of discipline the Commission may impose.

A complaint may be filed with the Commission by any person against any local or state judge. The Commission is required to conduct a preliminary investigation, after which the Commission must either dismiss the matter or order a hearing. To facilitate its operation, the Commission is granted the following authority under Article VI, Section 21(9) of the *Constitution*:

- Designate for each hearing an attorney or attorneys at law to act as counsel to conduct the proceeding;²
- Summon witnesses to appear and testify under oath and compel the production of books, papers, documents, and records;
- Grant immunity from prosecution or punishment when the Commission deems it necessary and proper to compel the giving of testimony under oath and the production of books, papers, documents, and records; and
- Exercise such further powers as the Legislature may from time to time confer upon the Commission.

Supreme Court Rules

Under Article 6, Section 21(5) of the *Constitution*, broad authority is allocated to the Supreme Court to adopt rules governing the confidentiality of proceedings before the Commission, the grounds of censure, and the conduct of investigations and hearings. Pursuant to this authority, the Supreme Court added Part VII, "Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline," to the *Supreme Court Rules* in 1988. Rules 1 through 11 of Part VII provide the general provisions, confidentiality guidelines, jurisdiction, and grounds for discipline. Rules 12 through 31 prescribe the procedures followed by the Commission on Judicial Discipline. Following is a brief overview of these rules.

Confidentiality - Rules 5 through 8

When a complaint is filed, all proceedings of the Commission are confidential until probable cause has been determined and a formal statement of charges is filed by the Commission. In addition to the proceedings, all written, recorded, or oral information and materials received or developed by the Commission during its preliminary investigation of alleged misconduct or disability of a judge must also remain confidential. Once formal charges are filed, confidentiality ceases and subsequent proceedings or documents formally filed with the Commission are open to the public. Prior to this time, the Commission may issue press releases or public statements describing its operation, including the procedure for filing a complaint. However, the

²The general practice of the Commission has been to utilize the services of the Office of the Attorney General. However, the Nevada Supreme Court stated in *Whitehead v. Nevada Commission on Judicial Discipline*, 110 Nev. 874, 878 P.2d 913 (1994), that the Commission must have independent counsel to avoid potential conflicts of interest and to uphold the separation of powers clause under Article 3, Section 1 of the *Nevada Constitution*.

name, position, address or other information identifying any respondent involved in a proceeding pending before the Commission cannot be released without the respondent's consent before formal charges are filed.

Suspension, Censure, or Removal - Rules 10 and 11

The Commission must suspend a judge with pay when a felony charge is pending against him, or when a judge is adjudicated mentally incompetent or insane. The Commission may suspend a judge without pay when he has pleaded guilty or no contest to a felony or is found guilty of a crime punishable as a felony. If the conviction is reversed, the judge is entitled to back pay.

The following are grounds for censure or removal:

1. Conviction of any felony or a misdemeanor involving moral turpitude.
2. Any acts or omissions amounting to any public offense which tend to corrupt or impair the administration of justice.
3. Violations of the "Nevada Code of Judicial Conduct" (Part VI of the *Supreme Court Rules*).
4. Willful or persistent failure to perform the duties of office.
5. Habitual intemperance.

Filing a Complaint - Rule 12

Anyone with a complaint alleging judicial misconduct, which if true would establish grounds for discipline under the *Supreme Court Rules*, must make the complaint upon oath and in writing. In exceptional circumstances, the Commission may authorize its executive officer to sign and swear to a complaint.

Probable Cause Hearing - Rules 14 through 19

The Commission is required to investigate all complaints to determine whether sufficient cause exists to proceed to probable cause hearing. If so, the respondent (judge) is notified that he is required to respond to the sworn complaint within 30 days. The Commission must allow the respondent to appear personally at the hearing, if he so requests, to oppose the complaint.

If the majority of the Commission finds that probable cause exists, then a formal statement of charges is signed and filed by a prosecuting attorney appointed by the Commission. A determination of probable cause means that the evidence available for

introduction at a later formal hearing could clearly and convincingly establish grounds for disciplinary action. The judge is then served with the formal statement of charges and has 20 days to respond.

Formal Hearing - Rules 7, and 20 through 30

A formal hearing is held to determine if disciplinary action should be taken. Once formal charges are filed, hearings must be open. The *Supreme Court Rules* describe the procedures that must be followed, including discovery, evidence, and cross examination. These procedures basically require the parties to comply with the *Nevada Rules of Civil of Procedure*.

If the Commission determines that the charges are not proven by clear and convincing evidence or that discipline is not warranted based on the facts involved, the Commission must file an order publicly dismissing the charges. If the Commission determines disciplinary action (censure, removal, or retirement) should be taken, the Commission must adopt a written statement of the nature of the proceedings, findings of fact, and conclusions of law regarding the complaint. A certified copy of this statement must be sent to the judge and filed with the Supreme Court once this statement is adopted and filed by the Commission.

Appeals - Rules 38 through 40

The respondent judge or the prosecuting attorney may petition the Supreme Court for review of orders of the Commission, which are considered either by the prosecuting officer or the respondent judge to be without or in excess of the Commission's jurisdiction. The judge has the right to appeal an order of censure, removal, or retirement to the Supreme Court.

Legislative Provisions Concerning the Operation of the Commission

In addition to providing for the service of process and execution of the orders of the Commission, NRS 1.430 through 1.460 provide for the monetary compensation of Commission members and other individuals who assist the Commission during an investigation, including attorneys, accountants, investigators, reporters, physicians, technical experts, and witnesses. The Commission is authorized to hire a secretary to prepare the budget, manage the fiscal affairs of the Commission, and perform any other duties relating to the administration of the Commission affairs. State employees, state agencies, and all officers of the court are required to cooperate with the Commission.

OVERVIEW OF JUDICIAL DISCIPLINE COMMISSIONS IN OTHER STATES

Following is a general overview of the judicial discipline commissions across the country based primarily upon Tables 36 through 39B from the *COGEL (Council on Governmental Ethics Laws) Blue Book*, published by The Council of State Governments, 1993. A secondary source is a chart published in the *Judicial Conduct Reporter*, Winter 1994, by the American Judicature Society, entitled "*Judicial Conduct Organizations Budgets and Staff, 1991-93.*" A third source is Judith Rosenbaum's *Practices and Procedures of State Judicial Conduct Organizations*, 1990, published by the American Judicature Society. This text compares the procedures of judicial conduct commissions in all 50 states.

Structure

Judicial discipline commissions are structured in two ways: one-tier and two-tier commissions. A commission which has one tier receives and investigates complaints, brings formal charges, conducts hearings, and either disciplines the judges or recommends disciplinary sanctions to a higher body, which is usually the state supreme court. The Nevada Commission on Judicial Discipline provides a good example of a one-tier structure.

A two-tier commission is composed of two separate entities. The first entity receives and investigates complaints and then determines whether to proceed to a hearing or dismiss the complaint. If a hearing is held, the first tier also presents charges before the second body which conducts the hearing and adjudicates the matter presented. The two-tier system has been adopted by nine states: Alabama, Delaware, Illinois, New Jersey, Ohio, Oklahoma, Pennsylvania, West Virginia, and Wisconsin (Rosenbaum, 1990, p. xi). An overview of the operation of the Pennsylvania judicial discipline structure is provided later.

Membership Composition

In the majority of states, including Nevada, commissions are composed of a combination of judges, attorneys, and public members. The composition in three states (Delaware, Hawaii, and Utah) is slightly different. Delaware's Court on the Judiciary is composed only of seven judges. Hawaii's Commission on Judicial Discipline does not include any judges. Utah's Judicial Conduct Commission includes not only public members, a judge, and bar commissioners, but also two Senators (appointed by the President of the Senate), and two Representatives (appointed by the Speaker of the House).

Confidentiality

The issue of confidentiality in judicial discipline cases is controversial. Arguments in support of confidentiality include shielding the complainant from public embarrassment and fear of reprisal from the judicial officer accused, protecting the reputation of a judge from false accusations while investigations into the complaint are conducted, and promoting public confidence in the judiciary by preventing the premature disclosure of unfounded complaints.

In contrast, many argue that because the judge is a public and, in some cases, elected figure and the judicial discipline commission is a public entity, the public is entitled to knowledge of complaints against a judge and the operation of the commission in upholding the ethical standards of conduct imposed on the judges. In addition, the judge usually learns the identity of the complainants after the investigation is commenced or once formal charges are filed.

All states require confidentiality at the investigation stage. The states vary on whether the confidentiality ceases when formal charges are filed, when the commission files recommendations for discipline with the state supreme court or when discipline is ordered. In Nevada, confidentiality ceases when the Commission on Judicial Discipline files a formal complaint against the judge.

Appeals

A commission either renders a report consisting of findings of fact, conclusions of law, and a recommendation to the state's highest court, or a decision subject to review by the highest court if the judge seeks an appeal. Illinois, a two-tier state, is the only state in which the decision of the judicial discipline commission is final. In the other states, the decision of the tier imposing discipline may be appealed to the state's highest court.

Pennsylvania - A Two-Tier Approach

In May 1993, the voters in Pennsylvania approved a constitutional amendment replacing the one-tier Judicial Inquiry and Review Board with a two-tier judicial discipline structure. Under Article V, Sections 16 and 18 of the *Constitution of Pennsylvania* and Title 42, "Judiciary and Judicial Procedure," of the *Pennsylvania Consolidated Statutes* (Pa.C.S.), the new structure is composed of the independent Judicial Conduct Board which conducts investigations of the conduct of judges, justices, justices of the peace, and the Court of Judicial Discipline, which conducts the hearings and imposes discipline when necessary. The Pennsylvania Supreme Court continues to be involved in the procedures with the authority to appoint half the members of both the Board and the Court, and to review the final decisions of the Court upon appeal.

The Pennsylvania Judicial Conduct Board

The Judicial Conduct Board (Board) is composed of the following 12 members appointed by the Supreme Court and the Governor (42 Pa.C.S. § 2102):

- One justice of the Superior Court (appointed by the Supreme Court);
- One district judge (appointed by the Supreme Court);
- One judge of the courts of common pleas (appointed by the Governor);
- Three non-judge attorneys (one appointed by the Supreme Court and two appointed by the Governor); and
- Six non-lawyer electors (three appointed by the Supreme Court and three appointed by the Governor).

No more than half of the appointees may be members of the same political party.

Responsibilities of the Board

Under Article V, Section 18(b) of the *Pennsylvania Constitution*, and 42 Pa.C.S. § 2105, the Board's responsibilities include the following:

- Prescribing the general rules governing the conduct of members;
- Appointing a chief counsel and staff to oversee the budget and exercise supervisory and administrative authority over all Board staff and functions;
- Receiving and investigating complaints regarding judicial conduct;
- Determining whether probable cause exists to file formal charges against a justice, judge, or justice of the peace for proscribed conduct; and
- Presenting the Board's case in support of the charges before the Court of Judicial Discipline.

Confidentiality

Complaints received by the Board and information and evidence obtained in the investigation are not public information. All proceedings of the Board are confidential. A justice, judge, or justice of the peace who is the subject of the investigation has the right to be apprised of the nature and content of the complaint and must be given the opportunity to respond to the complaint prior to a probable cause determination.

The Pennsylvania Court of Judicial Discipline

The role of the Court of Judicial Discipline (Court) is to determine the merits of a complaint against the judicial officer accused by the Board of misconduct and, if necessary, to impose discipline. The Court is composed of the following eight members appointed by the Supreme Court and the Governor (42 Pa.C.S. § 1602):

- Three judges of the Superior Court, the Commonwealth Court or the courts of common pleas (two appointed by the Supreme Court and one appointed by the Governor);
- A district justice (appointed by the Supreme Court);
- Two non-lawyer electors (one appointed by the Supreme Court and one appointed by the Governor); and
- Two non-judge attorneys (appointed by the Governor).

Like the Board, no more than half of the appointees can be members of the same political party.

Responsibilities

Under Article V, Section 18(b) of the *Pennsylvania Constitution*, and 42 Pa.C.S. §§ 1603 and 1604, the Court's responsibilities include the following:

- Prescribing the general rules governing the conduct of members;
- Appointing staff and administering its own budget;
- Promptly scheduling hearings upon the filing of formal charges by the Board; and
- Determining whether sanctions, including removal from office, suspension, or censure, should be imposed against a justice, judge, or justice of the peace.

Public Proceedings

All formal charges filed with the court are a matter of public record, and all hearings shall be public proceedings. The subject of the charges is presumed innocent, and the Board has the burden of proving the allegations by clear and convincing evidence. (Article V, Section 18(b)(5) and 42 Pa.C.S. § 3334)

Appeal of Final Decisions

A judge or justice of the peace may appeal a final order of discipline to the Supreme Court whose review is limited to narrow issues of law. The Supreme Court may also hear on appeal an order of the court dismissing a complaint against a judge. Final decisions involving a Supreme Court justice fall within the jurisdiction of a special tribunal composed of seven judges chosen by lot. (Article V, Section 18(c) and 42 Pa.C.S. §§ 725 and 727)

THE MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT

The *Model Rules for Judicial Disciplinary Enforcement* were promulgated in 1994 by the American Bar Association's Joint Committee on Judicial Discipline (Appendix A). The Joint Committee gathered information from all available sources on judicial discipline systems throughout the country. Twelve jurisdictions (Alabama, Arizona, California, Florida, Illinois, Michigan, Montana, New York, Ohio, Vermont, Virginia, and Washington) were selected for an in-depth study based upon complexity of procedure, location, number of complaints, size, and structure to ensure a broad picture of judicial discipline procedures. The jurisdictions selected included one- and two-tier systems. In addition to the procedures of the individual judicial discipline commissions, the studies included the review of case law in each jurisdiction and interviews with representatives from the 12 systems. The committee adopted the following goals in developing the rules:

- Assure conformity with the new American Bar Association (ABA) Model Code of Judicial Conduct;
- Ensure prompt and fair discipline for judges;
- Enhance public confidence in the judiciary and in the judicial discipline system;
- Ensure the protection of the public and the judiciary;
- Protect the independence of the judiciary; and
- Establish a model for states to use as a resource to establish improved judicial discipline systems.

