

PUBLIC NOTICE

The Court of Appeals Standing Committee on Rules of Practice and Procedure gives notice of the following Items:

Item 1: The text of revisions to the Rules pertaining to the Judicial Disabilities Commission (Rules 18-401 through 18-417) transmitted to the Court of Appeals on October 13, 2016 as part of the Committee's 191st Report;

Item 2: Excerpts from that Report explaining some of the principal revisions to the JDC Rules;

Item 3: The May 8, 2018 Order of the Court of Appeals remanding Item 1 to the Rules Committee for further consideration;

Item 4: The Rules Committee solicits written comment from interested individuals and organizations with respect to Item 1. Comments should be sent to the Committee's Reporter by July 6, 2018. The Committee prefers that any such comments be sent electronically in PDF or Word format but will accept comments in paper form. Comments sent electronically should be addressed to rules@mdcourts.gov. Comments sent in paper form should be addressed to:

Sandra F. Haines, Esq.
Reporter, Rules Committee
2011-D Commerce Park Drive
Annapolis, MD 21401

Item 5: At the conclusion of the comment period, the Attorneys and Judges Subcommittee of the Rules Committee will begin reviewing all comments timely received. Based on those comments, the Subcommittee may invite individuals and representatives of organizations to meet with the Subcommittee for further discussion.

Item 6: Recommendations from the Subcommittee will be posted on the Judiciary Website, along with a Notice of the time and place of the Rules Committee meeting at which those recommendations will be considered. Rules Committee meetings are open meetings.

Date: June 5, 2018

ITEM 1

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

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MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-401. COMMISSION OF JUDICIAL DISABILITIES - DEFINITIONS

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

(a) Address of Record

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

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

(b) Board

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

(c) Charges

"Charges" means the charges filed with the Commission by Investigative Counsel pursuant to Rule 18-413.

(d) Commission

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

(e) Commission Record

"Commission record" means all documents pertaining to the

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

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

(f) Complainant

"Complainant" means a person who has filed a complaint, and in Rule 18-404 (a), "complainant" also includes a person who has filed a written allegation of misconduct by or disability of a judge that is not under oath or supported by an affidavit.

(g) Complaint

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

(h) Disability

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

(i) Judge

"Judge" means (1) a judge of the Court of Appeals, the Court of Special Appeals, a circuit court, the District Court, or an orphans' court, and (2) a retired judge during any period that the retired judge has been approved for recall.

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

(j) Sanctionable Conduct

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

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

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

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

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

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

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-402. COMMISSION

(a) Chair and Vice Chair

The judicial member from the Court of Special Appeals shall serve as Chair of the Commission. The Commission shall select another of its judicial members to serve as Vice Chair. The Vice Chair shall perform the duties of the Chair whenever the Chair is disqualified or otherwise unable to act.

(b) Recusal

A member of the Commission shall not participate as a member in any proceeding in which (1) the member is a complainant, (2) the member's disability or sanctionable conduct is in issue, (3) the member's impartiality reasonably might be questioned, (4) the member has personal knowledge of disputed material evidentiary facts involved in the proceeding, or (5) the recusal of a judicial member otherwise would be required by the Maryland Code of Judicial Conduct.

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

(c) Executive Secretary

The Commission may select an attorney as Executive

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

(d) Investigative Counsel; Assistants

(1) Appointment; Compensation

The Commission shall appoint an attorney as Investigative Counsel. Before appointing Investigative Counsel, the Commission shall notify bar associations and the general public of the vacancy and shall consider any recommendations that are timely submitted. Investigative Counsel shall serve at the pleasure of the Commission and shall receive the compensation set forth in the budget of the Commission.

(2) Duties

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

(3) Additional Attorneys and Staff

As the need arises and to the extent funds are available in the Commission's budget, the Commission may appoint additional attorneys or other persons to assist Investigative Counsel. Investigative Counsel shall keep an accurate record of

the time and expenses of additional persons employed and ensure that the cost does not exceed the amount allocated by the Commission.

(e) Quorum

The presence of a majority of the members of the Commission constitutes a quorum for the transaction of business, provided that at least one judge, one attorney, and one public member are present. At a hearing on charges held pursuant to Rule 18-413 (i), a Commission member is present only if the member is physically present. Under all other circumstances, a member may be physically present or present by telephone, video, or other electronic conferencing. Other than adjournment of a meeting for lack of a quorum, no action may be taken by the Commission without the concurrence of a majority of members of the Commission.

(f) General Powers of Commission

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

- (1) administer oaths and affirmations;
- (2) issue subpoenas and compel the attendance of witnesses and the production of evidence;
- (3) require persons to testify and produce evidence by

granting them immunity from prosecution or from penalty or forfeiture; and

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

(g) Record

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

(h) Annual Report

Not later than September 1 of each year, the Commission shall submit an annual report to the Court of Appeals regarding its operations. The Report shall include statistical data with respect to complaints received and processed, but shall not include material declared confidential under Rule 18-417.

(i) Request for Home Address

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

Cross reference: See Rules 18-401 (a) and 18-417 (a).

