

Arizona Commission on Judicial Conduct

RULES

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RULES OF THE COMMISSION ON JUDICIAL CONDUCT

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RULES OF THE COMMISSION ON JUDICIAL CONDUCT

PREAMBLE

An independent, fair, and competent judiciary being one of the cornerstones of our legal system, judges must respect and honor their judicial office as a public trust. To preserve the integrity of the judiciary and to enhance public confidence in the judicial system, Arizona regulates judicial conduct through a system comprised of the Arizona Supreme Court and the Commission on Judicial Conduct, which is established by article 6.1 of the Arizona Constitution. By law, the supreme court is responsible for approving the commission's rules and reviewing recommendations for the censure, suspension, removal, or retirement of a judge. The supreme court is also responsible for adopting the Code of Judicial Conduct, which contains the standards governing the ethical conduct of judges. The commission is responsible for administering the judicial discipline and incapacity system over all state and local judges.

TERMINOLOGY

The following terms have specific meanings within the context of these rules:

“Censure” is a formal public sanction based on a finding that a judge has clearly committed misconduct but the conduct is not so egregious as to warrant suspension, removal or retirement.

“Code” means the Code of Judicial Conduct adopted by the supreme court.

“Complaint” means information in any form from any source received by the commission that alleges or implies judicial misconduct or incapacity.

“Complainant” means a person or organization that initially files a complaint regarding the conduct of a judge. The complainant is not a party to the proceeding.

“Constitution” means the Arizona Constitution.

“Disciplinary counsel” means an attorney responsible for investigating complaints, presenting information to an investigative panel, and prosecuting charges in a formal disciplinary proceeding before a hearing panel, a hearing officer, or the supreme court.

“Executive director” denotes the chief administrator for the commission.

“Formal charges” denotes the document setting forth specific acts of judicial misconduct or incapacity, including any amendment thereto, authorized by an investigative panel upon a determination of reasonable cause.

“Hearing” means a public proceeding at which issues of fact and law raised in the formal charges are tried before a hearing panel or a hearing officer.

“Hearing officer” denotes a person appointed by the commission to perform the functions of a hearing panel, including making proposed recommendations, when circumstances dictate that an appropriate hearing panel cannot be constituted, or when the hearing panel is unable to complete this process within the intent of the rules.

“Hearing panel” denotes the commission members appointed by the chairperson to conduct a hearing.

“Incapacity” is a mental or physical condition that adversely affects a judge’s ability to perform judicial functions. Incapacity is distinguished from a disability in that a disability does not necessarily adversely affect a judge’s performance of judicial functions.

“Investigative panel” denotes three commission members appointed by the chairperson to review the complaint and evidence to determine if reasonable cause exists to file formal charges against a judge.

“Judge” refers to anyone, whether or not a lawyer, who is or was an officer of the judicial branch of government subject to the code, including judges pro tempore, court commissioners, hearing officers, special masters, and referees.

“Misconduct” means any conduct by a judge constituting grounds for discipline.

“Presiding member” is the person designated by the chairperson to perform the duties of a presiding officer on a commission panel.

“Proceedings” denotes all steps in the discipline and incapacity system set forth in these rules.

“Public member” means a member of the commission who has never been a judge or an attorney.

“Reasonable Cause” is the equivalent of probable cause and means a reasonable ground for belief in the existence of facts warranting the filing of formal charges.

“Recommendations” denotes the written findings of fact, conclusions of law, and recommendations filed with the commission or the supreme court at the conclusion of a formal hearing.

“Record” means the complaint, the judge's response, the commission's findings, if any, and the final dispositional order in a case involving informal proceedings, and all documents filed in a case involving formal proceedings beginning with the notice and statement of formal charges, including the transcript of the hearing if recommendations are filed with the supreme court.

“Reprimand” is an informal public sanction imposed for minor misconduct that does not warrant censure, suspension, removal, or retirement.

“Supreme court” is the Supreme Court of Arizona.

SECTION A. ORGANIZATION AND ADMINISTRATION

RULE 1. SCOPE OF AUTHORITY

The disciplinary authority of the commission extends to every judge and judicial officer subject to article 6.1 of the constitution and the code.

RULE 2. PURPOSE AND JURISDICTION

The purpose of the commission is to administer the judicial discipline and incapacity system established by the constitution. The commission has jurisdiction over judges and former judges concerning allegations of misconduct occurring prior to or during service as a judge and allegations of incapacity during service as a judge.