Structure and Membership Composition

The rules provide that the commission shall be comprised of 12 appointed members with an equal number of judges, lawyers, and public members.

A primary criticism of judicial discipline commissions is that once the commission has investigated and decided to file formal charges, this same commission is not capable of serving as an unbiased adjudicatory body. In order to address this criticism, the proposed ABA rules divide the commission into two panels (a two-tier system). The first panel, composed of three members, serves as the investigative panel. The second panel serves as the hearing panel and is composed of nine members. Each panel must have an equal number of judges, lawyers, and public members. The membership of the panels rotates, but no member may serve on the investigative panel and the hearing panel in the same case.

Counsel

The investigative panel works closely with disciplinary counsel appointed by the commission. Disciplinary counsel handles the investigation and prosecution of cases, and counsel may not be dismissed without the concurrence of the Supreme Court.

The hearing panel shall have separate counsel appointed by the commission in order to avoid the appearance of unfairness. The commission determines which counsel of the two will inform the public of the commission's existence, maintain records, perform administrative tasks, and prepare the budget.

Confidentiality

Prior to the filing of a formal complaint, all proceedings are confidential. A complaint which is dismissed without filing formal charges may never be disclosed.

Review by the Highest Court in the State

Following a hearing, the hearing panel shall file with the highest court a record of the proceeding together with a report which includes proposed findings of fact and conclusions of law, any minority opinions, the order of dismissal or recommendation for sanction, and a written summary.

The highest court may choose to dismiss the charges, remand the case to expand the record, or impose sanctions. In promulgating this rule, the committee noted the importance of requiring that public sanctions be imposed only by the highest court in order to protect the independence of the judiciary.

CONCLUDING REMARKS

Each judicial discipline commission is unique and has developed out of circumstances unique to the local political environment. Strengths and weaknesses are present in each system, whether its structure is one-tiered, as in Nevada, or two-tiered with

separate bodies that conduct the investigations and hearings. Since the creation of the first commission in 1960, judicial discipline commissions, the state judiciary, and legislatures across the country continue to search for a system that balances the need to provide an accessible and effective system for responding to the valid concerns of citizens for the competence of judges while preserving the integrity and necessary independence of the judiciary.

SELECTED REFERENCES

- *Nevada Constitution*, Article 6, Section 21.
- *Supreme Court Rules*, Part VII, "Administrative and Procedural Rules of the Nevada Commission on Judicial Discipline."
- *Supreme Court Rules*, Part VI, "Nevada Code of Judicial Conduct."
- The Council of State Governments (1993). *Council on Governmental Ethics Laws Blue Book* (9th ed.). Tables 36 through 39B.
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APPENDIX A

Model Rules for Judicial Disciplinary Enforcement
Joint Committee on Judicial Discipline
American Bar Association, June 1994

REPORTDevelopment of the 1993 Model Rules for Judicial Disciplinary Enforcement

For nearly two decades the American Bar Association has been committed to an effective and strong professional regulatory system for lawyers and judges.

In February 1978, the American Bar Association adopted the Standards Relating to Judicial Discipline and Disability Retirement as a national model for enforcement of judicial conduct codes. To assist jurisdictions in the adaptation and implementation of these standards, the ABA Standing Committee on Professional Discipline and the Judicial Administration Division developed the Model Rules for Judicial Discipline and Disability Retirement in June 1979. In 1990, the American Bar Association significantly revised its Model Code of Judicial Conduct.

While nearing the completion of its project to combine the Standards for Lawyer Discipline and Disability Proceedings (1978) and the 1979 Model Rules for Lawyer Discipline and Disability Proceedings into the Model Rules for Lawyer Disciplinary Enforcement, which was approved by the ABA House of Delegates in August 1989, the Standing Committee on Professional Discipline decided to review the 1978 Standards Relating to Judicial Discipline and Disability Retirement.

In April 1988, Chairperson Marna S. Tucker appointed a Subcommittee chaired by Barbara Crabb, Chief Judge, United States District Court for the Western District of Wisconsin, to examine the effectiveness of the 1978 Judicial Standards, combine the Standards with the 1979 Model Rules and provide comment on the revisions of the Model Code of Judicial Conduct that were then under consideration by the Standing Committee on Ethics and Professional Responsibility. After a number of preliminary meetings, the Subcommittee decided that the Standards should be revised, and that the American Bar Association Judicial Administration Division should be invited to join in its efforts.

In February 1990, the Standing Committee on Professional Discipline and the Judicial Administration Division created the Joint Subcommittee on Judicial Discipline co-chaired by Vivi Dilweg, Judge of the Circuit Court, Green Bay, Wisconsin, representing the Standing Committee on Professional Discipline, and Judge Crabb, representing the Judicial Administration

Division. The members of the Subcommittee representing the Discipline Committee are Linda D. Donnelly, Disciplinary Counsel for the Supreme Court of Colorado; Thomas M. Fitzpatrick, Seattle, Washington; and H. Holcombe Perry, Jr., Albany, Georgia. Representing the Judicial Administration Division are C. Tolbert Goolsby, Judge, South Carolina Court of Appeals; Florence K. Murray, Justice, Rhode Island Supreme Court; and Gerald Stern, Administrator of the State of New York Commission on Judicial Conduct. The goals adopted by the Joint Subcommittee were to: (1) encourage conformity with the new ABA Model Code of Judicial Conduct, (2) ensure prompt and fair discipline for judges, (3) enhance public confidence in the judiciary and in the judicial disciplinary system, (4) ensure the protection of the public and the judiciary, (5) protect the independence of the judiciary, and (6) establish a model for states to use as a resource to establish improved judicial discipline systems.

The first task of the Joint Subcommittee was to gather information from all sources on how the judicial discipline system was working across the country. The judicial discipline procedures of each state were collected and reviewed with an in-depth study of twelve jurisdictions. The size, location, complexity of procedure, structure, and number of complaints disposed of each year were considered in identifying the twelve jurisdictions to ensure that the broad spectrum of disciplinary systems were represented in the study. The study included jurisdictions that combine the investigative and adjudicative functions of the judicial enforcement system, and jurisdictions that bifurcate those functions. Alabama, Arizona, California, Florida, Illinois, Michigan, Montana, New York, Ohio, Vermont, Virginia and Washington were chosen for study. The Joint Subcommittee conducted a complete review of each jurisdiction's disciplinary procedures and case law as well as relevant literature. In addition, interviews were conducted in each jurisdiction with selected representatives of the system.

Due to the complexity and importance of this nationwide project, the Joint Subcommittee on Judicial Discipline requested funding from the State Justice Institute to complete the project. The State Justice Institute approved a grant of \$120,000 in 1991.

After a series of meetings to complete information gathering and analysis and to draft proposed changes to the Standards, the Joint Subcommittee completed the first draft of the Model Rules for Judicial Disciplinary Enforcement in August 1992.

During 1992, the Joint Subcommittee held public hearings on the draft Model Rules at the American Judicature Society National

Conference in Baltimore and at the ABA Annual Meeting in San Francisco. After circulation of a second draft in January 1993, the Joint Subcommittee sponsored a public hearing at the ABA Midyear Meeting in Boston. Following dissemination of a third draft in July 1993, a panel discussion and forum was sponsored by the Judicial Administration Division at the ABA Annual Meeting in New York in August 1993.

As a part of its outreach efforts, the Joint Subcommittee presented the draft Model Rules at the August 1993 meeting of the National Conference of Chief Justices. Subcommittee Co-Chair Vivi Dilweg also addressed the National Commission on Judicial Discipline and Removal, which held hearings regarding the procedure for discipline and removal of federal judges.

During the drafting process, the Joint Subcommittee met with the Standing Committee on Professional Discipline and the Council of the Judicial Administration Division, had a continuing dialogue with the Joint Ethics Committee of the National Conference of State Trial Judges and the National Conference of Special Court Judges, and met with a committee of the Conference of Chief Justices appointed to review the rules. In addition to convening four public hearings, the Subcommittee received and carefully considered numerous written comments from members, counsel and executive directors of judicial discipline commissions, judges and the public.

Extensive debate within the Joint Subcommittee was common on almost every rule. Diverse views were expressed and often compromises were hammered out, not only within the Subcommittee, but also with groups and individuals who made presentations, oral or written. Members of the Subcommittee also met with a variety of groups to discuss drafting suggestions. The Model finally adopted represents the views of many individuals and groups interested in judicial discipline.

Highlights of the Model Rules for Judicial Disciplinary Enforcement

The recommended Model Rules, unlike the Standards, has a **Terminology Section** to resolve differences in language.

I. Organization and Structure

Section I of the Model Rules addresses organization and structure of the Commission on Judicial Conduct.

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Rule 1 provides that the disciplinary authority of the commission extends to any person performing judicial functions or exercising judicial powers in the state's judicial branch. The definition includes court administrators, judicial referees, and excludes administrative law judges and federal judges.

Rule 2 provides the method for the appointment of the commission members and recommends an equal number of judges, lawyers and public members.

One of the most consistent complaints the Joint Subcommittee heard from judges and their counsel was the perceived unfairness of a system that combines all functions -- investigation, prosecution, hearing and decision making -- in a single process. The process has survived due process challenges because in this type of system the highest court has the ultimate authority to review de novo and impose sanctions. The primary reason voiced in favor of this type of system is cost efficiency. The primary criticism is that once a commission is exposed to all the investigative information and determines probable cause to file formal charges, it is nearly impossible for the same commission to be a neutral adjudicative body. Although commissions and executive directors express their assurance that it is fair, the appearance of fairness is not met. The Joint Subcommittee engaged in extensive deliberations in formulating its recommendation to separate the investigative and prosecutorial functions from the hearing, fact finding and decision making functions.

The solution proposed in the Model Rules is to divide the commission into two panels, an investigative panel of three members and a hearing panel of nine members, and to have separate disciplinary and commission counsel.

Rule 3 provides that each panel should be composed of an equal numbers of judges, lawyers and members of the public. The membership on the panels rotates with the restriction that no member shall sit on both the hearing and investigative panel for the same case.

Rule 4 of the Model Rules provides that the investigative panel works closely with the disciplinary counsel. The disciplinary counsel handles the investigation and prosecution of the case. The commission appoints the disciplinary counsel, but to preserve the counsel's independence to appeal a hearing panel's decision, counsel cannot be removed without the concurrence of the Supreme Court.

Rule 5 proposes that the hearing panel have a separate commission counsel to assist it. It is left to the commission as a whole to determine which counsel would maintain the commission's records, prepare the commission's budget, inform the public of the existence and operation of the system and perform other administrative tasks. This structure is designed to resolve any appearance of unfairness.

II. General Provisions

General Provisions of the recommended Model Rules are embodied in Section II.

Rule 6 defines the grounds for discipline as any conduct constituting a violation of the Code of Judicial Conduct, the Rules of Professional Conduct or other applicable professional conduct codes. The only other ground for discipline is willful violation of a valid order of the highest court, the commission, or a panel of the commission in a proceeding under the Rules.

Like the Model Rules for Lawyer Disciplinary Enforcement, the proposed Model Rules do not adopt any statute of limitations. The conduct of a judge, no matter when it has occurred, is always relevant to the question of fitness for office. The time between the commission of alleged misconduct and the initiation of a complaint based on the conduct is relevant to whether and to what extent discipline should be imposed, but is not relevant to limit the commission's power to investigate.

Rule 7 establishes "clear and convincing evidence" as the standard of proof.

Rule 8 provides that the state's rules of evidence applicable to non-jury civil proceedings and the rules of civil procedure apply in judicial discipline and incapacity cases except as otherwise provided in these rules.

Rule 9 provides the judge with the right to counsel at all stages of the proceedings.

Rule 10 prohibits the commission's hearing panel, commission counsel and hearing officers from having ex parte contacts regarding the case. Prior to a determination to file formal charges, members of the investigative panel may communicate with disciplinary counsel, and disciplinary counsel may communicate with the respondent and witnesses as required to perform their duties.

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Rule 11 addresses confidentiality. Prior to the filing of formal charges, all proceedings are confidential. If the complaint is dismissed without the filing of formal charges, the commission may never disclose it. If the matter proceeds to the filing of formal charges, all proceedings are public except incapacity proceedings as defined in Rule 27. This reflects the policy adopted by the ABA in the Model Rules for Lawyer Disciplinary Enforcement and is consistent with Rule 4.6 of the Standards Relating to Judicial Discipline and Disability Retirement (1978).

Rule 12 provides immunity from civil suit for communications to the commission, commission counsel, disciplinary counsel or their staffs relating to misconduct or incapacity. Immunity does not attach to any communication made to the media or to anyone other than those named in the rule. Members of the commission, commission counsel and staff, and disciplinary counsel and staff are also absolutely immune from civil suit for all conduct in the course of their official duties. The Joint Subcommittee believes such immunity is essential to the effectiveness of the system.

Rule 13 provides that service of formal charges shall be made by personal service upon the judge or the judge's counsel or by registered or certified mail to the judge's address of record.

Rule 14 covers the use and enforcement of subpoenas.

Rule 15 provides that the highest court may place a judge on interim suspension upon the filing of an indictment, information, or complaint charging the judge with a serious crime under state or federal law or upon the receipt of sufficient evidence demonstrating that the judge poses a substantial threat of serious harm to the public or the administration of justice.