Source: This Rule is derived from former Rule 16-804 (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-403. JUDICIAL INQUIRY BOARD

(a) Creation and Composition

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

(b) Compensation

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

(c) Chair and Vice Chair

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

(d) Removal or Replacement

The Commission by majority vote may remove or replace members of the Board at any time.

(e) Quorum

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

(f) Record

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

Source: This Rule is derived from former Rule 16-804.1 (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-404. COMPLAINTS; INITIAL REVIEW BY INVESTIGATIVE
COUNSEL

(a) Procedure on Receipt of Complaint

(1) Referral to Investigative Counsel

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

(2) Complaint that Fails to Allege Disability or Sanctionable Conduct

If Investigative Counsel concludes that a complaint fails to allege facts that, if true, would constitute a disability or sanctionable conduct, Investigative Counsel shall (A) dismiss the complaint, and (B) notify the complainant and the Commission, in writing, that the complaint was filed and dismissed and the reasons for the dismissal.

Committee note: Subsection (a)(2) of this Rule does not preclude Investigative Counsel from communicating with the complainant or making an inquiry under section (c) of this Rule in order to clarify general or ambiguous allegations that may suggest a disability or sanctionable conduct. Outright dismissal is warranted when the complaint, on its face, complains only of conduct that clearly does not constitute a disability or sanctionable conduct.

(3) Allegation of Disability or Sanctionable Conduct not

Under Oath or Supported by Affidavit

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

(4) Failure to File Complaint Under Oath or Supported by Affidavit

If, after Investigative Counsel has given the notice provided for in subsection (a)(3) of this Rule or has been unable to do so, the complainant fails to file a timely complaint under oath or supported by an affidavit, Investigative Counsel may dismiss the matter and notify the complainant and the Commission, in writing, that a written allegation of misconduct or disability was filed and dismissed and the reasons for the dismissal.

Committee note: In contrast to dismissal of a complaint under Rule 18-405, which requires action by the Commission,

Investigative Counsel may dismiss an allegation of disability or sanctionable conduct under this Rule when, for the reasons noted, the allegation fails to constitute a complaint. Subject to section (c) of this Rule, if there is no cognizable complaint, there is no basis for conducting an investigation.

(b) Opening File on Receipt of Complaint

Investigative Counsel shall open a numbered file on each properly filed complaint and promptly in writing (1) acknowledge receipt of the complaint and (2) explain to the complainant the procedure for investigating and processing the complaint.

(c) Inquiry

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

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-405. INVESTIGATION BY INVESTIGATIVE COUNSEL

(a) Conduct of Investigation

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

If a complaint is not dismissed in accordance with Rule 18-404, Investigative Counsel shall conduct an investigation to determine whether there are reasonable grounds to believe that the judge may have a disability or may have committed sanctionable conduct. Investigative Counsel shall promptly inform the Board and the Commission that the investigation is being undertaken.

(2) Subpoena

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

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

(3) Grant of Immunity

Upon application by Investigative Counsel and for good

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

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

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

(4) Notice to Judge

(A) Except as provided in subsection (a)(4)(C) of this Rule, before the conclusion of the investigation, Investigative Counsel shall notify the judge, in writing, that (i) Investigative Counsel has undertaken an investigation into whether the judge has a disability or has committed sanctionable conduct; (ii) whether the investigation was undertaken on Investigative Counsel's initiative or on a complaint; (iii) if the investigation was undertaken on a complaint, the name of the person who filed the complaint and the contents of the complaint; (iv) the nature of the alleged disability or sanctionable conduct under investigation; and (v) the judge's rights under subsection (a)(5) of this Rule.

(B) The notice shall be given by first class mail or by certified mail requesting "Restricted Delivery - show to whom,

date, address of delivery" and shall be addressed to the judge at the judge's address of record.

(C) Notice shall not be given under this Rule if (i) Investigative Counsel determines, prior to the conclusion of the investigation, that the recommendation of Investigative Counsel will be dismissal of the complaint without a letter of cautionary advice, or (ii) as to other recommended dispositions, the Commission or Board, for good cause, directs a temporary delay of providing notice and includes in its directive a mechanism for providing the judge reasonable opportunity to present information to the Board.

(5) Opportunity of Judge to Respond

Upon the issuance of notice pursuant to subsection (a)(4) of this Rule, Investigative Counsel shall afford the judge a reasonable opportunity which, unless the Commission orders otherwise, shall be no less than 30 days, to present such information as the judge chooses.

(6) Time for Completion

Investigative Counsel shall complete an investigation within 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Chair of the Commission may extend the time for completing the investigation for a reasonable period. The Chair shall notify the Board of any extension granted. For

failure to comply with the time requirements of this section, the Commission may dismiss any complaint and terminate the investigation.