RULE 3. ORGANIZATION

(a) Members. The commission is comprised of eleven members appointed to staggered, six-year terms in specific categories as provided in article 6.1, § 1 of the constitution. Membership shall terminate if a member ceases to hold the position that qualified him or her for appointment. An appointment to fill a vacancy for an unexpired term shall be made in the same manner as provided for an original appointment.

(b) Officers. The members of the commission shall elect a chairperson, a vice-chairperson, and a secretary, each of whom may serve successive two-year terms. If an officer resigns or ceases to be a member of the commission, the commission shall elect another member to fill the remaining term of the vacated office.

(c) Duties of officers. The chairperson shall perform the duties normally associated with the office and shall preside over all general meetings of the full commission. The vice-chairperson shall act as chairperson in the absence of the chairperson. In the absence of both the chairperson and vice-chairperson, the members present at the meeting shall select an acting chairperson. The secretary, assisted by the executive director, shall keep the permanent minutes of commission meetings. The chairperson may appoint an acting secretary in the absence or inability of the secretary to perform these duties.

(d) Quorum. A majority of the members shall constitute a quorum for business transacted before the full commission. Three members shall constitute a quorum for an investigative panel and six members shall constitute a quorum for a hearing panel, providing that both panels shall include at least one public member.

(e) Meetings. The chairperson or any three members may call a meeting of the full commission and designate when and where the meeting shall be held. The

chairperson or executive director shall notify each member of the time and place of any meeting.

(f) Panels. When necessary under these rules, the chairperson shall divide the commission into an investigative panel of three members and a hearing panel of eight members, and shall designate a member to preside over each panel. Whenever possible panels shall include members from each category of membership (judges, attorneys, and public members), and shall meet at the direction of the presiding member. No member who sits on an investigative panel during a particular case may sit on a hearing panel for the same case.

(g) Expenses. Commission members shall not be compensated for their services, but may be reimbursed for their travel and other expenses incidental to the performance of their duties.

(h) Disqualification. A member of the commission shall disqualify himself or herself in any matter in which disqualification would be required of a judge under the code.

(i) Complaints against judicial members. If a complaint is filed against a judicial member of the commission, that member shall not participate in the investigation or adjudication of the matter.

RULE 4. ADMINISTRATION

(a) Appointment of staff. The commission may employ an executive director, disciplinary counsel, and such other staff as it deems necessary to assist the commission in performing its duties. Commission staff shall serve at the pleasure of the commission.

(b) Duties of executive director. The executive director is the chief administrative officer of the commission and is responsible for considering allegations of judicial misconduct from any source, screening complaints, and aiding as necessary in the investigation of complaints. The executive director shall supervise commission staff, prepare reports, accept service on behalf of the commission, administer appropriations and other funds in cooperation with the Administrative Director of the Courts, maintain records and files, and perform other duties as directed by the commission.

(c) Duties of disciplinary counsel. Disciplinary counsel shall conduct preliminary investigations and perform the functions of a prosecutor in proceedings before investigative panels, hearing panels or hearing officers, and the supreme court. Disciplinary counsel shall file formal charges when directed to do so by the commission or an investigative panel, and shall perform other duties as directed by the commission.

(d) Policies, procedures and forms. The commission may adopt administrative policies, procedures and forms that do not conflict with these rules.

SECTION B. GENERAL PROVISIONS

RULE 5. PURPOSE OF JUDICIAL DISCIPLINE

The purpose of the judicial discipline and incapacity system is to protect the public and to maintain high standards for the judiciary and the administration of justice. Any disciplinary remedy or sanction imposed shall be sufficient to restore and maintain the dignity and honor of the position and to protect the public by assuring that the judge will refrain from similar acts of misconduct in the future.

RULE 6. GROUNDS FOR DISCIPLINE

The grounds for judicial discipline include willful misconduct in office, willful and persistent failure to perform judicial duties, habitual intemperance, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or a violation of the code.

RULE 7. MISCONDUCT DISTINGUISHED FROM ERROR

The commission shall not take action against a judge for making erroneous findings of fact or conclusions of law in the absence of fraud, corrupt motive, or bad faith on the judge's part, unless such findings or conclusions constitute such an abuse of discretion as to otherwise violate one of the grounds for discipline described in these rules or the code.

RULE 8. RIGHT TO COUNSEL

A judge is entitled to due process, including, but not limited to, the right to defend against the charges and to be represented by counsel at his or her own expense.

RULE 9. PUBLIC ACCESS AND CONFIDENTIALITY

(a) Public access. The record in informal proceedings shall be public after the complainant and the judge are notified of the outcome of the proceedings and the time provided for further commission review has expired. The record in formal proceedings shall be public after the filing of the judge's response to formal charges or the expiration of the time provided for such a response, the entry of an order approving an agreement for discipline by consent, or the waiver of confidentiality by the judge.