Rule 16 provides that disciplinary counsel must notify the complainant in writing of the final disposition of a matter under the Model Rules. Notice is to be mailed within 10 days of the disposition. Such notice is important to the integrity of the system and to public understanding of judicial discipline. **Rule 16** also provides that the complainant must be notified of the filing of formal charges and the time and place of the hearing if one has been scheduled.

III. Disciplinary Proceedings

The disciplinary process begins with the receipt of a complaint by the commission. A complaint is defined as information in any form from any source that alleges or from which a reasonable inference can be drawn that a judge committed misconduct or is

incapacitated. This definition is broad enough to allow disciplinary counsel to initiate a complaint.

Rule 17 provides that disciplinary counsel evaluate all complaints to determine whether the matter is within the jurisdiction of the commission and whether the information, if true, constitutes judicial misconduct or incapacity. If it does not, disciplinary counsel either dismisses the matter or refers it to another agency if appropriate. After a preliminary investigation to determine whether grounds exist to believe the allegations of complaints, disciplinary counsel recommends to the investigative panel that it either authorize a full investigation or dismiss the matter.

After the completion of the full investigation, during which disciplinary counsel has the power to issue subpoenas, disciplinary counsel recommends to the investigative panel dismissal, private admonition or deferred discipline agreement, the filing of formal charges or a petition for transfer to incapacity inactive status, referral to another agency, or a stay.

When a full investigation is authorized, the judge is notified of the nature of the allegations under investigation unless the investigation would be compromised by such disclosure. Deferral of notice to the judge must be approved by the investigative panel. Either disciplinary counsel or the judge may request a meeting. Disciplinary counsel may request that the judge respond in writing after receiving notice of the allegations. The judge has a duty to cooperate, and failure to do so could be grounds for discipline.

Rule 18 limits the use of dismissed complaints by the commission. It is intended to protect the judge from the use of unsubstantiated information years after the information was received. The rule provides that if a complaint has been dismissed prior to the filing of formal charges, the allegations made in that complaint are not to be used for any purpose in any future judicial or lawyer disciplinary proceeding against the judge. If additional information becomes known regarding the complaint, the allegations may be reinvestigated only with the consent of an investigative panel.

Rule 19 governs the filing of formal charges.

Rule 20 provides that the respondent judge is given 20 days to respond to the formal charges.

Rule 21 provides that failure to answer shall result in default and that all facts alleged are deemed admitted.

In **Rule 22**, the Subcommittee balanced the judges' expressed desire for the full range of civil discovery with the need to ensure that the process does not become mired in the time and expense of endless depositions. **Rule 22** is similar to Rule 15 of the Model Rules for Lawyer Disciplinary Enforcement. Subpoena power is available to the respondent after the filing of the answer. Disciplinary counsel has subpoena power from the authorization of the full investigation. Depositions may be taken of witnesses to be called at trial, witnesses who may be unavailable at trial, and of other relevant persons for good cause shown. Non-privileged information and evidence relevant to the charges including witness statements and summaries of interviews of witnesses are discoverable. Disciplinary counsel must make available exculpatory evidence. No other civil discovery is permitted. There is a suggested limit of 60 days from the date of filing of the answer to complete discovery.

Rule 23 provides that the hearing panel of the commission may enter into an agreement with the respondent for discipline by consent at any time after the filing of formal charges. The agreement is confidential until the highest court approves it. If it is not approved, the agreement cannot be used against the judge.

Rule 24 sets forth the rules of the hearing. If a hearing is held, the members of the hearing panel either sit as the finder of fact or appoint a subpanel or a hearing officer. Both parties may present evidence and produce and cross examine witnesses. Disciplinary counsel may call the respondent as a witness. **Rule 24C** provides that the hearing be recorded verbatim. After the hearing, the hearing panel may dismiss the case or recommend a sanction to the court. Any recommendation for sanction shall include findings of fact and conclusions of law and any minority opinions.

Rule 25 provides that dismissals and the recommendations for sanction shall be reviewed by the highest court in the state which may accept, reject, or modify in whole or in part the findings and conclusions of the commission. The highest court may dismiss the charges, remand to expand the record or impose sanctions.

IV. Special Proceedings

The last section of the Model Rules establishes a model for the

discipline of a member of the state's highest court and outlines procedures to be used in cases involving allegations of mental or physical incapacity.

Rule 26 provides that a complaint against a member of the highest court proceed through the process in the same way as any other except that a special supreme court is constituted to act in place of the highest court. The special court shall consist of a number of judges equal to the number of justices of the highest court and may be composed of trial or appellate court judges or a combination of the two. The special supreme court will act on interim suspension motions and serve as the appellate review body for the imposition of sanctions. If disciplinary counsel, the respondent, and the hearing panel of the commission reach agreement on the findings and sanction, then the hearing panel of the Commission has the power to impose the sanction without review by the special supreme court.

In **Rule 27**, the Joint Subcommittee proposes a detailed rule to control cases involving allegations of the mental or physical incapacity of a judge. Most jurisdictions and the current ABA Standards use the term disability rather than incapacity; however, as exemplified by the Americans with Disabilities Act, a disability does not necessarily disqualify a person from serving. **Rule 27** uses the term incapacity instead of disability. The rule makes it clear that determination of incapacity is not a disciplinary proceeding. The purpose of the proceeding is to determine whether the respondent suffers from a physical or mental condition that adversely affects the respondent's ability to perform judicial functions. The rule also establishes a procedure for handling disciplinary cases where the judge pleads incapacity as a defense.

The 1994 Model Rules Offer Balanced Procedures for the Handling of Complaints against Judges

The regulation of judicial conduct is critical to preserving the integrity of the judiciary and enhancing public confidence in the judicial system. To carry out the regulatory task, a jurisdiction should have an adequately-funded judicial discipline and incapacity system.

These Model Rules are intended to assist jurisdictions in reviewing the procedures of their existing judicial discipline systems and in drafting fair and efficient procedures for enforcement of the ethical codes if they choose to revise their present systems. The model system is a careful balance of a number of competing interests: the rights of judges to fair

treatment in the disposition of complaints against them; the judges' interest in the confidentiality of complaints for which the commission finds there is not reasonable cause to believe that misconduct occurred; the public's concern that complaints against judges are given serious consideration and that judges are held to high standards of behavior; and the interest of the judges and the public in having judicial disciplinary complaints resolved promptly and accurately.

These Model Rules are presented with the understanding that each jurisdiction should determine for itself whether to accept or modify the individual rules.

Respectfully submitted,

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AUGUST 1994

The information in this recommendation and report has not been reviewed nor approved by the ABA Board of Governors or the ABA House of Delegates and does not constitute ABA policy.

MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT

JUNE 1994

Standing Committee on Professional Discipline

Judicial Administration Division

Standing Committee on Ethics and Professional Responsibility

Standing Committee on Judicial Selection Tenure and Compensation

Standing Committee on Lawyers' Responsibility for Client Protection

JOINT SUBCOMMITTEE ON JUDICIAL DISCIPLINE

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MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT

June 1994

PREAMBLE

The regulation of judicial conduct is critical to preserving the integrity of the judiciary and enhancing public confidence in the judicial system. To carry out the regulatory task, a jurisdiction should have an adequately-funded judicial discipline and incapacity system.

These Model Rules are intended to be a resource to jurisdictions in reviewing the procedures of their existing judicial discipline systems and in drafting fair and efficient procedures for enforcement of the ethical codes if they choose to revise their present systems. These Model Rules reflect a careful balance of a number of competing interests: the rights of judges to fair treatment in the disposition of complaints against them; the judges' interest in the confidentiality of complaints for which the commission finds there is not reasonable cause to believe that misconduct occurred; the public's concern that complaints against judges are given serious consideration and that judges are held to high standards of behavior; and the interest of the judges and the public in having judicial disciplinary complaints resolved promptly and accurately.

This model is presented with the understanding that each jurisdiction should determine for itself whether to accept or modify the individual rules.

In the following Model Rules, text in [brackets] is discretionary or an alternative provision. Text in {braces} requires the specific title of an entity, agency officer, code or rules.

TERMINOLOGY

To promote effective disciplinary enforcement in this state and among jurisdictions, the uniform terminology set forth below shall be used.

Commission Counsel: the lawyer drafting reports, providing legal advice to the commission and performing other duties assigned by the commission. See Rule 5.

Complaint: information in any form from any source received by the commission that alleges or from which a reasonable inference can be drawn that a judge committed

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Terminology, cont'd

1 misconduct or is incapacitated. If there is no written complaint from another person,
2 disciplinary counsel's written statement of the allegations constitutes the complaint.

3
4 **Deferred Discipline Agreement:** a confidential agreement between the judge and
5 an investigative panel of the commission for the judge to undergo treatment, participate
6 in education programs or take other corrective action. It is only available as a response
7 to misconduct that is minor and can be addressed through treatment or a rehabilitation
8 program. A deferred discipline agreement can only be entered into prior to the filing and
9 service of formal charges.

0
1 **Disciplinary Counsel:** the lawyer in charge of screening and investigating
2 complaints, prosecuting formal charges and performing other duties assigned by the
3 commission. See Rule 4.

4
5 **Formal Charges:** the document that charges the judge with specific acts of
6 misconduct or with a specific incapacity.

7
8 **Hearing Panel:** the panel of the commission that conducts hearings on formal
9 charges. See Rule 3.

0
1 **Hearing:** the public proceeding at which the issues of law and fact raised by the
2 formal charges and answer are tried. See Rule 24.

3
4 **Highest Court:** the highest court of the jurisdiction.

5
6 **Incapacity:** a mental or physical condition that adversely affects a judge's ability
7 to perform judicial functions. Incapacity is distinguished from a disability that does not
8 adversely affect a judge's performance of judicial functions.

9
0 **Incapacity Inactive Status:** non-disciplinary involuntary retirement or removal
1 of a judge from judicial office, with or without pay or retirement benefits, because of
2 mental or physical inability to perform judicial functions.

3
4 **Interim Suspension:** temporary removal from office pending a final determination
5 in any proceeding under these rules. See Rule 15.

6
7 **Investigation:** an inquiry into allegations of misconduct, including a search for and
8 examination of evidence concerning the allegations, divided into two stages: a preliminary
9 investigation conducted by disciplinary counsel after the receipt of a complaint and a full
0 investigation conducted after approval by an investigative panel of the commission. See
1 Rule 17.

1 **Investigative Panel:** the panel of the commission that determines whether full
2 investigations will be conducted and whether formal charges will be filed. See Rule 3.

3
4 **Judge:** anyone, whether or not a lawyer, who is an officer of a judicial system,
5 and who is eligible to perform judicial functions, including an officer such as a
6 magistrate, court commissioner, special master or referee, is a judge within the meaning
7 of these Rules.

8
9 **Misconduct:** any conduct by a judge constituting grounds for discipline. See Rule
10 6.A.

11
12 **Private Admonition:** a non-public sanction imposed on a judge by an investigative
13 panel of the commission with the consent of the judge. See Rule 6.B(6). A private
14 admonition cannot be imposed after the filing and service of formal charges. Only in
15 cases of minor misconduct, when there is little or no injury to the public, the legal
16 system, or the profession, should a private admonition be imposed.

17
18 **Proceedings:** all steps in the discipline and incapacity system set forth in these
19 rules.

20
21 **Public Members:** members of the commission who are neither lawyers nor
22 judges.

23
24 **Public Reprimand:** a reprimand by the highest court in the form of a written
25 decision which shall be imposed in person or served upon the respondent by certified
26 mail.

27
28 **Reasonable Cause:** a reasonable ground for belief in the existence of facts
29 warranting the filing of formal charges for discipline or a petition for transfer to
30 incapacity inactive status.

31
32 **Record:** all documents filed in the case beginning with the formal charges. The
33 record includes a transcript of the hearing on the formal charges only if a transcript is
34 requested by the respondent, disciplinary counsel, or a member of the hearing panel,
35 commission or highest court.

36
37 **Respondent:** a judge or former judge against whom formal charges have been
38 filed.

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Terminology, cont'd

- 1 **Screening:** examination of a complaint or other information coming to the
- 2 attention of disciplinary counsel to determine whether the commission has jurisdiction.
- 3 See Rule 17.
- 4
- 5

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Section I. ORGANIZATION AND STRUCTURE

RULE 1. DISCIPLINARY AUTHORITY

The disciplinary authority of the commission extends to every judge.

Commentary

A judge is anyone, whether or not a lawyer, who is an officer of a judicial system, and who is eligible to perform judicial functions, including an officer such as a magistrate, court commissioner, special master or referee. See definition of "Judge" in the Terminology Section. The commission's authority does not extend to federal judges or to administrative law judges of independent state agencies. Administrative law judges are affiliated with the executive branch of government and are not subject to discipline under these rules unless the legislature takes affirmative action to put them within the commission's jurisdiction. Each jurisdiction should determine whether mediators, arbitrators, and referees acting under the judicial branch should be included under these model rules.

The commission's authority extends to members of the jurisdiction's highest court.

See Rule 26.

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Rule 1, cont'd

1

RULE 2. THE COMMISSION ON JUDICIAL CONDUCT

A. Purpose. The Commission on Judicial Conduct shall administer the judicial discipline and incapacity system.

B. Jurisdiction.

(1) **Judges.** The commission has jurisdiction over judges regarding allegations that misconduct occurred before or during service as a judge and regarding allegations of incapacity during service as a judge.

(2) **Former Judges.** The commission has continuing jurisdiction over former judges regarding allegations that misconduct occurred before or during service as a judge if a complaint is made within one year following service as a judge.

C. Appointment of Members. The commission shall have [12] members who shall be residents of {jurisdiction}. [4] members shall be judges of the intermediate appellate or trial courts appointed by the highest court; [4] members shall be lawyers admitted to practice in this state appointed by the {name of bar association}; and [4] members who are neither lawyers nor judges shall be public members appointed by the Governor.