(b) Report and Recommendation by Investigative Counsel

(1) Duty to Make

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

(2) Contents

Investigative Counsel shall include in the report or attach to it any response or other information provided by the judge pursuant to subsection (a)(5) of this Rule. The report shall include a statement that the investigation indicates probable sanctionable conduct, probable disability, both, or neither, together with one of the following recommendations, as appropriate:

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

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

(C) a conditional diversion agreement;

(D) a private reprimand;

(E) a public reprimand;

(F) the filing of charges; or

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

(3) Recipient of Report

(A) If the recommendation is dismissal of the complaint without a letter of cautionary advice, the report and recommendation shall be made to the Commission. Upon receipt of the recommendation, the Commission shall proceed in accordance with Rule 18-408 (a)(2).

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

Committee note: A complaint may be dismissed outright and without a letter of cautionary advice for various reasons, at different stages, and by different entities. Investigative Counsel may dismiss a claim on his or her own initiative, without opening a file, pursuant to Rule 18-404 (a). In that instance, no notice need be given to the judge unless the judge has requested notice. If Investigative Counsel opens a file pursuant to Rule 18-404 (b) and performs an investigation under this Rule, Investigative Counsel may recommend dismissal without a letter of cautionary advice because, as a factual matter, there is insufficient evidence of a disability or sanctionable conduct. In that situation, if the Commission adopts the recommendation, there is no need for notice to the judge unless the judge has requested such notice. If the matter proceeds to the Board, the judge must receive notice, even if the ultimate decision is to dismiss the complaint.

(C) Subject to a retention schedule approved by the Commission, Investigative Counsel shall keep a record of the investigation.

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-406. PROCEEDINGS BEFORE BOARD; REVIEW BY COMMISSION

(a) Review of Investigative Counsel's Report

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

(b) Informal Meeting with Judge; Peer Review

(1) Generally

The Board may meet informally with the judge.

(2) Peer Review

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

(B) The discussion may occur in person or by telephone or other electronic conferencing but shall remain informal and confidential. The peer review panel (i) shall have no authority to make any findings or recommendations, other than to the judge; (ii) shall make no report to Investigative Counsel, the

Board, or the Commission; and (iii) may not testify regarding the conference with the judge before the Commission or in any court proceeding.

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

(c) Further Investigation

The Board may direct Investigative Counsel to make a further investigation pursuant to Rule 18-407.

(d) Board's Report to Commission

(1) Contents

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

(A) dismissal of any complaint, without a letter of cautionary advice pursuant to Rule 18-408 (a), and termination of any investigation;

(B) dismissal of any complaint, with a letter of cautionary advice pursuant to Rules 18-408 (b) and 18-414;

(C) a conditional diversion agreement pursuant to Rules 18-409 and 18-414;

(D) a private reprimand pursuant to Rules 18-410 and 18-

414;

(E) a public reprimand pursuant to Rules 18-411 and 18-

414;

(F) retirement of the judge pursuant to Rules 18-412 and 18-414; or

(G) upon a determination of probable cause that the judge has a disability or has committed sanctionable conduct, the filing of charges pursuant to Rule 18-413.

(2) Condition and Limitation

(A) The Board may not recommend (i) a dismissal with a letter of cautionary advice if the judge has objected to that disposition pursuant to Rule 18-408 (b), or (ii) a conditional diversion agreement, a private reprimand, a public reprimand, or retirement unless the judge has consented in writing to that remedy pursuant to the applicable Rules in this Chapter.

Committee note: A public reprimand or recommendation of retirement, without the consent of the judge, may be issued by the Commission only after the filing of charges and a hearing before the Commission.

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

(3) Time for Submission of Report

(A) Generally

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

(B) Extension

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

(C) Failure to File Timely Report

If the Board fails to issue its report within the time allowed, the Chair of the Commission and Investigative Counsel shall conform the report and recommendation of Investigative Counsel to the requirements of subsections (f)(1) and (2) of this Rule and refer the matter to the Commission, which may proceed, using the report and recommendation of Investigative Counsel.

(4) Copy to Investigative Counsel and Judge

Upon receiving the report and recommendation, the Commission promptly shall transmit a copy of it to Investigative Counsel and, except for a recommendation of dismissal without a letter of cautionary advice, to the judge.

(e) Filing of Response

Investigative Counsel and, except for a recommendation of

dismissal without a letter of cautionary advice, the judge may file with the Commission a written response to the Board's report and recommendation. Unless the Chair of the Commission, Investigative Counsel, and the judge agree to an extension, any response shall be filed within 15 days after the date the Commission transmitted copies of the report and recommendation to Investigative Counsel and the judge.

(f) Action by Commission on Board Report and Recommendation

(1) Review

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

(2) Appearance by Judge

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

(3) Disposition

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

(A) direct Investigative Counsel to conduct a further investigation pursuant to Rule 18-407;

(B) remand the matter to the Board for further

consideration and direct the Board to file a supplemental report within a specified period of time;

(C) enter a disposition pursuant to Rule 18-408, 18-409, 18-410, 18-411, or 18-412;

(D) enter an appropriate disposition to which the judge has filed a written consent in accordance with the Rules in this Chapter, including a disposition under Rule 18-414 (a)(5); or

(E) direct Investigative Counsel to file charges pursuant to Rule 18-413.