(b) Confidential matters. All other commission correspondence, draft documents, computer records, investigative reports, attorney work product, commission deliberations, and records in dismissed cases are confidential; provided that, following entry of an order of dismissal, the complaint and the order of dismissal shall be made public but with all identifying information regarding any person or court redacted and the judge and complainant designated only by number.

(c) Discretionary disclosure. The commission may disclose a complaint to a judge and a judge's response to a complainant at any time. It may also disclose confidential information to confirm a pending investigation in a case in which an investigation has become public or to clarify proceedings in such a case; to protect individuals, the public, or the administration of justice; and to comply with official requests from agencies and other organizations involved in criminal prosecutions, bar discipline investigations, or judicial nomination, selection, and retention proceedings. Unless otherwise ordered by the commission, complainants, respondent judges and witnesses are not prohibited from disclosing the existence of proceedings or from disclosing any documents or correspondence served on or provided to those persons.

(d) Protective orders. Upon motion by a party or by a person from whom the information was obtained, or by disciplinary counsel, and for good cause shown, the commission, an investigative panel, a hearing panel or a hearing officer may make an order sealing a portion of the record. Sealed materials shall be opened and viewed only by the commission or one of its corresponding panels, a hearing officer, disciplinary counsel or the supreme court. The information shall not otherwise be disclosed unless the parties and the person providing the information are given notice and an opportunity to be heard.

RULE 10. NOTIFICATION TO COMPLAINANT

Commission staff shall provide written acknowledgment of every complaint, if the complainant is known, and notify the complainant in writing of a public hearing, if any, and of the final disposition of the complaint.

RULE 11. ADMINISTRATION OF OATHS

Each member of the commission or its staff, and any hearing officer appointed under these rules, shall have the power to administer oaths for taking testimony on matters within the jurisdiction of the commission. Witnesses shall be sworn upon oath or affirmation to tell the truth and, prior to the initiation of formal proceedings, may be sworn not to disclose the existence of the investigation or the identity of the judge until the proceeding is no longer confidential under the rules.

RULE 12. SERVICE

Service upon a judge of formal charges in any disciplinary or incapacity proceeding shall be made by personal service upon the judge or judge's counsel by any person authorized by the commission chairperson, or by certified mail, return receipt requested, to the judge's address of record. Delivery of all other papers or notices, including a request for a response to a complaint, shall be made by first class mail unless otherwise ordered by the commission.

RULE 13. SUBPOENA POWER

(a) Subpoenas. In conformance with the applicable rules of civil procedure, presiding panel members, hearing officers, and their designees, on their own motion

or at the request of a party, may issue subpoenas compelling the attendance of the judge or witnesses and the production of pertinent books, papers, and documents for the purposes of investigation, depositions, and formal hearings. Subpoenas issued during investigations prior to the institution of formal proceedings shall indicate that they are issued in connection with a confidential investigation.

(b) Enforcement. Upon proper application, the superior court in any county in which the attendance of a witness or production of documents is required shall enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(c) Witness fees. Subpoena fees and costs shall be the same as those provided for in proceedings in the superior court.

RULE 14. PROHIBITION AGAINST RETALIATION

A judge against whom a complaint is filed shall not directly or indirectly engage in any act of retaliation against any person who files a complaint, cooperates in the investigation of a complaint, or acts as a witness in any proceeding brought against the judge. "Retaliation" includes, but is not limited to, the act of dismissing or procuring the dismissal, without reasonable cause, of a member of the judge's staff or other person subject to the judge's direction and control, creating a hostile or offensive working environment for such person, or filing a frivolous bar complaint against an attorney who is a complainant or witness. The commission or disciplinary counsel may, at any time, file a petition with the supreme court for an order prohibiting, at the risk of sanctions for contempt, conduct of a judge that is or appears to be retaliatory in nature.

RULE 15. IMMUNITY FROM CIVIL SUIT

Communications with the supreme court, the court's staff, the commission, or commission staff relating to judicial misconduct or incapacity and testimony given in any proceedings before the commission, a panel thereof, or a hearing officer shall be absolutely privileged as provided by law. No civil action may be instituted against any complainant or witness on the basis of these privileged communications. Members of the commission, commission staff, hearing officers, and court staff shall be immune from suit for any conduct in the course of their official duties.

