

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

NOTICE OF PROPOSED RULES CHANGES

The Rules Committee has submitted its Two Hundred and Tenth Report to the Court of Appeals, recommending amendments to current Rules 19-726 and 2-412.

The Committee's Two Hundred and Tenth Report and the proposed Rules changes are set forth below.

Interested persons are asked to consider the Committee's Report and proposed Rules changes and to forward on or before May 5, 2022 any written comments they may wish to make to rules@mdcourts.gov or:

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

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April 28, 2022

The Honorable Matthew J. Fader,
Chief Judge
The Honorable Shirley M. Watts
The Honorable Michele D. Hotten
The Honorable Brynja M. Booth
The Honorable Jonathan Biran
The Honorable Steven B. Gould
The Honorable Angela M. Eaves,
Judges

Your Honors:

The Rules Committee submits this, its Two Hundred and Tenth Report, and recommends that the Court adopt, on an expedited basis, the proposed amendments to Rules 19-726 and 2-412 transmitted with this Report.

Rule 19-726 deals with discovery in attorney grievance proceedings. Until most recently amended by Rules Order dated July 1, 2021, effective October 1, 2021, the Rule simply provided that discovery in those proceedings was governed by the Rules in Title 2, Chapter 400 [*i.e.*, the Rules applicable to general civil proceedings], subject to any scheduling order entered pursuant to Rule 19-722. Several issues arose with that approach, mostly dealing with discovery directed at the Attorney Grievance Commission or its members, Bar Counsel, and agents or employees of the Commission or Bar Counsel.

In both preliminary discussions and formal proceedings, attempts were made to deal with those issues. The Committee ultimately decided, in place of the full panoply of interrogatories, depositions, and other discovery techniques, to require Bar Counsel, (1) after the filing of an answer and within 30 days after a written request from the attorney, to provide to the attorney all material, information, and

statements, including summaries or reports of oral statements, accumulated during the investigation and certify that, except for material that constitutes attorney work product or that is subject to lawful privilege or a protective order, the material disclosed constitutes the complete record of Bar Counsel, and (2) without the necessity of a request, no later than 30 days after the filing of an answer, to disclose all evidence of which Bar Counsel is aware that would negate any allegation in the petition, be admissible to impeach a witness intended to be called by Bar Counsel, or be admissible to mitigate any sanction. Provisions for the timely disclosure of fact and expert witnesses also were included in the Rule.

Subsequent to the adoption of the Rule, the Court has had some concerns about the revised Rule and potential interpretations of it. At its March 30, 2022 open meeting on Rules, the Court discussed those concerns and, *inter alia*, requested the Committee to revise Rule 19-726 to permit the attorney to have the full scope of allowable discovery provided for in Title 2 of the Rules.

Section (a) of the Rule transmitted with this Report provides for that. Except as otherwise provided in the Rule, discovery is governed by the relevant Rules in Title 2, Chapter 400. The "except" clause is consistent with that in Rule 18-433, pertaining to the Judicial Disabilities Commission. There are some details in Rule 19-726 that are peculiar to Attorney Grievance Commission proceedings and are not provided for in Title 2, such as regarding Bar Counsel as a party and expressly requiring Bar Counsel to turn over certain information, even without a request. It is not intended to preclude Bar Counsel or the attorney from using the discovery techniques provided for in Title 2. See subsection (a)(1) and the ensuing Committee Note.

Two additional topics discussed by the Court at the March 30 open meeting were the potential utility of Rule 2-402 (b)(1) in tailoring the use and scope of discovery to the facts and circumstances of a particular attorney grievance proceeding and the oath to be used by Bar Counsel in responding to discovery requests, notably, in preparing answers to interrogatories. In the amendments to Rule 19-726, these topics are addressed, respectively, by the addition of a reference to Rule 2-402 (b)(2) to subsection (a)(1) and by the addition of a Committee note following subsection (a)(3).