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-407. FURTHER INVESTIGATION

(a) Notice to Judge of Investigation

Upon a directive for a further investigation by the Board pursuant to Rule 18-406 (c) or by the Commission pursuant to Rule 18-405 (b)(3)(A) or 18-406 (f)(3), Investigative Counsel promptly shall (A) provide the notice and opportunity to respond required by Rule 18-405 (a)(4) and (5) if such notice and opportunity have not already been provided, and (B) notify the judge at the judge's address of record that the Board or Commission has directed a further investigation.

(b) Subpoenas

(1) Issuance

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

(2) Notice to Judge

Promptly after service of the subpoena and in addition

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

(3) Motion for Protective Order

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

(4) Failure to Comply

Upon a failure to comply with a subpoena issued pursuant to this Rule, the court, on motion of Investigative Counsel, may compel compliance with the subpoena as provided in Rule 18-402 (f).

(5) Confidentiality

(A) Subpoena

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

(B) Court Files and Records

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

(C) Hearings

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

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

(c) Time for Completion of Investigation

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

(d) Report and Recommendation

(1) Duty to Make

Within the time allowed for completing the further investigation, Investigative Counsel shall make a report of the

results of the investigation to the Board or Commission, whichever authorized the further investigation, in the form the Commission requires.

(2) Contents

Unless the material already has been provided to the recipient of the report, Investigative Counsel shall include in the report or attach to it any response or other information provided by the judge pursuant to section (a) of this Rule or Rule 18-405 (a)(5). The report shall include a statement that the investigation indicates probable sanctionable conduct, probable disability, both, or neither, together with one of the following recommendations:

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

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

(C) a conditional diversion agreement;

(D) a private reprimand;

(E) a public reprimand;

(F) the filing of charges; or

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

Source: This Rule is derived from former Rule 16-806 (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-408. DISMISSAL OF COMPLAINT

(a) Without Letter of Cautionary Advice

(1) Generally

If, after an investigation by Investigative Counsel, the Commission concludes that the evidence fails to show that the judge has a disability or has committed sanctionable conduct, it shall dismiss the complaint without a letter of cautionary advice. Unless the judge has requested in writing notice of any dismissal, the Commission need not notify the judge of the dismissal but shall notify the complainant and the Board.

(2) Upon Recommendation Pursuant to Rule 18-405 (b)(3)

If Investigative Counsel has recommended dismissal of the complaint without a letter of cautionary advice pursuant to Rule 18-405 (b)(3), the Commission may (A) accept the recommendation and dismiss the complaint, (B) refer the matter to the Board for its consideration, or (C) direct Investigative Counsel to undertake a further investigation pursuant to Rule 18-407.

(b) With Letter of Cautionary Advice

(1) When Appropriate

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

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

(2) Notice to Judge

Before a dismissal with a letter of cautionary advice is issued, the Commission shall mail to the judge a notice that states (i) that the Commission intends to dismiss the complaint accompanied by a letter of cautionary advice, (ii) the content of the letter, (iii) whether the complainant is to be notified that such a letter was issued; (iv) that the judge has the right to object to the letter by filing a written objection with the Commission within 30 days after the date of the notice; (v) if a written objection is not filed within that time, the Commission may issue the letter as an accompaniment to the dismissal; and (vi) if a timely objection is filed, the proposed disposition will be regarded as withdrawn and the matter shall proceed as if the proposed disposition was never made.

(3) Objection by Judge

The judge may object to the proposed dismissal accompanied by the letter of cautionary advice by filing a written objection with the Commission within the 30-day period stated in the notice. If a timely objection is not filed, the Commission may proceed with the proposed disposition upon the expiration of the time for filing an objection. If a timely objection is filed, the Commission shall not proceed with the proposed disposition, the proceeding shall resume as if no dismissal with a letter of cautionary advice had been proposed, and the fact that a dismissal with an accompanying letter of cautionary advice was proposed and withdrawn may not be admitted into evidence.

(4) Confidentiality of Content of Letter of Cautionary Advice

The contents of the letter are private and confidential, except that the Commission may notify the complainant that a letter of cautionary advice was given to the judge.

(5) Not a Form of Discipline

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

Source: This Rule is derived from former Rule 16-807 (a) (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-409. CONDITIONAL DIVERSION AGREEMENT

(a) When Appropriate

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

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

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

(b) Compliance

The Commission shall direct Investigative Counsel to monitor compliance with the conditions of the agreement and may

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

(c) Not a Form of Discipline

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

(d) Confidentiality

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

(e) Termination of Proceedings

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

Source: This Rule is derived from former Rule 16-807 (c) (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-410. PRIVATE REPRIMAND

(a) When Appropriate

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

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

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

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

(b) Form of Discipline

A private reprimand constitutes a form of discipline.

(c) Confidentiality; Notice to Complainant

(1) Generally

Except as otherwise provided by subsection (b)(2) of this Rule and Rule 18-417, a private reprimand is confidential and shall not be disclosed unless the judge consents, in writing, to the disclosure.