SECTION C. DISPOSITIONS AND SANCTIONS

RULE 16. DISPOSITIONS IN GENERAL

(a) Dismissal. The commission may dismiss a complaint that fails to allege an act of judicial misconduct, that lacks sufficient evidence to support an investigation, that is solely appellate in nature, or that is otherwise frivolous, unfounded or outside its jurisdiction. A dismissal may be issued with confidential comments reminding a judge of ethical obligations or recommending changes in behavior or procedures.

(b) Additional forms of discipline. If the commission finds an act of judicial misconduct, in addition to any other sanction or sanctions imposed, the commission may direct a judge to participate in professional counseling, judicial education, mentoring, or other similar activities.

(c) Consultation. The commission may confer confidentially with a judge at any time to discuss disciplinary alternatives including voluntary retirement or resignation from judicial office. If a judge agrees to retire or resign while a complaint is pending, the commission may dismiss the complaint or take other appropriate action consistent with these rules.

(d) Discipline by contracting authority. The commission may recommend to the chief justice, a chief judge, or a presiding judge of any court that a judicial officer hired under contract be disciplined directly by the contracting authority.

RULE 17. INFORMAL SANCTIONS

(a) Reprimand. The commission may reprimand a judge without a formal hearing for conduct that is unacceptable under one of the grounds for judicial discipline, but that is not so serious as to warrant formal proceedings or further discipline by the supreme court.

(b) Other informal sanctions. The commission may take any other informal action consistent with these rules, including, but not limited to, the assessment of attorney fees and costs.

RULE 18. FORMAL SANCTIONS

(a) Censure, suspension, or removal. The commission may recommend to the supreme court, pursuant to article 6.1, § 4 of the constitution, that a judge be censured, suspended without pay, or removed from office for misconduct following a formal hearing or the approval of an agreement for discipline by consent.

(b) Involuntary retirement. The commission may recommend to the supreme court, pursuant to article 6.1, § 4 of the constitution, that a judge be involuntarily retired for a mental or physical incapacity that seriously interferes with the performance of the judge's duties and is likely to become permanent following an incapacity proceeding or the approval of an agreement for discipline by consent.

(c) Immediate disqualification. A judge shall be disqualified, without loss of salary, pursuant to article 6.1, § 2 of the constitution, from acting as a judge when the commission files a recommendation to the supreme court for the judge's suspension, removal, or retirement.

(d) Criminal conduct. The commission may recommend to the supreme court, pursuant to article 6.1, § 3 of the constitution, that a judge be suspended from office without salary when the judge pleads guilty or no contest to, or is found guilty

of, a crime punishable as a felony under state or federal law or of any other crime that involves moral turpitude under such law. The supreme court may also act on its own motion under this section.

(e) Other formal sanctions. The commission may recommend the imposition of other formal sanctions consistent with these rules, including, but not limited to, the assessment of attorney fees and costs.

RULE 19. MITIGATING AND AGGRAVATING FACTORS

The following nonexclusive factors may be considered in determining appropriate disciplinary action:

- (a)** the nature, extent, and frequency of the misconduct;
- (b)** the judge's experience and length of service on the bench;
- (c)** whether the conduct occurred in the judge's official capacity or private life;
- (d)** the nature and extent to which the acts of misconduct injured other persons or respect for the judiciary;
- (e)** whether and to what extent the judge exploited his or her position for improper purposes;
- (f)** whether the judge has recognized and acknowledged the wrongful nature of the conduct and manifested an effort to change or reform the conduct;
- (g)** whether there has been prior disciplinary action concerning the judge, and if so, its remoteness and relevance to the present proceeding;
- (h)** whether the judge complied with prior discipline or requested and complied with a formal ethics advisory opinion;
- (i)** whether the judge cooperated fully and honestly with the commission in the proceeding; and
- (j)** whether the judge was suffering from personal or emotional problems or from physical or mental disability or impairment at the time of the misconduct.

SECTION D. DISCIPLINARY PROCEEDINGS

RULE 20. COMMENCEMENT

The commission shall commence an investigation upon receiving a written complaint alleging facts of judicial misconduct or incapacity and may otherwise do so upon its own motion. If a written complaint is not filed, the commission's written statement of allegations constitutes the complaint.

RULE 21. INITIAL SCREENING

The executive director shall conduct an initial screening to determine whether a complaint warrants investigation and evaluation. A complaint that is frivolous, unfounded, solely appellate in nature, or outside the jurisdiction of the commission shall be dismissed subject to review by the commission at its next scheduled meeting. A complaint that is not dismissed shall be referred to disciplinary counsel for further investigation.

RULE 22. INVESTIGATION

(a) Preliminary investigation. Disciplinary counsel shall conduct a preliminary investigation of a complaint that is not dismissed during initial screening. If, after preliminary investigation of a complaint, disciplinary counsel recommends dismissal or imposition of informal sanctions, the investigative findings and recommendation shall be reported to the commission.