Section (f) preserves the Commission's immunity from being subject to an organizational designee deposition pursuant to Rule 2-412, and the amendment to Rule 2-412 is a conforming one. At the March 30 open meeting, the Court requested that Rule 19-726 include a clarification that section (f) does not preclude the taking of a deposition of an individual member of Bar Counsel's office, an individual member of the Attorney Grievance Commission, or any other person under appropriate circumstances. A Committee note following section (f) provides that clarification.

As noted in the Reporter's note following the Rule, additional amendments to Rule 19-726 are made either to better align it to the discovery procedures applicable in judicial disability and disciplinary proceedings or to otherwise improve or clarify the Rule.

Included as an Appendix to this Report is an unmarked version of the Rule that shows how Rule 19-726 would read if the proposed amendments to it are adopted.

For the further guidance of the Court and the public, following the proposed amendments to each of the existing Rules is a Reporter's note describing in further detail the reasons for the proposals. We caution that the Reporter's notes are not part of the Rules, have not been debated or approved by the Committee, and are not to be regarded as any kind of official comment or interpretation. They are included solely to assist the Court in understanding some of the reasons for the proposed changes.

Respectfully Submitted

/ s /

Alan M. Wilner
Chair

AMW:sdm
cc: Suzanne C. Johnson, Clerk

MARYLAND RULES OF PROCEDURE

TITLE 19 - ATTORNEYS

CHAPTER 700 - DISCIPLINE, INACTIVE STATUS, RESIGNATION

DIVISION 3 - PROCEEDINGS ON PETITION FOR

DISCIPLINARY OR REMEDIAL ACTION

AMEND Rule 19-726 by lettering the preamble before current section (a) as new section (a); by deleting certain language from new subsection (a)(1) and replacing it with a provision pertaining to the applicability of the Rules in Title 2, Chapter 400 to disciplinary and remedial actions; by adding a provision to new subsection (a)(1) pertaining to orders entered pursuant to Rule 2-402 (b)(1); by adding a Committee note following subsection (a)(1); by adding new subsection (a)(2), which identifies the parties for the purposes of this Rule; by adding new subsection (a)(3) pertaining to the obligation of the parties to respond to each other's discovery requests; by adding a Committee note following subsection (a)(3) pertaining to the oath or affirmation to be used by Bar Counsel when answering interrogatories; by adding new subsection (a)(4) pertaining to the continuing obligation of the parties to supplement information disclosed under this Rule; by adding new subsection (a)(5) pertaining to consequences for a party's failure to

disclose under this Rule; by re-lettering current section (a) as section (b) and revising the tagline; by replacing the word "inspection" in section (b) with the word "disclosure"; by re-lettering current section (b) as section (c); by changing the reference to section (a) in section (c) to section (b); by re-lettering current subsection (c)(1) as section (d) and revising the timing of disclosure of witnesses by Bar Counsel and the attorney; by deleting current subsection (c)(2); by deleting current subsection (d)(1); by re-lettering current subsection (d)(2) as subsection (e)(1); by adding new subsection (e)(2) pertaining to medical or psychological examinations; by deleting current subsection (e)(1); by re-lettering current subsection (e)(2) as section (f) and revising the tagline; by replacing the words "may not be" with "is not" and adding the words "or remedial" in new section (f); by adding a Committee note following section (f) pertaining to depositions of individual members of the office of Bar Counsel, individual members of the Attorney Grievance Commission, and other persons; by deleting current section (f); and by adding a provision to section (g) pertaining to the authority of the presiding circuit court judge appointed by Rule 19-722, as follows:

Rule 19-726. DISCOVERY

(a) Generally

(1) After Except as otherwise provided in this Rule, discovery after a Petition for Disciplinary or Remedial Action has been filed, discovery is permitted as follows governed by the relevant Rules in Title 2, Chapter 400, subject to any scheduling order entered pursuant to Rule 19-722 and any order entered pursuant to Rule 2-402 (b) (1) tailoring discovery to the facts and circumstances of the particular action.