D. Terms. Commission members shall serve for a term of [4] years and shall be eligible for reappointment to a second full term. Initial appointments shall be made so that the terms of one member in each of the three categories shall expire every year. A member appointed to a term of less than [4] years or to fill an unexpired term may be reappointed for two full terms. The commission members shall not be subject to removal except for cause. Removal shall be by the respective appointing authority.

E. Vacancies. A vacancy shall occur when a commission member ceases to be eligible to represent the category from which the member was appointed, or becomes unable to serve for any reason. An appointment to fill a vacancy for the duration of an unexpired term shall be made by the appropriate appointing authority. If a vacancy is not filled by the appointing authority within [60] days from the date on which the commission notified the appointing authority of the vacancy, the {chief justice of the highest court} shall appoint from the category to be represented a member within the next [10] days. That member will serve for the duration of the unexpired term.

F. Funding. The commission shall prepare its own budget, separate from the budget of any other agency or branch of government, and submit it to {legislature}.

Commentary

Although the commission may be established by the highest court or the legislature, it should be established by constitutional provision to make certain the commission is free from interference from any branch of government. The rule, therefore, does not contain an establishment clause.

1 The commission has jurisdiction over the conduct of judges that is alleged to be
2 in violation of the jurisdiction's code of judicial conduct or other applicable ethics code
3 whether the conduct occurs on or off the bench and whether the judge is full-time or part-
4 time. The commission has concurrent jurisdiction with the lawyer disciplinary agency
5 over part-time judges who are lawyers, because misconduct can occur in the part-time
6 judge's capacity as a practicing lawyer, and because a violation of the code of judicial
7 conduct can also be a violation of the rules of professional responsibility. See Rule
8 6.A(1). See also Model Rules for Lawyer Disciplinary Enforcement, Rule 12.

9
10 The commission has jurisdiction over former judges to respond to complaints of
11 misconduct that occurred before or during service as a judge if a complaint is brought
12 within one year following the last day of the judge's service. This continuing jurisdiction
13 ensures that judges cannot avoid judicial discipline by resigning before information
14 regarding their misconduct was made known to disciplinary counsel and thereafter seek
15 judicial office with no record of misconduct. Obviously, the commission will exercise
16 discretion in initiating an investigation of a former judge. Important factors the
17 commission may consider are the seriousness of the complaint, the likelihood that the
18 judge will return to judicial service and the extent to which the matter can and will be
19 appropriately handled by the lawyer disciplinary agency.

20 Suspension or removal, as authorized under Rule 6.B, may be imposed to allow
21 the record to reflect that the judge who resigned was determined to have engaged in
22 conduct that warranted suspension or removal.

23
24 Procedures for handling allegations against members of the highest court are set
25 out in Rule 26.

26
27 Each category of commission members (judges, lawyers, and public members)
28 should be equally represented on the commission, in order to balance viewpoints and to
29 distribute appointing authority among the branches of government. To the extent practical,
30 appointments should reflect the diversity of the state's population. Appointments should
31 not be made on the basis of politics or ideology if the commission's independence is to
32 be protected from the appearance of impropriety and outside interference. Members of
33 the jurisdiction's highest court should not be commission members because they are
34 members of the court that will decide the outcome of each disciplinary case. Incumbent
35 and retired judges may be designated as judicial members.

36 Public confidence in the judicial discipline system is enhanced when the
37 commission includes members of the public. Their participation provides the judicial
38 discipline commission with an important perspective and avoids the appearance of a
39 closed system. Many states have recognized the importance of public members to the
40 maintenance of public confidence in judicial discipline by increasing the number of public
41 members on their judicial discipline commissions.

1
2 The membership terms should be long enough to provide consistency but short
3 enough to promote new perspectives. In jurisdictions where proceedings are infrequent,
4 the terms may be made longer to ensure continuity and expertise.
5

6 To assure the commission's fiscal and operational independence, its necessary
7 expenses should be provided for in a budget separate from that of the judicial branch.
8 This protects the judiciary from the charge that it is withholding funds and thereby
9 hampering the commission in investigating the conduct of its members. The commission
10 should be authorized to prepare and submit its budget independently. It should not have
11 to rely on any other agency for this essential function.
12

13 If a jurisdiction is to have a judicial system that has the confidence of the citizens,
14 it must have a judicial discipline system that is independent and effective. The only way
15 to achieve such a discipline system is to fund it adequately so that budgetary constraints
16 do not inhibit the investigation of complaints and presentation of formal charges.
17

104

Rule 2, cont'd

1

RULE 3. ORGANIZATION AND AUTHORITY OF THE COMMISSION

A. Panels and Meetings. The commission shall divide itself into a hearing panel of [9] members and an investigative panel of [3] members. Investigative and hearing panels include members from each category of membership – lawyer, judge, and public members. [Membership on the panels may rotate in a manner determined by the commission provided that no member shall sit on both the hearing and investigative panel for the same proceeding.] Panels shall meet when scheduled by the commission. The full commission shall meet periodically as determined by the commission to consider administrative matters. Meetings of the commission other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of three members of the commission.

B. Officers. The commission shall elect one of its members to serve as chair and another to serve as vice-chair for such terms as the commission shall determine. The vice-chair shall perform the duties of the chair whenever the chair is absent or unable to act.

C. Quorum. [7] members of the full commission, [5] members of a hearing panel, and [3] members of an investigative panel shall constitute a quorum for the transaction of business. A quorum of the commission or any panel must include one member from each category of membership. Alternate members should be appointed where necessary to fulfill the quorum requirements.

D. Expenses. Members shall be reimbursed for reasonable and necessary expenses incurred pursuant to their duties.

E. Powers and Duties.

(1) The commission shall have the duty and authority to:

- (a) adopt its own rules of procedure for discipline and incapacity proceedings subject to the approval of the highest court;
- (b) propose amendments to the {code of judicial conduct} and these Rules For Judicial Disciplinary Enforcement to the highest court;
- (c) appoint disciplinary counsel; and
- (d) appoint commission counsel.

(2) In addition to the duties assigned to disciplinary counsel and commission counsel in Rules 4 and 5, the commission may delegate to either the disciplinary counsel or commission counsel the duty and authority to:

- (a) maintain the commission's records;
- (b) maintain statistics concerning the operation of the commission and make them available to the commission and the highest court;
- (c) prepare the commission's budget for its approval and administer the funds;
- (d) notify the appropriate appointing authority of vacancies on the commission;
- (e) prepare an annual report of the commission's activities for presentation to the highest court and the public; and

(f) inform the public of the existence and operation of the judicial discipline system, including the commission's address and telephone number and the disposition of each matter in which public discipline is imposed.

(3) An investigative panel shall have the duty and authority to:

(a) review the recommendations of disciplinary counsel after preliminary investigation and either authorize a full investigation or dismiss the complaint; and

(b) review the recommendations of disciplinary counsel after full investigation and approve, disapprove or modify the recommendations as provided in Rule 17.D(2).

(4) a hearing panel shall have the duty and authority to:

(a) rule on pre-hearing motions, conduct hearings on formal charges and make findings, conclusions, and recommendations to the highest court for sanctions or dismiss the case, pursuant to Rule 24;

(b) appoint a hearing officer or a subpanel of the hearing panel to conduct the hearing in appropriate cases; and

(c) review findings of the hearing officer or subpanel if one has been appointed, and make findings, conclusions, and recommendations to the highest court for sanctions or dismiss the case.

F. Recusal. A member of the commission shall recuse himself or herself in any matter in which recusal would be required of a judicial officer under the {code of judicial conduct}.

G. Complaints Against Members of the Commission. If a complaint is filed against a member of the commission who is a judge subject to the jurisdiction of the commission, the commission member against whom the complaint has been filed shall not participate in the investigation or adjudication of the matter.

Commentary

The proposed rules seek to separate the investigative and adjudicative functions of commission members. No matter how fair individual members can be, the system cannot convey the appearance of fairness when members have full access to investigative materials, formulate their decisions to file charges in reliance on the investigative files, and then make adjudicative decisions based on the evidence presented in formal proceedings. This process is in conflict with the fundamental division of investigative and adjudicative responsibilities that is a hallmark of our judicial system. The indicting grand jury does not hear and determine the evidence presented at trial. Such a process could not be regarded as fair by a defendant who is indicted and convicted by the same body.

The commission divides itself into panels so that no member of the commission is involved both in deciding whether to file formal charges and in hearing the case on those charges. The rotation of membership provides that all members of the commission

1 will be involved in both investigation of complaints and the hearing of charges. Each
2 commission should decide the method of rotation. The panels could rotate on a per case,
3 per meeting, per quarter basis, or even semiannual or annual basis as the case load and
4 convenience of the commission dictates. Investigative and hearing panels should meet fre-
5 quently enough to efficiently dispose of all complaints. Periodic meetings of investigative
6 panels eliminate scheduling difficulties and provide adequate advance notice of scheduled
7 meetings.

8 The independence of the commission will be enhanced if the commission chooses
9 its own leadership.

10 No qualified person should be deterred from serving on the commission by the
11 expenses incurred for service.

12 It is essential that the commission have the authority to promulgate its own rules
13 of procedure to achieve uniformity, continuity, and the equitable and expeditious
14 resolution of recurring issues. Rules of procedure may include matters such as the
15 grounds and procedures for disqualification of a member, the method of appointing
16 hearing officers, the procedures to be followed by hearing officers, and other matters
17 related to the proceedings. Each commission will develop the expertise necessary to adopt
18 its own rules. Since administrative procedures and civil rules may not be appropriate to
19 all aspects of these proceedings (see Rule 8), it is essential that the commission have this
20 authority.

21 The commission may appoint a hearing officer or a subpanel of the hearing panel
22 in cases where taking evidence would be burdensome on a hearing panel. Hearing officers
23 could be members of the hearing panel or lawyers or former judges who are not members
24 of the commission. If a subpanel of the hearing panel is used, there should be equal
25 representation of categories of members: one lawyer, one judge, and one non-lawyer
26 member. The hearing officer or subpanel makes findings of fact and submits a report to
27 the full hearing panel with a time provided for the disciplinary counsel and the respondent
28 to file objections. The hearing panel then reviews the report and record and makes its
29 own findings, conclusions, and recommendations to the highest court for sanction or
30 dismissal. If a subpanel of the hearing panel conducts the hearing, the members of the
31 subpanel may sit with the full hearing panel when it reviews the report of the subpanel.
32 If hearing officers are used, they should have knowledge of the principles of judicial
33 ethics and discipline.

34 The commission appoints disciplinary counsel and commission counsel but
35 disciplinary counsel can be removed only with the concurrence of the commission and the
36 highest court. See Rule 4. The duties of disciplinary counsel and commission counsel are
37 specified in Rules 4 and 5. The commission can delegate the functions in Rule 3.E(2) to
38 either disciplinary counsel or commission counsel.

39 Educating the public, bar, and judiciary should be an integral part of the
40 enforcement function. Distribution of a detailed annual report is essential to this purpose.
41 To fulfill its educational function, the annual report should contain: a description of the

commission's purpose and function, basic statistics, descriptions of proper and improper judicial conduct, a discussion of the cases decided during the year including private sanctions (without identifying the judges), an explanation of any recommendations for changes in procedure or in the code of judicial conduct, and an explanation of how to bring a matter before the commission. The annual report should be widely distributed and available, upon request, free of charge.

RULE 4. DISCIPLINARY COUNSEL

A. Appointment. The commission shall appoint disciplinary counsel [for a term of 8 years subject to reappointment]. Full-time disciplinary counsel shall not otherwise engage in the practice of law or serve in a judicial capacity. Disciplinary counsel shall not be removed from office except upon the concurrence of both the highest court and the commission.

B. Powers and Duties. Disciplinary counsel shall have the authority and duty to:

(1) receive and screen complaints, refer complaints to other agencies when appropriate, conduct preliminary investigations, recommend to an investigative panel of the commission and upon authorization conduct full investigations, notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after full investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file notices of exceptions to the findings, conclusions, recommendations for sanctions or orders of dismissal of hearing panels;

(2) maintain permanent records of the operations of disciplinary counsel's office, including receipt of complaints, screening, investigation, and filing of formal charges in judicial discipline and incapacity matters, subject to the requirements of Rule 18;

(3) compile statistics to aid in the administration of the system, including but not limited to a log of all complaints received, investigative files, and statistical summaries of docket processing and case dispositions;

(4) prepare disciplinary counsel's budget for submission to the commission and administer the funds;

(5) employ and supervise other members of disciplinary counsel's staff;

(6) employ private investigators or experts as necessary to investigate and process matters before the commission and the highest court; and

(7) perform other duties at the direction of the commission.

Commentary

The proposed model rules contemplate the establishment of a professional staff exclusively committed to the disciplinary system, and not on loan from other agencies of state government. Although the size of the disciplinary counsel's staff will vary, every state should have at least one person who is responsible for the investigation of complaints and presentation of evidence of judicial misconduct. A system that relies on other government agencies to investigate complaints or present evidence, or both, loses efficiency and endangers confidentiality. The proposed model rules envision a disciplinary counsel who would develop expertise and oversee the proper functioning of the system. At the same time, a separate position, identified in the proposed rules as commission

1 counsel, would assist the commission in its deliberative functions and act on its behalf in
2 arranging for hearings and resolving minor scheduling conflicts.

3 Most states provide for an "executive director" of the commission. The concept
4 of executive director is not in keeping with the demands of the 1990's. That person is too
5 closely aligned with the commission members who exercise discretion in post-charge
6 proceedings. Too many states rely on the executive director to conduct investigations,
7 present evidence, and provide advice and services to the commission members in their
8 post-charge, decision-making capacity. Some states have taken informal steps to prevent
9 executive directors from performing the inconsistent roles of prosecutor and advisor, but
10 in the absence of clear rules, the perception persists that the executive directors continue
11 to carry out such conflicting roles. One alternative, equally flawed, is for the commis-
12 sion's executive director to conduct the investigation, retain outside counsel to present
13 evidence on formal charges, and then advise the commission in its deliberative and
14 adjudicative functions. Although not constitutionally mandated, prosecutorial and
15 adjudicative functions should be separated as much as possible to avoid unfairness and the
16 appearance of unfairness.