(2) Notice to Complainant

Upon the issuance of a private reprimand, the Commission shall notify the complainant that such a reprimand was issued but shall not disclose the text of the reprimand.

Source: This Rule is derived from former Rule 16-807 (b) (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-411. PUBLIC REPRIMAND

(a) When Appropriate

The Commission may issue a public reprimand upon a finding by the Commission that (1) the judge has committed sanctionable conduct, (2) the conduct, by reason of its nature, repetition, or effect, is sufficiently serious as to make a private reprimand or a conditional diversion agreement inappropriate but not sufficiently serious to warrant the judge being suspended or removed from office.

(b) Consent of Judge

(1) A public reprimand may be issued with the written consent of the judge pursuant to subsection (b)(2) of this Rule or, after the filing of charges and a hearing, without the judge's consent.

(2) A consent by the judge shall be in writing and shall include a waiver of (A) the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals, and (B) the right to challenge the findings that serve as the basis for the public reprimand.

(c) Publication

A public reprimand shall be posted on the Judiciary website and may be otherwise disclosed. A copy of the public reprimand shall be sent to the complainant.

(d) Form of Discipline

A public reprimand constitutes a form of discipline.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-412. RETIREMENT

(a) When Appropriate

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

(b) Effect

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

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

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

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-413. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

(a) Filing of Charges

(1) Direction by Commission

After considering the report and recommendation of the Board submitted pursuant to Rule 18-406 and any timely filed response, and upon a finding by the Commission of probable cause to believe that a judge has a disability or has committed sanctionable conduct, the Commission may direct Investigative Counsel to initiate proceedings against the judge by filing with the Commission charges that the judge has a disability or has committed sanctionable conduct.

(2) Content of Charges

The charges shall (A) state the nature of the alleged disability or sanctionable conduct, including each Rule of the Maryland Code of Judicial Conduct allegedly violated by the judge, (B) allege the specific facts upon which the charges are based, and (C) state that the judge has the right to file a written response to the charges within 30 days after service of the charges.

(b) Service; Notice

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

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

(c) Response

Within 30 days after service of the charges, the judge may file with the Commission an original and 11 copies of a written response or the judge may file a response electronically in a format acceptable to the Commission.

(d) Notice of Hearing

Upon the filing of a response or, if no response is filed, upon expiration of the time for filing one, the Commission shall notify the judge of the date, time, and place of a hearing. Unless the judge has agreed to an earlier hearing date, the hearing shall not be held earlier than 60 days after the notice was sent. If the hearing is on a charge of sanctionable conduct, the Commission also shall notify the complainant and post a notice on the Judiciary website that is limited to (1) the name of the judge, (2) the date, time, and place of the hearing, and (3) the charges that have been filed and any response from the judge.

Cross reference: See Rule 18-417 (a)(3), concerning the time for posting on the Judiciary website.

(e) Extension of Time

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

(f) Procedural Rights of Judge

The judge has the right to (1) inspect and copy the Commission Record, (2) receive a prompt hearing on the charges in accordance with this Rule, (3) be represented by an attorney, (4) the issuance of subpoenas for the attendance of witnesses and for the production of documents and other tangible things, (5) present evidence and argument, and (6) examine and cross-examine witnesses.

(g) Exchange of Information

(1) Generally

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

(2) List of Witnesses; Documents

Not later than 30 days before the date set for the

hearing, Investigative Counsel and the judge shall provide each other with a list of the names, addresses, and telephone numbers of the witnesses that each intends to call and copies of the documents that each intends to introduce in evidence at the hearing.

(3) Scope of Discovery

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

(4) Mental or Physical Examination

When disability of the judge is an issue, on request of Investigative Counsel upon a showing of good cause or on the initiative of the Commission, the Chair of the Commission may order the judge to submit to a mental or physical examination in accordance with Rule 2-423.

(h) Amendments

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

(i) Hearing on Charges

The hearing on charges shall be conducted in the following manner:

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

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

(3) Except for good cause shown, a motion for recusal of a member of the Commission shall be filed at least 30 days before the hearing.

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

(5) Title 5 of the Maryland Rules shall apply.

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

(7) with the approval of the Chair of the Commission, the

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

(j) Commission Findings and Action

(1) Finding of Disability

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

(2) Finding of Sanctionable Conduct

If the Commission finds by clear and convincing evidence that the judge has committed sanctionable conduct but does not find that the judge has a disability, it shall either issue a public reprimand to the judge or refer the matter to the Court of Appeals.

(3) Finding of No Disability or Sanctionable Conduct

If the Commission does not find that the judge has a disability and does not find that the judge committed sanctionable conduct, it shall dismiss the charges and terminate the proceeding.

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

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

(1) make written findings of fact and conclusions of law

with respect to the issues of fact and law in the proceeding, state its recommendations, and enter those findings and recommendations in the record;

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

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

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

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

Source: This Rule is derived from former Rule 16-808 (a) through (k) (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-414. CONSENT TO DISPOSITION

(a) Generally

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

(1) dismissal of the complaint accompanied by a letter of cautionary advice by failing to object pursuant to Rule 18-408

(b);

(2) a conditional diversion agreement pursuant to Rule 18-409;

(3) a private reprimand pursuant to Rule 18-410;

(4) a public reprimand;

(5) suspension or removal from judicial office; or

(6) retirement from judicial office pursuant to Rule 18-412.