Committee note: The Rules in Title 2, Chapter 400 deal with discovery in civil cases. Rule 19-722 (a) requires a judge designated by the Court of Appeals to conduct hearings in an action for disciplinary or remedial action and, within 15 days after an answer to the petition is due and after consultation with Bar Counsel and the attorney, to enter a scheduling order setting dates for the completion of discovery and other events. Rule 2-402 (b) (1) permits the designated judge, after consultation with the parties, to limit or modify certain aspects of the discovery Rules.

~~(a) Discovery from Bar Counsel~~

(2) For purposes of this Rule, the parties are Bar Counsel and the attorney against whom charges have been filed.

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

Committee note: Answers to interrogatories executed by Bar Counsel shall include an oath or affirmation on knowledge, information, and belief, as generally set forth in Rule 1-304. The affiant's recitation also may include an explanation of the

affiant's role in the preparation and signing of the answers to interrogatories and the extent of the affiant's personal knowledge of the information provided.

(4) Bar Counsel and the attorney have a continuing duty to supplement information required to be disclosed under this Rule.

(5) The judge appointed pursuant to Rule 19-722 shall preclude a party from calling a witness, other than a rebuttal witness, or otherwise presenting evidence upon a finding, after the opportunity for a hearing if one is requested, that (A) the witness or evidence was subject to disclosure under this Rule, (B) the party, without substantial justification, failed to disclose the witness or evidence in a timely manner, and (C) the failure was prejudicial to the other party.

(b) Disclosure by Bar Counsel upon Written Request

After an Answer has been filed pursuant to Rule 19-724 and within 30 days after a written request from the attorney, Bar Counsel shall (1) provide the attorney with a copy of all material and information accumulated during the investigation and statements as defined in Rule 2-402 (f), (2) provide summaries or reports of all oral statements for which contemporaneously recorded substantially verbatim recitals do not exist, and (3) certify to the attorney in writing that, except for material that constitutes attorney work product or that is subject to a lawful privilege or protective order issued

by the circuit court, the material disclosed constitutes the complete record of Bar Counsel as of the date of ~~inspection~~ disclosure.

~~(b)~~ (c) Exculpatory Information

Whether as part of the disclosure pursuant to section ~~(a)~~ (b) of this Rule or otherwise, no later than 30 days following the filing of an Answer, Bar Counsel shall disclose to the attorney all statements and other evidence of which Bar Counsel is aware that (1) directly negate any allegation in the Petition, (2) would be admissible to impeach a witness intended to be called by Bar Counsel, or (3) would be admissible to mitigate any sanction.

~~(c)~~ (d) Witnesses

~~(1)~~ Fact Witnesses

No later than ~~15 days after the filing of an Answer~~ 45 days prior to the scheduled hearing, Bar Counsel shall provide to the attorney the names and addresses of all persons, other than a rebuttal witness, Bar Counsel intends to call at the hearing. No later than ~~35 days after the filing of an Answer~~ 30 days prior to the scheduled hearing, the attorney shall provide to Bar Counsel the names and addresses of all persons, other than a rebuttal witness, the attorney intends to call at the hearing.

~~(2) Expert Witnesses~~

~~—The designation of expert witnesses is governed by Title 5, Chapter 700.~~

~~(d) Other Discovery from the Attorney~~

~~(1) Bar Counsel may serve interrogatories, requests for production of documents, electronically stored information and property, requests for admission of facts and genuineness of documents, and request for mental or physical evaluations of the attorney pursuant to Title 2, Chapter 400.~~

~~(2) (e) Waiver of Medical Privilege; Medical or Psychological Examination~~

(1) The assertion by an attorney of the existence of a mental or physical condition or an addiction, as a defense to or in mitigation of a charge of misconduct, or the non-existence of a mental or physical condition or an addiction, as a defense to a charge against the attorney constitutes a waiver of the attorney's medical privilege and permits Bar Counsel to obtain, by subpoena or other legitimate means, medical and psychological records of the attorney relevant to issues presented in the case.