17 Disciplinary counsel should serve full-time. In jurisdictions where the work load
18 is insufficient to warrant hiring a full-time disciplinary counsel, a person who is licensed
19 to practice but whose practice would not involve a conflict should be retained on a
20 part-time basis. In order to preserve disciplinary counsel's independence (e.g. to appeal
21 the decision of the hearing panel under Rule 24.F), the commission should not have sole
22 control over the removal of disciplinary counsel. Although requiring both the highest
23 court and the commission to agree on removal makes it more difficult to terminate
24 disciplinary counsel, the importance of protecting the independence of this office
25 outweighs the commissions's interest in being able to act quickly to terminate unsatisfac-
26 tory counsel. Recognizing the difficulty in terminating disciplinary counsel, some
27 jurisdictions may choose to establish a term of office for disciplinary counsel.

28 The duties of disciplinary counsel and commission counsel should be
29 clearly defined and separated: the commission counsel is legal counsel to the commission.
30 Disciplinary counsel receives and screens complaints, conducts investigations, and
31 presents formal charges. Disciplinary counsel should not participate in commission
32 deliberations, draft decisions, orders, or other documents, or otherwise serve as legal
33 counsel to the commission. Disciplinary counsel shall also perform those duties assigned
34 by the commission under Rule 3.E(2).

35 The hiring and supervision of disciplinary counsel's staff are the responsibility of
36 disciplinary counsel. Disciplinary counsel has the authority to employ lawyers, private
37 investigators, and other experts necessary to investigate and present cases before the
38 commission and the highest court.

39 Judicial investigations should be conducted by disciplinary counsel under the
40 authority of the commission. Disciplinary counsel should not use law enforcement
41 officials or staff to investigate complaints or present cases. These persons have other
42 responsibilities that could be given priority over the processing of disciplinary matters.

- 1 Their use could compromise the confidentiality of investigations and could pose separation
- 2 of powers problems.
- 3 The disciplinary counsel's office should be adequately funded to assure its
- 4 independence and effectiveness. Budgetary constraints should not prevent the investigation
- 5 of complaints and presentation of formal charges.
- 6

104

Rule 4, cont'd

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RULE 5. COMMISSION COUNSEL

A. Appointment. The commission may appoint a commission counsel to assist the commission.

B. Powers and Duties. The commission may delegate functions to the commission counsel, including but not limited to the duty and authority to:

(1) advise the hearing panel during its deliberations and draft decisions, orders, reports, and other documents on behalf of the hearing panel;

(2) employ and supervise other staff necessary to the performance of the commission's duties; and

(3) perform other duties at the direction of the commission.

Commentary

It is crucial to the perception of fairness that the commission keep separate the tasks of investigation and prosecution, which are performed by disciplinary counsel, and the tasks of conducting the hearing and determining the recommended disposition of the complaint, which are performed by the hearing panel of the commission. To do so, the commission cannot allow the hearing panels to obtain help or advice from disciplinary counsel on any procedural or substantive matters such as those relating to discovery, the manner of holding the hearing, the disposition of the complaint or the drafting of the findings of fact and recommended disposition. It is possible for the hearing panels to operate without the benefit of advice or assistance from paid counsel, particularly in jurisdictions in which few complaints reach the hearing stage, but it is a significant burden on volunteer commission members to expect them to work without staff help. For this reason, the commission should hire a commission counsel to provide legal research, drafting, and advice. In jurisdictions where the work load is not sufficient to warrant hiring a commission counsel full-time, the commission may choose to retain on a part-time or per diem basis an individual who is licensed to practice but whose practice would not involve a conflict.

The commission counsel and staff can assist the commission in the assignment of hearing and investigative panel members, provide the support necessary to the efficient functioning of the hearing process and perform any other duties assigned by the commission under Rule 3.E(2).

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Rule 5, cont'd

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SECTION II. GENERAL PROVISIONS

RULE 6. GROUNDS FOR DISCIPLINE; SANCTIONS IMPOSED; DEFERRED DISCIPLINE AGREEMENT

A. Grounds for Discipline. The grounds for discipline are:

(1) any conduct constituting a violation of the {code of judicial conduct} or {rules of professional conduct} or other applicable ethics codes; or

(2) a willful violation of a valid order of the highest court, commission, or panels of the commission in a proceeding under these rules, a willful failure to appear personally as directed, or a knowing failure to respond to a lawful demand from a disciplinary authority.

B. Sanctions. These sanctions may be imposed upon a respondent who has committed misconduct:

(1) removal by the highest court;

(2) suspension by the highest court;

(3) imposition by the highest court of limitations on the performance of judicial duties;

(4) imposition of lawyer discipline by the highest court;

(5) public reprimand by the highest court;

(6) private admonition by an investigative panel of the commission with the consent of the judge, provided that a private admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of the sanction to be imposed, pursuant to Rule 17.F(3); and

(7) deferred discipline agreement.

Commentary

If a jurisdiction has determined that referees, mediators, and arbitrators acting under the judicial branch are to be included under these model rules, then a violation of any ethics codes applicable to those positions would be grounds for discipline.

Removal and suspension are the most serious sanction that can be imposed by the judicial discipline system. They can be imposed only by the highest court, and their use is appropriate when the respondent's misconduct demonstrates that the respondent is unfit to hold judicial office.

In many instances, however, judicial misconduct is of a lesser nature that does not require the judge's removal or suspension, either to protect the public or to preserve the integrity of the judiciary. The facts may indicate that the judge can continue to serve effectively with certain limitations (e.g., limitation to a specific court or docket or participation in a therapy, counseling, or recovery program). In these cases, the commission should recommend, and the highest court should exercise its inherent authority to fashion, appropriate limitations and conditions.

1 A private admonition is a non-public sanction imposed on a judge by an
2 investigative panel of the commission with the consent of the judge. A private admonition
3 cannot be imposed after the filing and service of formal charges. Only in cases of minor
4 misconduct, when there is little or no injury to the public, the legal system or the
5 profession, should a private admonition be imposed. A deferred discipline agreement is
6 a confidential agreement between the judge and an investigative panel of the commission
7 for the judge to undergo treatment, participate in education programs or take other
8 corrective action. It is only available as a response to misconduct that is minor and can
9 be addressed through treatment or a rehabilitation program. A deferred discipline
10 agreement can only be entered into prior to the filing and service of formal charges.

11
12 Some misconduct is so minor that it is appropriate not to impose any discipline.
13 It is not intended that every transgression of the Canons and Sections of the Code of
14 Judicial Conduct will result in the imposition of discipline. Whenever the commission
15 determines there has been a transgression, it should consider whether disciplinary action
16 is appropriate and the degree of discipline to be imposed through a reasonable and
17 reasoned application of the text of the Code, taking into account such factors as the
18 seriousness of the transgression, whether there is a pattern of improper activity and the
19 effect of the improper activity on others or on the judicial system. See ABA Model Code
20 of Judicial Conduct, p.4.

21
22 Under these rules it is not within the commission's authority to impose public
23 discipline. That is the responsibility of the highest court. The commission's function is
24 to determine facts, make conclusions of law and recommend sanctions, or dismiss cases
25 when misconduct was not proven. Some jurisdictions may choose to give the commission
26 the authority to impose some forms of public discipline. (See Rule 25 regarding review
27 by the highest court.)

28
29 Some misconduct is so serious that the respondent should not only be removed
30 from judicial office but also be disbarred or suspended from the practice of law. This
31 does not mean that disbarment should follow automatically every time a respondent is
32 removed from office; rather, it should be determined on the facts of each case.

33 The lawyer disciplinary agency should be provided an opportunity to brief the
34 highest court on its recommendations regarding lawyer discipline in order to avoid
35 duplicative lawyer disciplinary procedures against the respondent judge. See Rule 24.G.
36 "Lawyer discipline" includes disbarment, suspension, limitations on practice, and other
37 sanctions authorized by the rules for lawyer disciplinary enforcement. See ABA Model
38 Rules for Lawyer Disciplinary Enforcement.

39
40 Removal by impeachment is the least desirable method of judicial discipline. It is
41 an all-or-nothing approach. The impeachment process is subject to political considerations

1 and it is expensive, cumbersome, and ineffective. However, the availability of
2 impeachment as a sanction serves as a check not only upon the judiciary, but upon the
3 judicial discipline and incapacity process as well.
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Rule 6, cont'd

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3 **RULE 7. PROOF**

4 **Charges of misconduct and grounds for transfer to and from incapacity**
5 **inactive status shall be established by clear and convincing evidence. The burden of**
6 **proof in proceedings seeking transfer from incapacity inactive status is on the judge.**
7

8 **Commentary**

9 Judicial (and lawyer) disciplinary cases are neither civil nor criminal in nature but
10 are *sui generis*. "Clear and convincing evidence" is a standard of proof higher than the
11 civil law standard of "preponderance of the evidence" and lower than the criminal law
12 standard of "beyond a reasonable doubt." The standard of proof required to sanction a
13 respondent's conduct is thus commensurate with the importance of protecting the judicial
14 system's ability to function -- more than required to prove a private wrong, less than
15 required to prove a criminal offense. The same standard is applied in lawyer disciplinary
16 proceedings. See ABA Model Rules for Lawyer Disciplinary Enforcement. When
17 incapacity is raised as a defense, the same burden of proof applies. See Rule 27.D(1).
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Rule 7, cont'd

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RULE 8. CIVIL RULES APPLICABLE

Except as otherwise provided in these rules, the {rules of evidence applicable to non-jury civil proceedings} and the {rules of civil procedure} apply in judicial discipline and incapacity cases.

Commentary

Rules adopted by the commission pursuant to its authority under Rule 3.E(1)(a) take precedence over the jurisdiction's civil rules of evidence and procedure. See, e.g., Rule 13 on service, Rule 14 on subpoena power, and Rule 22 on discovery.

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Rule 8, cont'd

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RULE 9. RIGHT TO COUNSEL

The judge shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings.

Commentary

The judge should have the right to counsel at all stages of the proceedings.

104

Rule 9, cont'd

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RULE 10. EX PARTE CONTACTS

Members of the commission, hearing officers, and commission counsel shall not engage in ex parte communications regarding a case, except that before making a determination to file formal charges in a case pursuant to Rule 17.D(2), members of the investigative panel assigned to that case may communicate with disciplinary counsel as required to perform their duties in accordance with these rules.

Commentary

What constitutes ex parte communication is determined by the jurisdiction's code of judicial conduct and rules of professional responsibility. The ABA Model Code of Judicial Conduct Canon 3B(7) states:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided;

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a distinguished expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized to do so.

104

Rule 10, cont'd

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RULE 11. CONFIDENTIALITY**A. Proceedings.**

(1) Before the filing and service of formal charges, all proceedings shall be confidential.

(2) After the filing and service of formal charges, all proceedings shall be public except incapacity proceedings as provided in Rule 27.B.

B. Information.

(1) Before the filing and service of formal charges, all information relating to a complaint that has not been dismissed shall be held confidential by the commission and disciplinary counsel and their staffs, except that the commission may disclose information:

(a) when the commission has determined that there is a need to notify another person to protect that person or to notify a government agency in order to protect the public or the administration of justice; or

(b) upon waiver in writing by the judge.

(2) All information relating to a complaint that has been dismissed without formal charges being filed shall be held confidential by the commission and disciplinary counsel and their staffs.

(3) Disciplinary counsel's work product, commission deliberations, and records of the commission's deliberations shall not be disclosed.

Commentary

In the initial stages of the disciplinary case, confidentiality is necessary to protect a judge's reputation from unfounded charges and to protect witnesses from possible recriminations while a claim is being investigated.

Once the formal charges have been filed and served upon the judge, the policy emphasis shifts from confidentiality to the public's right to know. The integrity of the judicial system is better protected by an open public hearing than by a closed hearing. This is particularly true in those instances in which the conduct is publicly known and the commission proceedings are the subject of rumor and speculation. Once formal charges have been filed and served, there is no longer a danger that the charges are frivolous. It is no longer possible to protect the identity of the witnesses because their identity must be disclosed through the discovery to which the respondent is entitled.

Rule 11.B(1)(a) is intended primarily to cover the release of information the commission determines should be made known to law enforcement authorities or to the assigning authority in connection with the assignment or reactivation of a judge to judicial duties. It does not apply to information sought by appointing authorities, who may obtain information only upon waiver as provided in Rule 11.B(1)(b).

Neither the commission nor disciplinary counsel should disclose information about dismissed complaints even if a waiver has been signed by the judge who is the subject of the complaint. Such waivers are rarely voluntary, but are signed at the direction of organizations that can withhold benefits or determine career advancement, such as

1 admission to practice in another state, appointment to the federal bench, etc. Disclosing
2 the existence of complaints that were considered and dismissed is unfair to the judge and
3 undermines the work of the commission. It is unfair to allow any adverse inferences to
4 be drawn from the mere existence of a complaint when it was not substantial enough to
5 state a possible ground for discipline. The commission and disciplinary counsel will have
6 greater credibility if they do not release information about dismissed complaints under any
7 circumstances. If the judge wishes to have such information disclosed, the judge may
8 release the information.

RULE 12. IMMUNITY FROM CIVIL SUITS

Communications to the commission, commission counsel, disciplinary counsel, or their staffs relating to misconduct or incapacity and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witness. Members of the commission, commission counsel and staff, and disciplinary counsel and staff shall be absolutely immune from civil suit for all conduct in the course of their official duties.