(b) Form of Consent

(1) Generally

Except for a consent by failure to object to a dismissal accompanied by a letter of cautionary advice, a consent shall be in the form of a written agreement between the judge and the Commission.

(2) If Charges Filed

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

(A) an admission by the judge to all or part of the charges;

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

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

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

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

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

(3) If Charges Not Yet Filed

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

(c) Submission to Court of Appeals

An agreement requiring the approval of the Court of Appeals shall be submitted to the Court, which shall either

approve or reject the agreement. Until approved by the Court of Appeals, the agreement is confidential and privileged. If the Court approves the agreement and imposes the stated sanction, the agreement shall be made public. If the Court rejects the stated sanction, the proceeding shall resume as if no consent had been given, and all admissions and waivers contained in the agreement are withdrawn and may not be admitted into evidence.

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

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-415. PROCEEDINGS IN COURT OF APPEALS

(a) Expedited Consideration

Upon receiving the hearing record pursuant to Rule 18-413 (k), the Clerk of the Court of Appeals shall docket the case for expedited consideration.

(b) Exceptions

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

(c) Response

The Commission shall file a response within 15 days after service of the exceptions in accordance with Rule 20-405. The Commission shall be represented in the Court of Appeals by its Executive Secretary or such other attorney as the Commission may appoint. A copy of the response shall be served on the judge in

accordance with Rules 1-321 and 1-323.

(d) Hearing

If exceptions are timely filed, upon the filing of a response or, if no response is filed, upon the expiration of the time for filing it, the Court shall set a schedule for filing memoranda in support of the exceptions and response and a date for a hearing. The hearing on exceptions shall be conducted in accordance with Rule 8-522. If no exceptions are timely filed or if the judge files with the Court a written waiver of the judge's right to a hearing, the Court may decide the matter without a hearing.

(e) Disposition

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

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

(f) Decision

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

Source: This Rule is derived from former Rule 16-809 (2016).

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-416. EXECUTION OF DISCIPLINE

(a) Authority

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

(b) Monitoring Compliance

(1) Unless the Court orders otherwise, the Commission shall monitor compliance with the conditions stated in the order. The Commission may direct Investigative Counsel to monitor compliance on its behalf.

(2) The Commission may direct the judge to provide to Investigative Counsel such information and documentation and to authorize other designated persons to provide such information and documentation to Investigative Counsel as necessary for the Commission effectively to monitor compliance with the applicable conditions.

(3) Upon any material failure of the judge to comply with those requirements or upon receipt of information that the judge

otherwise has failed to comply with a condition imposed by the Court, Investigative Counsel shall promptly file a report with the Commission and send written notice to the judge that it has done so. The notice shall include a copy of the report and inform the judge that, within fifteen days from the date of the notice, the judge may file a written response with the Commission.

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

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

(c) Response; Hearing

Within fifteen days after the filing of the Commission's report, the judge may file a response with the Court. The judge shall serve a copy of any response on the Commission. The Court shall hold a hearing on the Commission's report and any timely response filed by the judge and may take whatever action it finds appropriate. The Commission may be represented in the

proceeding by its Executive Secretary or any other attorney the Commission may appoint.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-417. CONFIDENTIALITY

(a) Generally

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

(1) Address of Record

The judge's current home address shall remain confidential at all stages of proceedings under these rules. Any other address of record shall be open to the public if the charges and proceedings are open to the public.

(2) Complaints; Investigations; Disposition Without Charges

Except as otherwise required by Rule 18-408, 18-409, and 18-410, all proceedings under Rules 18-404 through 18-410 shall be confidential.

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

Charges alleging sanctionable conduct, whether or not joined with charges of disability, and all subsequent proceedings before the Commission on those charges shall be open

to the public upon the first to occur of (A) the resignation or voluntary retirement of the judge, (B) the filing of a response by the judge to the charges, or (C) expiration of the time for filing a response. If the charges allege only that the judge has a disability, the charges and all proceedings before the Commission on them shall be confidential.

(4) Work Product, Proceedings, and Deliberations

Except to the extent admitted into evidence before the Commission, the following matters shall be confidential: (A) Investigative Counsel's work product; (B) proceedings before the Board, including any peer review proceeding; (C) deliberations of the Board and Commission; and (D) records of the Board's and Commission's deliberations.

(5) Proceedings in the Court of Appeals

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

(b) Permitted Release of Information by Commission

(1) Written Waiver

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

(2) Explanatory Statement

The Commission may issue a brief explanatory statement necessary to correct any public misperception about actual or

possible proceedings before the Commission.

(3) To Chief Judge of Court of Appeals

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

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

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

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

(4) Information Involving Criminal Activity

The Commission may provide to law enforcement and prosecuting officials information involving criminal activity, including information requested by subpoena from a grand jury.