(2) Medical or psychological examination of the attorney is governed by Rule 2-423.

~~(e) Depositions~~

~~(1) Except as provided in subsection (e) (2) of this Rule, depositions are governed by the Rules in Title 2, Chapter 400.~~

~~(2) (f) Depositions of the Attorney Grievance Commission~~

The Attorney Grievance Commission ~~may not be~~ is not subject to an organizational designee deposition, pursuant to Rule 2-412 (d), in an attorney disciplinary or remedial matter.

Committee note: Section (f) of this Rule does not preclude the deposition of other persons, including individual members of the Commission or of the Office of Bar Counsel, in accordance with the Rules in Title 2, Chapter 400, subject to the substantive law applicable to taking a deposition of the person. For example, if a deposition of opposing counsel is sought, the party seeking the discovery ordinarily would have the burden of proving that (1) no other means exist to obtain the information sought, (2) the information sought is relevant and not privileged, and (3) the information sought is crucial to the preparation of the case.

~~(f) Continuing Duty to Disclose~~

~~— Bar Counsel and the attorney have a continuing duty to supplement promptly the information required to be disclosed under this Rule.~~

(g) Motions

All discovery motions are governed by Title 2, Chapter 400 and shall be determined by the judge appointed pursuant to Rule 19-722.

Source: This Rule is new in part and is derived, in part from former Rule 16-756 (2016).

Reporter's Note

Rule 19-726 is amended to more closely parallel discovery procedures set forth in Title 18, Chapter 400, Judicial Disabilities and Discipline.

Subsection (a) (1) restores the 2020 version of Rule 19-726, with the addition of the following language from Rule 18-433

(a): "Except as otherwise provided in this Rule" and "the relevant Rules in." Additionally, a reference to Rule 2-402 (b) (1) is added to implement a suggestion made by a judge of the Court of Appeals at the Court's March 30, 2022 open meeting discussion of revisions to this Rule, and a Committee note is added after the subsection.

Subsection (a) (2) is derived from the second sentence of Rule 18-433 (a) (5).

Subsection (a) (3) is derived from Rule 18-433 (a) (3). In light of discussion at the March 30, 2022 open meeting, a Committee note after subsection (a) (3) clarifies the form of oath or affirmation to be used by Bar Counsel when answering interrogatories.

Subsection (a) (4) carries forward the substance of Rule 19-726 (f), which is derived from Rule 18-433 (a) (4).

Subsection (a) (5) is derived from the first sentence of Rule 18-433 (a) (5).

Section (b) carries forward the provisions of current Rule 19-726 (a), with a revised tagline and substitution of the word "disclosure" for the word "inspection" at the end of the section. Section (b) is based upon Rule 18-433 (b), with stylistic changes and the inclusion of timing provisions appropriate to attorney disciplinary and remedial proceedings.

Section (c) carries forward the provisions of current Rule 19-726 (b). Section (c) is based upon Rule 18-433 (c), with stylistic changes and with the timing of the required disclosure of exculpatory information set at "30 days following the filing of an Answer," rather than "no later than 30 days prior to the scheduled hearing," which is the timing of the disclosure of

exculpatory information in judicial disability and disciplinary proceedings.

Section (d) carries forward the provisions of current Rule 19-726 (c) (1); however, the timing provisions are revised to provide that Bar Counsel must disclose witnesses "no later than 45 days prior to the scheduled hearing," and the attorney must disclose witnesses "no later than 30 days prior to the scheduled hearing." The current Rule requires that the disclosures be made "no later than 15 days after the filing of an Answer" and "no later than 35 days after the filing of an Answer," respectively. The Committee believes the revised timing is more workable, and Bar Counsel advises that the change is not likely to cause delay in the proceedings. Section (d) is based upon Rule 18-433 (d), with revised timing provisions appropriate to attorney disciplinary and remedial proceedings.