Commentary

This rule does not cover immunity from criminal prosecution. Immunity from criminal prosecution for witnesses in judicial disciplinary proceedings is covered by Rule 17.H.

It is crucial that persons with information about misconduct feel free to bring matters to the commission. Complainants and witnesses will not come forward without some protection.

Complainants and witnesses should be granted absolute immunity. Qualified immunity does not protect against the threat of a civil lawsuit because it does not apply to acts done with malice. The judge may file suit alleging malice and force the complainant or witness to undergo the expense of defending the suit. Qualified immunity therefore does not serve to encourage cooperation with the disciplinary process.

Immunity from civil action attaches only to communications made to the commission or its staff and to testimony given in the proceeding. If the complainant or witness publicly discloses the information, immunity does not apply to the public disclosure. The complainant or witness remains liable in a civil action if he or she publicly makes a false allegation about a judge. Immunity under this rule does not protect a complainant or witness from a criminal prosecution for perjury.

Commission members and staff must be free from harassment. Immunity assures the independence of the commission and eliminates a major deterrent to service on it.

The immunity provision of this rule may require legislative enactment if existing statutes in the jurisdiction are not applicable to judicial disciplinary officials.

104

Rule 12, cont'd

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RULE 13. SERVICE

Service upon the judge of formal charges in any disciplinary or incapacity proceeding or of notice that a complaint has been received shall be made by personal service upon the judge or judge's counsel by any person authorized by the chair of the commission or by registered or certified mail to [the judge's address of record]. Delivery of all other papers or notices shall be made in accordance with {jurisdiction's rules of civil procedure}.

Commentary

Service may be completed by a variety of means including: personal service upon the judge, or, with the judge's consent, upon the judge's counsel; or registered or certified mail to the judge at the judge's address of record. Because of geographical limitations, personal service may be difficult and expensive. Moreover, it is awkward and difficult to serve a judge personally, and with current security concerns, the process server may have great difficulty effectuating personal service. If a jurisdiction finds that these limitations are not applicable in its state, it may choose to require personal service. The best way to ensure confidentiality and prompt service is to advise the judge's attorney who, in return, will obtain the judge's consent to accept service on the judge's behalf.

Disciplinary counsel will probably consider different methods of service for different purposes. A letter to the judge disclosing that an investigative panel has authorized a full investigation may be mailed by certified or registered mail, while the service of formal charges may be accomplished by serving the judge's lawyer on the lawyer's assurance that he or she has authority to accept service. Usually, the judge is relieved not to have to accept personal service.

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Rule 13, cont'd

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RULE 14. SUBPOENA POWER

A. Oaths. Oaths and affirmations may be administered by any member of the commission, disciplinary counsel in matters under full investigation, or any other person authorized by law.

B. Subpoenas for Investigation. After a full investigation is authorized pursuant to Rule 17.B(3), disciplinary counsel may compel by subpoena the attendance of the judge or witnesses and the production of pertinent books, papers, and documents for purposes of investigation. The investigative panel may issue subpoenas for specific witnesses or documents at the request of a judge under investigation.

C. Subpoenas for Deposition or Hearing. After formal charges are filed, disciplinary counsel and respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents at a deposition or hearing held under these rules.

D. Enforcement of Subpoenas. Upon proper application, the {appropriate court of general jurisdiction of the circuit, county, or city} in which the attendance or production is required may enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

E. Quashing Subpoena. Any attack on the validity of a subpoena shall be heard and determined by the investigative or hearing panel before which the matter is pending or by the court wherein enforcement of the subpoena is being sought. Any resulting order is not appealable prior to entry of a final order in the proceeding.

F. Witnesses and Fees. Subpoena fees and costs shall be the same as those provided for in proceedings in the {appropriate court of general jurisdiction}.

104

Rule 14, cont'd

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RULE 15. INTERIM SUSPENSION

A. Criminal Prosecution. Without the necessity of commission action, the highest court may immediately place a judge on interim suspension upon notice of the filing of an indictment, information, or complaint charging the judge with a "serious crime" under state or federal law.

B. Definition of "Serious Crime". A "serious crime" is any felony or lesser crime that reflects adversely on the judge's honesty, trustworthiness or fitness as a judge in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a "serious crime."

C. Other Misconduct. Upon receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, the highest court may transfer the judge to incapacity inactive status or suspend the judge pending a final determination in any proceeding under these rules.

D. Motion for Reconsideration. A judge suspended or transferred to incapacity inactive status may apply to the highest court for reconsideration of the order.

E. Effect on Commission Action. Interim suspension of a judge shall not preclude action by the commission on the same conduct that was the basis for the felony or misdemeanor charge. Acquittal, dismissal, or conviction of the criminal charge shall not preclude proceedings by the commission on the conduct that was the basis for the charge.

Commentary

The integrity of the judicial system demands prompt action whenever a judge has been formally charged with a serious crime. Consequently, the highest court should bypass the normal commission procedure and act directly to temporarily suspend the judge pending final determination of the charges.

Almost all cases in which a judge is charged with a felony will result in an interim suspension; however these rules give the highest court discretion to impose an interim suspension in all cases in order to preserve the independence of the judiciary. If suspension were mandatory, the highest court would be required to suspend a judge even if the court was convinced that the complaint against the judge was filed only for political reasons.

A judge charged with conduct that constitutes a felony in another jurisdiction but does not constitute a felony in the state in which the judge is serving should be subjected to interim suspension only if, upon petition by an investigative panel of the commission or the highest court or upon its own motion, the highest court determines that interim suspension is required.

1 In determining whether to proceed on a disciplinary complaint when criminal
2 charges have been filed, disciplinary counsel and the commission should consider the
3 effect that a disciplinary investigation might have on the criminal investigation. Where it
4 is appropriate, disciplinary counsel should consult with the criminal prosecutor or law
5 enforcement authority before proceeding.

6 If the judge is found not guilty or if the judge's conviction is reversed on appeal,
7 the highest court should review the order of interim suspension and either continue it
8 under Rule 15.B or vacate it. An acquittal or dismissal does not preclude proceedings by
9 the commission because the standard of proof for judicial discipline requires clear and
0 convincing evidence, not proof beyond a reasonable doubt, and because the alleged
1 conduct may constitute grounds for misconduct under Rule 6.A but not be a violation of
2 the criminal laws.

3 Certain misconduct poses such an immediate threat to the public or the
4 administration of justice that the judge should be suspended from the bench immediately,
5 pending a final determination of the ultimate discipline to be imposed. Interim suspension
6 is also appropriate when the judge's continuing conduct is causing or is likely to cause
7 serious harm to the administration of justice. In such cases, it may be necessary for the
8 highest court to impose an interim suspension or transfer to incapacity status to maintain
9 public confidence in the judiciary.

0 See Rule 26 regarding cases in which a member of the highest court is charged
1 with a crime.
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4 **RULE 16. NOTIFICATION TO COMPLAINANT**

5 **Disciplinary counsel shall provide written acknowledgement of every**
6 **complaint, if the complainant is known, and notify the complainant in writing of the**
7 **final disposition of a proceeding under these rules. Notification in writing shall be**
8 **mailed within [10] days of the order disposing of the proceeding.**
9

10 **Commentary**

11 It is advisable for disciplinary counsel to keep the complainant informed of the
12 status of the case throughout the proceedings. Providing notice to complainants of the
13 final disposition in all cases is vital to maintaining public confidence in the judicial
14 disciplinary system. When a complaint has been dismissed, the notification to the com-
15 plainant should include a brief summary of the facts and reasoning upon which the
16 decision to dismiss was made. When final disposition is by private admonition or deferred
17 discipline agreement, the complainant should be notified that action was taken on the
18 matter without specifying the nature of the disposition.
19

104

Rule 16, cont'd

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SECTION III. DISCIPLINARY PROCEEDINGS

RULE 17. SCREENING AND INVESTIGATION

A. Screening. Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges judicial misconduct or incapacity. If the information would not constitute misconduct or incapacity if it was true, disciplinary counsel shall dismiss the complaint, subject to review by an investigative panel or, if appropriate, refer the matter to another agency. If the information raises allegations that would constitute judicial misconduct or incapacity if true, disciplinary counsel shall conduct a preliminary investigation.

B. Preliminary Investigation.

(1) Disciplinary counsel may conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints, provided that no subpoena shall issue to obtain testimony or evidence until an investigative panel of the commission authorizes a full investigation pursuant to Rule 17.C.

(2) When disciplinary counsel believes there is evidence supporting the allegations against a judge, he or she shall recommend to the investigative panel of the commission assigned to the case that the panel authorize a full investigation. Disciplinary counsel may recommend a full investigation when there are grounds to believe that evidence supporting the allegations could be obtained by subpoena or further investigation. In all other cases, disciplinary counsel shall recommend that the matter be dismissed.

(3) The investigative panel shall review disciplinary counsel's recommendations and either dismiss the complaint or authorize a full investigation.

C. Full Investigation.

(1) Within [10] days after the investigative panel authorizes a full investigation, disciplinary counsel shall give the following notice to the judge:

(a) a specific statement of the allegations being investigated and the canons or rules allegedly violated, with the provision that the investigation can be expanded if appropriate;

(b) the judge's duty to respond pursuant to rule 17.C(2);

(c) the judge's opportunity to meet with disciplinary counsel pursuant to Rule 7.C(3); and

(d) the name of the complainant unless the investigative panel determines that there is good cause to withhold that information.

(2) The investigative panel may defer the giving of notice but, when notice is deferred, disciplinary counsel must give notice to the judge before making a recommendation as to a disposition.

(3) Disciplinary counsel may request that the judge file a written response within [30] days after service of the notice under Rule 17.C(1).

(4) Before the investigative panel determines its disposition of the complaint under 17.D, either disciplinary counsel or the judge may request

1 an appearance before disciplinary counsel to respond to questions. The
 2 appearance shall be on the record. If disciplinary counsel requests the judge's
 3 appearance, disciplinary counsel must give the judge [20] days' notice and the
 4 testimony shall be sworn.

5 (5) Disciplinary counsel is authorized to issue subpoenas pursuant to
 6 Rule 14.B(1) once a full investigation has been approved. Disciplinary counsel
 7 shall conduct all investigations.

8 D. Disposition After Full Investigation.

9 (1) Upon the conclusion of a full investigation, disciplinary counsel may
 0 recommend to the investigative panel:

- 1 (a) dismissal;
- 2 (b) private admonition or deferred discipline agreement;
- 3 (c) the filing of formal charges;
- 4 (d) the filing of a petition for transfer to incapacity inactive
 5 status;
- 6 (e) referral to an appropriate agency; or
- 7 (f) a stay.

8 (2) The investigative panel may adopt, reject or modify the recommen-
 9 dations of disciplinary counsel. If the investigative panel finds a violation
 0 pursuant to Rule 6 for which the imposition of discipline is not warranted it
 1 may dismiss. If the investigative panel finds that there is reasonable cause to
 2 believe the judge committed misconduct,

3 (a) it may propose a private admonition or deferred discipline
 4 agreement to the respondent and if the respondent consents, it shall
 5 admonish the respondent or implement the deferred disciplinary
 6 agreement; in addition, it may assess costs against the respondent as
 7 a condition of the private admonition or deferred disciplinary agree-
 8 ment;

9 (b) if the respondent does not consent to the admonishment or
 0 the deferred discipline, the investigative panel may direct disciplinary
 1 counsel either to file formal charges or dismiss the complaint; or

2 (c) it may direct disciplinary counsel to file formal charges.

3 E. Immunity from Criminal Prosecution. Whenever a witness invokes his or
 4 her privilege against self-incrimination as a basis for refusing to answer a question
 5 or to produce other evidence that may be relevant to a discipline or incapacity
 6 proceeding, disciplinary counsel may apply to the {court of general jurisdiction} for
 7 a grant of immunity from criminal prosecution and shall give notice of the
 8 application to the {prosecuting authority of the jurisdiction}. If the court grants the
 9 order, the witness may not refuse to comply with the order on the basis of the
 0 witness's privilege against self-incrimination, but no testimony or other evidence
 1 compelled under such an order shall be used against the witness in any criminal

1 case. The witness may be prosecuted for perjury or contempt committed in
2 answering or failing to answer in accordance with the order.
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6 Commentary

7 Disciplinary counsel must be authorized to screen complaints because complaints
8 that fail to state grounds for discipline represent a large portion of those received by
9 commissions. However, an investigative panel should review the dismissals to determine
10 that the screening is being done properly. The term "complaint" includes information
11 received by telephone, news items, and any other source and includes complaints initiated
12 by disciplinary counsel on their own motions. See the definition of "complaint" in the
13 Terminology Section. Disciplinary counsel should consider complaints submitted anony-
14 mously in the same manner as other complaints in order to ensure that lawyers, court
15 personnel or litigants can bring misconduct to the attention of the commission without the
16 fear of retaliation.

17 Disciplinary counsel need not notify a judge of every complaint made against the
18 judge. For example, it is not necessary to notify a judge of a complaint that is dismissed
19 after screening on the ground that it does not state facts constituting misconduct. Also,
20 disciplinary counsel may want to withhold the fact of a complaint from a judge until after
21 a preliminary investigation has been conducted. Disciplinary counsel should notify the
22 judge of the complaint within [10] days after the investigative panel authorizes a full
23 investigation unless the panel determines that notice should be deferred. The investigative
24 panel should permit deferral only where necessary to protect the identity of a witness who
25 may suffer harm. Disciplinary counsel must notify the judge before disciplinary counsel
26 recommends a disposition to the investigative panel, in order to ensure that the
27 investigative panel can consider all the facts, including the judge's statement, before
28 determining whether to file formal charges or offer respondent a deferred discipline
29 agreement or private admonition.