(5) Nominations; Appointments; Approvals

(A) Permitted Disclosures

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

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

(i) information about any completed proceedings involving the judge that did not result in dismissal, including conditional diversion agreements and private reprimands; and

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

Committee note: A dismissal with a letter of cautionary advice does not constitute discipline and is not disclosed under subsection (b)(5)(A)(i) of this Rule.

(B) Restrictions

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

(C) Copy to Judge

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

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

(c) Statistical Reports

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

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

ITEM 2

CATEGORY 1

Category 1 consists of the latest revisions to the proposed Rules governing the Commission on Judicial Disabilities and the resolution of complaints made against judges (Title 18, Chapter 400, consisting of Rules 18-401 through 18-417). Revisions to the judicial discipline Rules were initially included in Part II of the Committee's 178th Report, submitted to the Court in June 2013. A hearing was held on that Part in October 2013, but no final action was taken at that time, as the plan was to deal with all three Parts of the 178th Report together, and Part III had not yet been completed.

Due to intervening matters of greater urgency, Part III, dealing with attorneys, could not be completed until March 2016, at which time it, along with updating Supplements to Parts I and II, were submitted. During the interim, the Committee considered a number of additional changes to the judicial discipline Rules recommended by the Chair of the Judicial Disabilities Commission and Investigative Counsel, some of which were included in the Supplement to Part II.

Following the submission of that Supplement, but prior to the Court's hearing on it, concerns regarding some of those changes were expressed to the Committee by some former members of the Commission and the Inquiry Board. At the Committee's request, the Court deferred action on those Rules in order to give the Committee an opportunity to discuss the concerns with those who had expressed them and with the current Chairs of the Commission and Inquiry Board and Investigative Counsel. With that exception, and a few others, the Court approved the balance of the 178th Report (Part III and the Supplements to Parts I and II), to take effect July 1, 2016. That decision left the *current* judicial discipline Rules -- renumbered Title 18, Chapter 400 -- intact for the time being.

Further discussions occurred and, as a result, compromises were reached. There now appears to be agreement among those parties and the Rules Committee. The proposed Rules in Category 1 reflect those agreements. For the convenience of the Court and, as was done in the initial submission of Part II in 2013 and in the Supplement to that Part, Title 18, Chapter 400 is submitted in two formats - a "clean" version showing how the Rules will read if adopted, and, as APPENDIX A to this Report, a

"marked" version showing, through underlining and strikeouts, the changes made to the current Rules.

As noted in the Supplement to Part II, most of the changes involve a reorganization and updating of the Rules, making some administrative changes, and clarifying some provisions. There are, however, a few more substantive changes to which the Court's attention is drawn.

First, although the Maryland Constitution establishes the name of the Commission as the Commission on Judicial Disabilities (Art. IV, §§4A and 4B), it recognizes that the Commission's authority extends not just to *disabilities* on the part of judges but to *sanctionable conduct* as well, and, in fact, the great majority of complaints dealt with by the Commission and by the Court have involved allegations of sanctionable conduct rather than disability, although occasionally there is some overlap. The distinction is an important one, both in terms of accurately defining the role of the Commission, the Inquiry Board, and the Court in dealing with complaints against judges and in assuring that dispositions recommended or imposed fairly match the circumstances.

In that regard, the Committee proposes to caption the Title 18, Chapter 400 Rules "Judicial Disabilities and Discipline," but to give greater recognition to the Constitutionally permissible disposition of mandatory retirement. Mandatory retirement which is not regarded as discipline, may be appropriate when the conduct that brought the judge before the Commission was truly the product of a *disability*, as defined in Rule 18-401 (h), rather than inexcusable misconduct, for which a reprimand, conditional diversion (currently referred to as deferred discipline) censure, suspension, or removal from office may be appropriate. See proposed Rules 18-405, 18-407, 18-412, and 18-414.

Second, the current Rules permit a judge to reject an offer of dismissal with a warning or a private reprimand, and several judges have done that, either in the honest belief that they have done nothing wrong or fearful of the consequences of receiving a "warning" or a reprimand, should that ever become public. That leaves the Commission with the choice of either dismissing the complaint outright or proceeding with the filing of formal charges, neither of which it believes is the most appropriate disposition.

The Rules Committee does not propose to alter the right of the judge to reject such an offer but recommends two changes that may help remove an impediment to making those two

dispositions more acceptable. Although other States permit their counterpart agency to couple a dismissal with a letter of some kind, some use a description other than "warning," which has a negative and confrontational connotation. The Committee proposes substituting "letter of cautionary advice," coupled with a Committee note to Rule 18-408 -- the dismissal Rule -- explaining the remedial purpose of the attachment, in order to soften its image but still send the desired message.