Subsection (e) (1) carries forward the provisions of current Rule 16-726 (d) (2). Subsection (e) (2) is based upon the final clause in current Rule 16-726 (d) (1). Comparable provisions applicable in judicial disability and disciplinary proceedings are contained in Rule 18-441 (f) (1) (A) and (B).

Section (f) carries forward current Rule 19-726 (e) (2), with stylistic and clarifying changes.

The Committee note following section (f) is new. It is added to clarify that depositions of individuals in the Office of Bar Counsel, individual members of the Attorney Grievance Commission, and other persons may be taken in accordance with the Rules in Title 2, Chapter 400, subject to the substantive law applicable to taking a deposition of the person. The Committee note includes, as an example, factors that the party seeking discovery ordinarily would be required to prove if a deposition of opposing counsel is sought, to wit: (1) that no other means exist to obtain the information sought, (2) that the information sought is relevant and not privileged, and (3) that the information sought is crucial to the preparation of the case. See, e.g., *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628-29 (6th Cir. 2002); *3M Co. v. Engle*, 328 S.W.3d 184, 188 (Ky. 2010); and *Club Vista Fin. Services. v. Eighth Judicial Dist. Court*, 276 P.3d 246, 250 (Nev. 2012).

Section (g) carries forward current Rule 19-726 (g), with the addition of clarifying language stating that discovery motions are determined by the judge appointed pursuant to Rule 19-722.

Subsections (c) (2), (d) (1), and (e) (1) and section (f) of current Rule 19-726 are deleted as superfluous.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 400 - DISCOVERY

Amend Rule 2-412 (d) by making a stylistic change to the tagline and by adding a sentence stating that the section does not apply to a deposition sought of the Attorney Grievance Commission in an action under the Rules in Title 19, Chapter 700, as follows:

RULE 2-412. DEPOSITION - NOTICE

. . .

(d) Designation of Person to Testify ~~for~~ on Behalf of an Organization

A party may in a notice and subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or other persons who will testify on its behalf regarding the matters described and may set forth the matters on which each person designated will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall

testify as to matters known or reasonably available to the organization. This section does not apply to a deposition sought of the Attorney Grievance Commission in an action under the Rules in Title 19, Chapter 700.

. . .

REPORTER'S NOTE

Rule 2-412 (d) is proposed to be amended to conform to Rule 19-726 (f), which provides that the Attorney Grievance Commission is not subject to an organizational designee deposition in an attorney disciplinary matter. Additionally, a stylistic change is made to the tagline.

MARYLAND RULES OF PROCEDURE

TITLE 19 - ATTORNEYS

CHAPTER 700 - DISCIPLINE, INACTIVE STATUS, RESIGNATION

DIVISION 3. PROCEEDINGS ON PETITION FOR

DISCIPLINARY OR REMEDIAL ACTION

Rule 19-726. DISCOVERY

(a) Generally

(1) Except as otherwise provided in this Rule, discovery after a Petition for Disciplinary or Remedial Action has been filed is governed by the relevant Rules in Title 2, Chapter 400, subject to any scheduling order entered pursuant to Rule 19-722 and any order entered pursuant to Rule 2-402 (b) (1) tailoring discovery to the facts and circumstances of the particular action.

Committee note: The Rules in Title 2, Chapter 400 deal with discovery in civil cases. Rule 19-722 (a) requires a judge designated by the Court of Appeals to conduct hearings in an action for disciplinary or remedial action and, within 15 days after an answer to the petition is due and after consultation with Bar Counsel and the attorney, to enter a scheduling order setting dates for the completion of discovery and other events. Rule 2-402 (b) (1) permits the designated judge, after consultation with the parties, to limit or modify certain aspects of the discovery Rules.