30 When giving notice, disciplinary counsel should inform the judge of the nature of
31 the allegations, the code provisions alleged to have been violated, the duty of the judge
32 to respond if requested and the judge's opportunity to meet with disciplinary counsel.
33 Disciplinary counsel should advise the judge that since the investigation is ongoing, facts
34 may be discovered that will change the violations charged.

35 If disciplinary counsel requests a written response from the judge, disciplinary
36 counsel should state when the judge is to respond and provide the judge a copy of the
37 rules of the commission. If disciplinary counsel requests the judge's appearance, the judge
38 must appear and answer questions. If either disciplinary counsel or the judge requests an
39 opportunity to appear before disciplinary counsel, the judge may have counsel present at
40 the appearance.

41 In reviewing a complaint after full investigation, the investigative panel should
42 consider disciplinary counsel's recommendation and memoranda on the law together with

1 the investigative file. The investigative file should include the statements of the
2 complainant, the witnesses, if any, and the respondent, as well as relevant documents and
3 other evidence.

4 If the investigative panel decides to impose a private admonition the panel should
5 condition the private admonition upon the judge's execution of a waiver of the right to
6 a hearing. Such a waiver should bar the judge from objecting to the use at a subsequent
7 proceeding against the judge of the findings that are the basis for the admonition. The
8 private admonition should be in writing.

9 A deferred disciplinary agreement may be entered into only with the consent of
10 the judge. The agreement sets forth conditions imposed by the investigatory panel with
11 which the judge must comply in order to avoid the reinstatement of disciplinary proceed-
12 ings. The agreement must be in writing. A deferred discipline agreement does not
13 constitute a finding that misconduct was committed. It is appropriate only when the
14 alleged misconduct is minor, that is, it does not reflect on the judge's fitness for office,
15 and when the underlying cause of the misconduct can be addressed through a treatment
16 or rehabilitation program. Upon successful completion of the program the complaint will
17 be dismissed. If the judge fails to complete the program, the investigative panel may
18 proceed to determine whether to dismiss the complaint against the judge, impose a private
19 admonition with the consent of the judge, or direct disciplinary counsel to file formal
20 charges or a petition for transfer to incapacity inactive status.

21
22 A stay of the proceedings may be appropriate when there is an ongoing civil or
23 criminal action against the judge, so as not to interfere with the expeditious litigation of
24 the court action.

RULE 18. USE OF ALLEGATIONS FROM DISMISSED CASES

If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose in any judicial or lawyer disciplinary proceeding against the judge. If additional information becomes known to disciplinary counsel regarding a complaint that has been dismissed before the filing of formal charges, the allegations may be reinvestigated with permission of an investigative panel.

Commentary

A judge should not be subject forever to possible disciplinary action based on a complaint that has been investigated and dismissed. It is implicit in a dismissal of a complaint alleging misconduct within the jurisdiction of the judicial discipline system that an investigative panel has found insufficient evidence to go forward with charges. It is unfair to use these inadequately supported complaints to establish a pattern or practice of misconduct. If, however, additional evidence is discovered that adds substance to the allegations of a previously dismissed complaint, it is appropriate to reinvestigate the allegations of the original complaint. In determining whether to reinvestigate allegations, an investigative panel may wish to consider factors such as the length of time elapsed, the alleged harm caused, possible disruption to the judicial system, the extent of the original investigation, the good faith of the complainant, and other appropriate factors. Like the Model Rules for Lawyer Disciplinary Enforcement, these rules do not adopt any statute of limitations. The conduct of a judge, no matter when it has occurred, is always relevant to the question of fitness for office. The time between the commission of alleged misconduct and the initiation of a complaint based on the conduct is relevant to whether and to what extent discipline should be imposed, but is not relevant to limit the commission's power to investigate.

This rule does not establish a policy for the retention or destruction of the physical files of dismissed cases.

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Rule 18, cont'd

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3 **RULE 19. FORMAL CHARGES**

4 The formal charges shall give fair and adequate notice of the nature of the
5 alleged misconduct or incapacity. Disciplinary counsel shall file the formal charges
6 with the commission. Disciplinary counsel shall cause a copy of the formal charges
7 to be served upon the respondent or respondent's counsel pursuant to Rule 13 and
8 shall file proof of service with the commission.
9

10 **Commentary**

11 The formal charges should be drawn with clarity and specificity. From them the
12 respondent should be able to ascertain the allegations and provisions of the applicable
13 codes alleged to have been violated or the alleged incapacity. In many instances, the
14 formal charges will not be identical to the allegations of the original complaint. Often the
15 investigation of a complaint will lead to the elimination of some allegations and the
16 clarification of others. New, related allegations may come to light, some of which may
17 be much more serious than those in the complaint. Sometimes an investigative panel will
18 choose not to pursue certain allegations.
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Rule 19, cont'd

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RULE 20. ANSWER

A. Time. The respondent shall file a written answer with the commission and serve a copy on disciplinary counsel within [20] days after service of the formal charges, unless the time is extended by the hearing panel.

B. Waiver of Privilege. The raising of a mental or physical condition as a defense constitutes a waiver of medical privilege pursuant to Rule 27.D(4).

Commentary

The respondent is required to answer the formal charges as a part of a judge's duty as a public official. Commission rules should prescribe the time for response and other time intervals.

The answer should contain denials of those factual allegations known or believed to be untrue. It should also specify those factual allegations as to which the respondent lacks knowledge or information sufficient to form a belief. This has the effect of a denial. All other factual allegations in the formal charges are deemed admitted. The answer may also contain affirmative and other defenses and may assert that the conduct alleged in the formal charges is not misconduct.

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Rule 20, cont'd

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3 **RULE 21. FAILURE TO ANSWER/FAILURE TO APPEAR**

4 **A. Failure to Answer.** Failure to answer the formal charges shall constitute
5 an admission of the factual allegations.

6 **B. Failure to Appear.** If the respondent should fail to appear when specifically
7 so ordered by the hearing panel or the highest court, the respondent shall be deemed
8 to have admitted the factual allegations which were to be the subject of such
9 appearance and to have conceded the merits of any motion or recommendations to
10 be considered at such appearance. Absent good cause, the hearing panel or highest
11 court shall not continue or delay proceedings because of the respondent's failure to
12 appear.

13
14 **Commentary**

15 This rule provides remedies for a judge's failure to comply with the duty to
16 respond to a lawful demand for information from a disciplinary authority. Failure to
17 appear or to respond to a lawful demand is a ground for discipline under Rule 6.A(2).
18 If the judge fails to appear when requested, such failure shall constitute lack of
19 cooperation and may be the subject of a specific charge of misconduct.
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Rule 21, cont'd

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RULE 22. DISCOVERY

A. Witnesses. Within [20] days of the filing of an answer, disciplinary counsel and respondent shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who can authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the judge. The chair's review of the withholding request is to be in camera, but disciplinary counsel must advise respondent of the request without disclosing the subject of the request. The hearing panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing. Disciplinary counsel and respondent may take depositions only of witnesses to be called at the hearing and other witnesses who are unavailable to testify. Depositions of other persons may be taken only with permission of the chair of the hearing panel or the chair's designee and only for good cause shown.

B. Other Evidence. Disciplinary counsel and respondent shall exchange:

(1) non-privileged evidence relevant to the formal charges, documents to be presented at the hearing, witness statements and summaries of interviews with witnesses who will be called at the hearing; and

(2) other material only upon good cause shown to the chair of the hearing panel.

C. Exculpatory Evidence. Disciplinary counsel shall provide respondent with exculpatory evidence relevant to the formal charges.

D. Duty of Supplementation. Both parties have a continuing duty to supplement information required to be exchanged under this rule.

E. Completion of Discovery. All discovery shall be completed within [60] days of the filing of the answer.

F. Failure to Disclose. The hearing panel may preclude either party from calling a witness at the hearing if the party has not provided the opposing party with the witness's name and address, any statements taken from the witness or summaries of any interviews with the witness.

G. Resolution of Disputes. Disputes concerning discovery shall be determined by the hearing panel before whom the matter is pending. The decisions of the hearing panel may not be appealed before the entry of the final order.

H. Civil Rules Not Applicable. Proceedings under these rules are not subject to the {state rules of civil procedure} regarding discovery except those rules relating to depositions and subpoenas.

1 **Commentary**

2 All reference in this rule to "hearing panel" include hearing officers, subpanels
3 of the hearing panel if the hearing panel has appointed a hearing officer or subpanel to
4 conduct the hearings. "Witnesses to be called at the hearing" include witnesses whose
5 testimony will be presented by deposition.

6 Liberal exchanges of non-privileged information should be encouraged, since they
7 facilitate the trial of the charges. However, the hearing panel should monitor closely the
8 extent of discovery permitted and the time for obtaining such discovery in order to
9 prevent counsel from using discovery as a means of delay. Discovery orders should not
0 be appealable before the entry of a final order in the proceeding.

1 Under this rule, the number of persons who may be deposed is limited to avoid
2 building delay into the process and to protect persons who will not testify at trial.
3 Subpoena power is covered in Rule 14.

4 In determining whether to preclude a party from calling a witness at the hearing
5 for failure to disclose required information, the hearing panel may take into consideration
6 the prejudice to the party calling the witness if the witness is not called and the extent to
7 which the opposing party will be prejudiced by the lack of advance disclosure.

RULE 23. DISCIPLINE BY CONSENT

A. Approval. At any time after the filing of formal charges and before final disposition, the respondent may agree with disciplinary counsel that the respondent shall admit to any or all of the formal charges in exchange for a stated sanction. The agreement shall be submitted to the hearing panel of the commission assigned to the case, which shall either:

(1) reject the agreement; or

(2) submit the agreement to the highest court for approval.

B. Rejection of Sanction. If the stated sanction is rejected by the hearing panel or the highest court, the admission shall be withdrawn and cannot be used against the respondent in any proceedings.

C. Affidavit of Consent. A respondent who consents to a stated sanction shall sign an affidavit stating that

(1) the respondent consents to the sanction;

(2) the consent is freely and voluntarily rendered; and

(3) there is presently pending a proceeding involving allegations of misconduct; and

(4) the facts set forth in the affidavit are true.

D. Order of Discipline. The commission shall file the affidavit with the highest court. The affidavit shall remain confidential until it is accepted by the highest court. The highest court shall either reject the agreement or enter the order disciplining the respondent. The final order of discipline shall be based upon the formal charges and the conditional admission.

Commentary

Either the respondent or disciplinary counsel may initiate negotiations on discipline by consent, but both parties must agree to the stipulation. The stipulation is conclusive evidence of guilt.

Discipline by consent is beneficial to all participants. It enables the respondent who acknowledges guilt to avoid the personal anguish and expense of a proceeding and it relieves the public and the judicial discipline system of the time-consuming and expensive necessity of a formal proceeding.

In the event the proposed stipulated discipline is disapproved by the hearing panel or the highest court or the matter is returned for formal proceedings for any reason, the respondent's admission of the charges cannot be used against the respondent.

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Rule 23, cont'd

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RULE 24. HEARING

A. Scheduling. Upon receipt of the respondent's answer or upon expiration of the time to answer, the hearing panel of the commission shall schedule a public hearing and notify disciplinary counsel and respondent of the date, time, and place of the hearing.

B. Hearing Panel. The hearing shall be conducted by the hearing panel of the commission, a subpanel of the hearing panel, or a hearing officer. See Rule 3.E.

C. Conduct of Hearing.

(1) All testimony shall be under oath.

(2) Disciplinary counsel shall present evidence on formal charges.

(3) Disciplinary counsel may call the respondent as a witness.

(4) Both parties shall be permitted to present evidence and produce and cross-examine witnesses.

(5) The hearing shall be recorded verbatim. Whenever a transcript is requested by respondent, disciplinary counsel, a member of the hearing panel, or the highest court, a transcript of the hearing shall be produced promptly and shall be provided to the respondent without cost.

(6) Disciplinary counsel and the respondent may submit proposed findings, conclusions, and recommendations for sanction or order of dismissal to the hearing panel.

(7) If a subpanel or hearing officer is used, the findings are to be submitted to the hearing panel.

D. Dismissal or Recommendation for Sanction. The hearing panel shall either dismiss the case or recommend a sanction to the highest court. The hearing panel shall decide a matter only upon the concurrence of a majority of all members of the panel.

E. Submission of the Report. Within [30] days after the hearing or after the filing of the transcript if one was requested, the hearing panel shall file with the highest court the record of the proceeding and a report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions, and the order of dismissal or recommendation for sanction. The hearing panel shall at the same time serve the report upon the respondent and disciplinary counsel.

F. Notice of Exceptions. Within [10] days of receipt of the hearing panel's report, the respondent and disciplinary counsel may file with the highest court notice of exceptions to the findings, conclusions, or recommendations for sanction or order of dismissal of the hearing panel. The failure to file notice of exceptions constitutes acceptance of the findings of fact, conclusions of law, and order of dismissal or recommendation for sanction.

G. Notice to {Lawyer Disciplinary Agency}. Whenever the hearing panel recommends the suspension or removal of a respondent, it shall serve a copy of its report on the {lawyer disciplinary agency} at the same time the report is filed with the highest court. The {lawyer disciplinary agency} may file with the highest court recommendations for imposing lawyer disciplinary sanctions on the respondent.

1 **Recommendations from the {lawyer disciplinary agency} shall be filed in a brief in**
2 **accordance with Rule 25.B.**

3
4 **Commentary**

5 In several jurisdictions, the full commission conducts the hearing. Under these
6 Model Rules, an investigative panel of the commission determines whether disciplinary
7 counsel has sufficient grounds to conduct a full investigation. After the investigation, the
8 investigative panel determines whether reasonable cause exists to believe misconduct was
9 committed. After the hearing panel of the commission conducts the hearing, it determines
0 whether to recommend discipline to the highest court or to dismiss the case. The hearing
1 panel has the option of appointing a hearing officer or subpanel of the hearing panel to
2 take evidence. See Rule 3.E(4)(b). Under this option, the full hearing panel reviews the
3 report of the hearing officer or subpanel and then makes its determination to dismiss or
4 recommend sanctions. These functions of the commission are adjudicative in nature.