The Committee also proposes, in Rule 18-406, dealing with proceedings before the Inquiry Board, to permit the Board, *with the consent of the judge*, to convene a peer review panel consisting of two judges of the same level of court as the judge to meet privately with the judge, offer their neutral evaluation, and suggest options for the judge to consider. This panel would not be part of the formal disciplinary process; it would not act as a mediator or make any findings, and its meeting with the judge would be confidential. The judge may freely reject any suggestions his or her colleagues may offer. A somewhat similar process seems to have worked well in attorney grievance cases.

Third, under the current Rule, all recommendations of Investigative Counsel, including outright dismissal of the complaint without a warning, go to the Inquiry Board for its review and then to the Commission, which has final authority over the dismissal. In the last two fiscal years (FY 2015 and 2016), Investigative Counsel recommended that 186 complaints be dismissed without a warning, all of which were approved by the Board and ultimately by the Commission.

The Committee recommends that recommendations by Investigative Counsel of outright dismissal of the complaint be sent directly to the Commission, to avoid the double proceeding. The Chairs of the Commission and the Inquiry Board, as well as Investigative Counsel concur in this recommendation.

The Rules Committee does not view this recommendation as detracting from the important role played by the Inquiry Board in shielding the Commission, which ultimately may have to "try the case," from undue involvement in the investigation phase. It is unlikely that the judge will ever object to a recommendation of outright dismissal, and, if the Commission were to have any qualm about approving such a recommendation, it would have the authority to refer the matter to the Inquiry Board for consideration. Under this proposal, recommended dismissals accompanied by a letter of cautionary advice would continue to be referred to the Inquiry Board, because (1) the judge may wish to reject that proposed disposition and thereby

create a contested issue, and (2) the Board's views on the content of the proposed letter would be useful.

Fourth, current Rule 18-406 (c) [former Rule 16-807 (c)] permits the Commission, with the consent of the judge, to enter into what the Rule refers to as a "deferred discipline agreement." That is probably a misnomer, as the hope and expectation is that there will be no discipline. It is akin to the "conditional diversion agreement" provided for in the attorney grievance Rules, and the Committee believes that is a more accurate description of what is intended. The Committee proposes using that term.

Fifth, another new addition is Rule 18-416, to fill a gap in the current Rules. On several occasions, the Court has suspended a judge for a set period of time and simultaneously suspended execution of part of that suspension, subject to compliance with certain conditions. It is a form of probation, although that term has not been used. There is no current Rule on that, which leaves open the question of who is to monitor compliance with the conditions set by the Court, how any non-compliance would be reported to the Court, and what would happen then. Rule 18-416 places that option into the Rules and, unless the Court orders otherwise, directs that the Commission monitor compliance and report any material failure of compliance on the part of the judge but permits the Commission to delegate the basic monitoring to Investigative Counsel. Upon a report from Investigative Counsel of a material violation by the judge, the Commission would schedule a hearing and report its findings to the Court. The judge would have the right to file a response. The Court would hold a hearing and take whatever action it deems appropriate.

Finally, the Committee proposes in Rule 18-417, dealing with the confidentiality of proceedings before Investigative Counsel, the Inquiry Board, and the Commission, that, at the request of the Chief Judge of the Court of Appeals, the Commission disclose to the Chief Judge (1) whether a complaint is pending against the judge who is the subject of the request, and (2) the disposition of each complaint that had been filed against that judge within the preceding five years. The Rule would permit the Chief Judge to share that information with the members of the Court. The Court, or the Chief Judge, may need this information in determining whether to approve a retired (senior) judge for recall, in deciding whether to designate the judge as an administrative judge, cross-designate the judge to sit on another court, or to appoint the judge to a committee.

ITEM 3

IN THE COURT OF APPEALS OF MARYLAND

R U L E S O R D E R

WHEREAS, this Court's Standing Committee on Rules of Practice and Procedure submitted its One Hundred Ninety-First Report to the Court, recommending, *inter alia*, the proposed deletion of current Title 18, Chapter 400 (Judicial Discipline) and adoption of a new Title 18, Chapter 400 (Judicial Disabilities and Discipline); and

WHEREAS, this Court, by Rules Order dated December 13, 2016, deferred action on the proposed revision of Title 18, Chapter 400; and

WHEREAS, this Court now wishes to recommit the proposed revision to its Rules Committee for further study in light of developments in the law; now, therefore, it is this 8th day of May, 2018

ORDERED, by the Court of Appeals of Maryland, that the proposed revision of Title 18, Chapter 400 be, and it is hereby,

remanded to the Standing Committee on Rules of Practice and Procedure for further study by the Committee; and it is further

ORDERED that a copy of this Order be posted promptly on the website of the Maryland Judiciary.

/s/ Mary Ellen Barbera

Mary Ellen Barbera

/s/ Clayton Greene, Jr.

Clayton Greene, Jr.

/s/ Sally D. Adkins

Sally D. Adkins

/s/ Robert N. McDonald

Robert N. McDonald

/s/ Shirley M. Watts

Shirley M. Watts

/s/ Michele D. Hotten

Michele D. Hotten

/s/ Joseph M. Getty

Joseph M. Getty

Filed: May 8, 2018

/s/ Bessie M. Decker

Clerk
Court of Appeals of Maryland