(2) For purposes of this Rule, the parties are Bar Counsel and the attorney against whom charges have been filed.

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

Committee note: Answers to interrogatories executed by Bar Counsel shall include an oath or affirmation on knowledge, information, and belief, as generally set forth in Rule 1-304. The affiant's recitation also may include an explanation of the affiant's role in the preparation and signing of the answers to interrogatories and the extent of the affiant's personal knowledge of the information provided.

(4) Bar Counsel and the attorney have a continuing duty to supplement information required to be disclosed under this Rule.

(5) The judge appointed pursuant to Rule 19-722 shall preclude a party from calling a witness, other than a rebuttal witness, or otherwise presenting evidence upon a finding, after the opportunity for a hearing if one is requested, that (A) the witness or evidence was subject to disclosure under this Rule, (B) the party, without substantial justification, failed to disclose the witness or evidence in a timely manner, and (C) the failure was prejudicial to the other party.

(b) Disclosure by Bar Counsel upon Written Request

After an Answer has been filed pursuant to Rule 19-724 and within 30 days after a written request from the attorney, Bar Counsel shall (1) provide the attorney with a copy of all material and information accumulated during the investigation and statements as defined in Rule 2-402 (f), (2) provide summaries or reports of all oral statements for which

contemporaneously recorded substantially verbatim recitals do not exist, and (3) certify to the attorney in writing that, except for material that constitutes attorney work product or that is subject to a lawful privilege or protective order issued by the circuit court, the material disclosed constitutes the complete record of Bar Counsel as of the date of ~~inspection~~ disclosure.

(c) Exculpatory Information

Whether as part of the disclosure pursuant to section (b) of this Rule or otherwise, no later than 30 days following the filing of an Answer, Bar Counsel shall disclose to the attorney all statements and other evidence of which Bar Counsel is aware that (1) directly negate any allegation in the Petition, (2) would be admissible to impeach a witness intended to be called by Bar Counsel, or (3) would be admissible to mitigate any sanction.

(d) Witnesses

No later than 45 days prior to the scheduled hearing, Bar Counsel shall provide to the attorney the names and addresses of all persons, other than a rebuttal witness, Bar Counsel intends to call at the hearing. No later than 30 days prior to the scheduled hearing, the attorney shall provide to Bar Counsel the

names and addresses of all persons, other than a rebuttal witness, the attorney intends to call at the hearing.

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

(1) The assertion by an attorney of the existence of a mental or physical condition or an addiction, as a defense to or in mitigation of a charge of misconduct, or the non-existence of a mental or physical condition or an addiction, as a defense to a charge against the attorney constitutes a waiver of the attorney's medical privilege and permits Bar Counsel to obtain, by subpoena or other legitimate means, medical and psychological records of the attorney relevant to issues presented in the case.

(2) Medical or psychological examination of the attorney is governed by Rule 2-423.

(f) Depositions of the Attorney Grievance Commission

The Attorney Grievance Commission is not subject to an organizational designee deposition, pursuant to Rule 2-412 (d), in an attorney disciplinary or remedial matter.

Committee note: Section (f) of this Rule does not preclude the deposition of other persons, including individual members of the Commission or of the Office of Bar Counsel, in accordance with the Rules in Title 2, Chapter 400, subject to the substantive law applicable to taking a deposition of the person. For example, if a deposition of opposing counsel is sought, the party seeking the discovery ordinarily would have the burden of proving that (1) no other means exist to obtain the information

sought, (2) the information sought is relevant and not privileged, and (3) the information sought is crucial to the preparation of the case.

(g) Motions

All discovery motions are governed by Title 2, Chapter 400 and shall be determined by the judge appointed pursuant to Rule 19-722.

Source: This Rule is new in part and is derived, in part from former Rule 16-756 (2016).