5 If formal charges are not answered and are deemed admitted, the hearing shall be
6 for the purpose of determining the appropriate sanction. See Rule 21.

7 A disciplinary proceeding is not a criminal proceeding. The respondent may not
8 decline to testify but may claim the protection of the Fifth Amendment. However, the
9 respondent may be removed from judicial office for failing to respond to questions about
0 the conduct in issue.

1 Disciplinary counsel and respondent are encouraged to stipulate to any issue of fact
2 or law so as to shorten the time for the hearing.
3

RULE 25. REVIEW BY {HIGHEST COURT}

A. Expedited Consideration.

(1) The clerk of the court shall docket for expedited consideration any case in which the commission recommended a sanction or a notice of exceptions was filed.

(2) In cases the commission has dismissed to which no exceptions were filed, the dismissal shall be final if the highest court has not ordered a review within [15] days.

B. Brief and Supplementary Filings.

(1) Disciplinary counsel, the respondent, and the {lawyer disciplinary agency} if it is entitled to file pursuant to Rule 24.G, shall file briefs as follows: [an expedited schedule should be determined by the highest court and inserted here].

(2) If the highest court desires an expansion of the record or additional findings, it shall remand the case to the hearing panel with appropriate directions, retain jurisdiction, and withhold action pending receipt of the additional filing.

(3) The highest court may order additional briefs or oral arguments as to the entire case or specified issues.

C. Stay for Further Proceedings. If during review by the highest court the commission receives another complaint against the respondent, the disciplinary counsel shall advise the highest court. The highest court may stay its review pending the commission's determination of the second complaint. The highest court may impose a single sanction covering all recommendations for discipline from the commission against a respondent.

D. Decision.

(1) The highest court shall file a written decision dismissing the case or imposing a sanction. All decisions issued by the highest court shall be published in the official reports for the guidance of other judges and for public information.

(2) The highest court may accept, reject, or modify in whole or in part the findings and conclusions of the commission.

(3) The highest court may assess costs against the respondent if it finds the respondent committed misconduct.

1 Commentary

2 The highest court has the inherent power and final responsibility to regulate the
3 judicial branch of government. These rules provide for de novo review by the highest
4 court. They also provide that all public sanctions be imposed by the highest court.
5 Jurisdictions may decide, depending on the local legal culture, to have the highest court
6 review cases on the record or only on appeal. Jurisdictions may also decide to permit the
7 commission to impose certain forms of public discipline.

8 The disciplinary counsel should advise the highest court whenever a new complaint
9 has been received against a respondent whose case is before the highest court and an
0 investigative panel has authorized a full investigation of the new complaint. The highest
1 court can then decide whether to proceed with the first matter or to stay it so that all
2 matters against the respondent can be considered together.

SECTION IV. SPECIAL PROCEEDINGS

RULE 26. COMPLAINT AGAINST A MEMBER OF {HIGHEST COURT}

A. Proceedings Generally. A complaint against a member of {highest court} shall proceed in the same manner as a complaint against any other judge except as set forth in this rule.

B. Special Supreme Court. Upon either a motion by disciplinary counsel or {highest court}'s own motion for interim suspension of a member of {highest court} pursuant to Rule 15.A or a finding of reasonable cause to believe misconduct was committed by a member of {highest court} pursuant to Rule 17.F(2), a special supreme court shall be constituted. The special supreme court shall consist of a number of judges equal to the number of justices of the {highest court}.

C. Stipulated Dispositions. Final review of a stipulation pursuant to Rule 23 shall be by the full commission.

D. Final Disposition. If neither the disciplinary counsel nor the respondent objects to the decision of the hearing panel pursuant to Rule 24.D, the decision shall be final and the special supreme court shall not review the matter. If either the disciplinary counsel or the respondent objects, the hearing panel shall file its report and conclusions, any minority opinion, and the record of the proceedings with the special supreme court which shall review the matter pursuant to Rule 25.

Commentary

The highest court is a collegial body. Granting it the authority to discipline its own members would create appearances of impropriety and of conflicts of interest. Under this rule the commission has the authority to impose a sanction on a member of {highest court} if the commission, the disciplinary counsel and the respondent agree to the sanction. Under any other circumstances the commission does not have the authority to impose a public sanction. If the respondent or disciplinary counsel object, a special supreme court must be appointed to decide the case.

When a criminal charge is filed against a member of the highest court, the highest court should direct the appointment of a special supreme court either on its own motion or on the motion of disciplinary counsel, so that an independent decision maker may determine whether the charge raises a substantial question of fitness to hold office so as to require interim suspension.

The special supreme court may be composed of judges from trial courts, appellate courts, or a mixture of the two. Various schemes exist in the states for the selection of special supreme court members. Selection by lot of each category of judge is a simple and quick method. Selection should occur when the decision is made to file formal charges even though the case may be concluded by the commission pursuant to Rule 26.C or 26.D. Selection must be made earlier if a motion for interim suspension has been filed, as noted above.

As in other cases, the commission, disciplinary counsel and the judge may agree to a deferred discipline agreement, private admonition, or discipline by consent. If the

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Rule 26, cont'd

1 commission approves an agreement for discipline by consent, no further approval is
2 needed.

3 Nothing in these rules is intended to preclude the legislature from initiating
4 impeaching proceedings against a judge under any authority existing under the constitution
5 of the jurisdiction. If, however, the constitution limits removal of judicial officers to the
6 legislative impeachment process, a constitutional amendment is necessary to effectuate this
7 rule.
8

RULE 27. CASES INVOLVING ALLEGATIONS OF MENTAL OR PHYSICAL INCAPACITY

A. Initiation of Incapacity Proceeding. An incapacity proceeding can be initiated by complaint, by a claim of inability to defend in a disciplinary proceeding, or by an order of involuntary commitment or adjudication of incompetency.

B. Proceedings to Determine Incapacity Generally. All incapacity proceedings shall be conducted in accordance with the procedures for disciplinary proceedings, except:

(1) the purpose of the incapacity proceedings shall be to determine whether the judge suffers from a physical or mental condition that adversely affects the judge's ability to perform judicial functions;

(2) all of the proceedings shall be confidential;

(3) the commission may appoint a lawyer to represent the judge if the judge is without representation; and

(4) if the highest court concludes that the judge is incapacitated to hold judicial office, it may enter any order appropriate to the circumstances, the nature of the incapacity, and the probable length of the period of incapacity, including:

(a) retiring the judge;

(b) transferring the judge to judicial incapacity inactive status;

(c) if the highest court concludes that the judge is incapacitated to practice law, transferring the judge to lawyer incapacity inactive status; and

(d) if a judicial disciplinary proceeding against the judge is pending and the highest court concludes that the judge is incapacitated to defend, deferring the disciplinary proceeding, pursuant to Rule 27.D(2).

C. Involuntary Commitment or Adjudication of Incompetency. If a judge has been judicially declared incompetent or is involuntarily committed on the grounds of incompetency or incapacity by a final judicial order after a judicial hearing, the highest court, upon receipt of a certified copy of the order, shall enter an order immediately transferring the judge to both lawyer and judicial incapacity inactive status. A copy of the order shall be served, in the manner the highest court shall direct, upon the judge, his or her guardian, or the director of the institution to which the judge has been committed.

D. Inability to Properly Defend in a Disciplinary Proceeding.

(1) If in the course of a disciplinary proceeding a judge alleges an inability to assist in the defense due to mental or physical incapacity, disciplinary counsel shall notify the highest court. The highest court shall immediately transfer the judge to lawyer and judicial incapacity inactive status pending a determination by the highest court of the incapacity pursuant to Rule 27.B. A determination by the commission that the judge is able to

1 assist in his or her own defense is interlocutory and may not be appealed
2 before entry of a final order in the proceeding.

3 (2) If, pursuant to Rule 27.B., the highest court determines the claim
4 of inability to defend is valid, the disciplinary proceeding shall be deferred.
5 Any investigation of the disciplinary complaint may continue. The judge shall
6 be retained on lawyer and judicial incapacity inactive status until the highest
7 court grants a petition for reinstatement to active status as a lawyer or judge.
8 If the highest court considering the petition for reinstatement to active status
9 determines that the petition shall be granted, the highest court shall also
0 determine the disposition of the interrupted disciplinary proceedings.

1 (3) If, pursuant to Rule 27.B, the highest court determines that the
2 claim of inability to defend is invalid but that the judge is incapacitated to
3 hold judicial office, the disciplinary proceeding shall resume. The judge shall
4 be retained on judicial incapacity inactive status.

5 (4) The raising of mental or physical condition as a defense to or in
6 mitigation of formal charges constitutes a waiver of medical privilege.

7 **E. Stipulated Disposition.**

8 (1) The hearing panel shall designate one or more qualified medical,
9 psychiatric, or psychological experts to examine the judge prior to the hearing
0 on the matter. The hearing panel may designate an expert agreed upon by
1 disciplinary counsel and the judge. The expert or experts shall report to the
2 highest court and the parties.

3 (2) After receipt of the examination report, disciplinary counsel and
4 the judge may agree upon proposed findings of fact, conclusions, and order.
5 The stipulated disposition shall be submitted to the hearing panel for a
6 recommendation to the highest court of approval or rejection. The final
7 decision on the recommendation shall be made by the highest court.

8 (3) If the highest court accepts the stipulated disposition, the highest
9 court shall enter an order in accordance with its terms. If the stipulated
0 disposition is rejected by the highest court, it shall be withdrawn and cannot
1 be used against the judge in any proceedings. If the highest court rejects the
2 stipulated disposition, the highest court shall order that the hearing proceed.

3 **[F. Appointment to Fill Vacancy.** Upon ordering a judge transferred to
4 judicial incapacity inactive status pursuant to Rule 27.B or 27.C, a replacement
5 judge may be appointed by [the appropriate appointing authority] to serve during
6 the period of incapacity, whether the incapacity is temporary or permanent.]

7 **G. Reinstatement from Incapacity Inactive Status.**

8 (1) No judge transferred to incapacity inactive status may resume
9 active status except by order of the highest court.

0 (2) Any judge transferred to incapacity inactive status shall be entitled
1 to petition for transfer to active status [once a year] or at whatever shorter

1 intervals the highest court may direct in the order transferring the judge to
2 incapacity inactive status or any modifications thereof.

3 (3) Upon the filing of a petition for transfer to active status, the highest
4 court may take or direct whatever action it deems necessary or proper to
5 determine whether the incapacity has been removed, including a direction for
6 an examination of the judge by qualified medical or psychological experts
7 designated by the highest court.

8 (4) With the filing of a petition for reinstatement to active status, the
9 judge shall be required to disclose the name of each psychiatrist, psychologist,
10 physician and hospital or other institution by whom or in which the judge has
11 been examined or treated since the transfer to incapacity inactive status. The
12 judge shall furnish to the highest court written consent to the release of
13 information and records relating to the incapacity if requested by the highest
14 court or court-appointed medical or psychological experts.

15 (5) If a judge transferred to lawyer incapacity inactive status on the
16 basis of a judicial determination of incompetence has been declared to be
17 competent, the highest court may dispense with further evidence that the
18 incapacity to practice law has been removed and may immediately direct
19 reinstatement to active status as a lawyer.

20
21 **Commentary**

22 Incapacity to perform judicial functions must be distinguished from a disability that
23 does not adversely affect a judge's ability to perform judicial functions. Incapacity
24 proceeding should be initiated any time information comes to the attention of the
25 disciplinary counsel, the commission, or the highest court that a judge is incapacitated.
26 This information can come from any source, including a complainant, a judicial
27 adjudication in a civil or criminal action, or a claim of inability to defend by a respondent
28 judge in a judicial disciplinary proceeding. If, during the course of a judicial disciplinary
29 proceeding, disciplinary counsel receives information that the judge is incapacitated, disci-
30 plinary counsel should initiate an incapacity investigation.

31 "Involuntary commitment" does not include a temporary commitment for purposes
32 of evaluation or examination.

33 It is important that incapacity not be treated as misconduct. Willful conduct should
34 be clearly distinguished from conduct that is beyond the control of the judge.

35 The order transferring the judge to incapacity inactive status should clearly state
36 the conditions the judge must meet to be reinstated to active status.

37 If the judge in a disciplinary proceeding alleges inability to conduct a defense
38 because of present incapacity, the judge should be transferred immediately to incapacity
39 inactive status to protect the administration of justice. A proceeding to determine whether
40 the judge is in fact incapacitated should be initiated immediately. If the judge is found to
41 be incapacitated, the transfer to incapacity inactive status remains in force until the judge

establishes that the incapacity has terminated. Once the incapacity has terminated, the proceedings alleging misconduct should be determined. If it is determined that the claim of current incapacity is unsubstantiated, the proceedings predicated on the allegations of misconduct should be immediately resumed.

Incapacity proceedings remain confidential until a final order is issued by the highest court, because the proceedings involve medical or psychological evidence or other personal information about the judge.

Petitions for reinstatement from incapacity inactive status should be filed with the commission. Factual issues underlying petitions for reinstatement should be assigned to a hearing panel for recommendation to the highest court.

The filing of a petition for reinstatement from incapacity inactive status must be accompanied by a waiver of doctor-patient or other privilege so that the highest court may obtain the information needed to evaluate the claim of rehabilitation. This waiver applies only to information relating to the incapacity upon which the transfer to incapacity inactive status was predicated.

Depending on the method for selection of judges and the length of the judge's term, the highest court [or other appropriate appointing authority] may need to appoint a replacement judge. The rule does not express a preference for the method of selection of the replacement.