(b) Request for response from judge. As part of the preliminary investigation, the judge may be notified of the substance of the complaint and afforded a reasonable opportunity to respond. The commission shall not impose informal sanctions or initiate formal proceedings without first having provided such notice and opportunity.

(c) Appointment of investigative panel. If, after consultation with the executive director, disciplinary counsel determines that a full investigation may be required to resolve a complaint or that sufficient evidence may already exist to support formal charges against a judge, a three-member investigative panel shall be appointed as provided in Rule 3(f).

(d) Full investigation. The investigative panel shall review the findings of the preliminary investigation and may authorize disciplinary counsel to conduct a full investigation if there are grounds to believe that evidence supporting the allegations may be obtained by subpoena or further investigation.

(e) Use of information from closed cases. Unless otherwise prohibited, information in a closed file may be used during an investigation or any subsequent proceeding to show a pattern of misconduct, to determine the severity of the sanction, or to exonerate a judge, providing that the existence of the file is disclosed prior to the commencement of formal proceedings and the judge is permitted to raise issues pertaining to prior conduct in the proceedings. A complaint previously dismissed may be reopened if additional information regarding the complaint comes to light and is disclosed to the judge.

(f) Finding of reasonable cause. At the conclusion of a full investigation, the investigative panel may instruct disciplinary counsel to prepare formal charges if it finds reasonable cause to believe that one or more grounds for discipline of a judge exists that cannot be resolved through dismissal or informal sanctions. In all other cases, the investigative panel shall refer the matter to the full commission for final disposition.

RULE 23. COMMISSION REVIEW

(a) Disposition. After reviewing a complaint, the report of the executive director or disciplinary counsel, or the recommendation of an investigative panel, the commission may issue an order dismissing the complaint or imposing an informal sanction consistent with these rules.

(b) Motion for reconsideration. Within fifteen days of the mailing of an order, the judge or the complainant may file a motion for reconsideration, which may include a request to appear before the commission. No response to the motion is required unless requested by the commission. The commission shall promptly notify the judge and the complainant of its decision.

(c) Request for formal hearing. As an alternative to filing a motion for reconsideration, the judge may, within fifteen days of the mailing of an order, file a request for a hearing conducted pursuant to Rule 27, providing, however, that the hearing shall be conducted before the commission rather than a hearing panel or hearing officer, that the duties of the presiding member described in the rule shall be performed by the chairperson of the commission or the chairperson's designee, and that all other subsections of the rule shall be interpreted in accordance with these provisions.

RULE 24. FORMAL CHARGES

(a) Formal charges. After the investigative panel finds reasonable cause to proceed, disciplinary counsel shall prepare a statement of formal charges for the purpose of giving the judge full and fair notice of the allegations. Disciplinary counsel shall file the formal charges in the office of the commission.

(b) Notice. The formal charges shall be served upon the judge, along with a notice of formal proceedings prepared by the executive director. The notice shall advise the judge of the charges, the right to be represented by counsel, and the right to file a written response within fifteen days after service.

(c) Amendments. Before the commencement of the formal hearing, amendments to the formal charges or response may be allowed for good cause. During or after the formal hearing, and pursuant to motion, the formal charges may be amended to conform to the evidence.

RULE 25. RESPONSE

(a) Response. Within fifteen days after service of the formal charges and notice of formal proceedings, the judge may file a response in the office of the commission. The executive director shall promptly prepare copies of the response for distribution to disciplinary counsel and members of the hearing panel.

(b) Waiver of privilege. The raising of a mental or physical condition as a defense constitutes a waiver of medical privilege as to the particular condition at issue.

(c) Extension of time. For good cause shown, the presiding member may grant an extension of time to file a response to the formal charges.

(d) Failure to respond. In the event a judge fails to respond within the prescribed time, the factual allegations in the formal charges shall be deemed admitted.

RULE 26. DISCOVERY

(a) Witnesses. Within twenty days of the filing of a response, disciplinary counsel and the judge shall exchange the names and addresses of all persons known to have knowledge of the relevant facts, designating those persons the parties intend to call at the hearing. A party may withhold such information only with permission of the presiding member of the hearing panel (or his or her designee) or the hearing officer, and only for good cause shown. Review of the withholding request shall be in camera, but the requesting party shall advise the other party of the existence of the request.

(b) Other evidence. The parties shall exchange evidence relevant to the charges that is not otherwise confidential. Confidential information may be discoverable only upon good cause shown.

(c) Exculpatory evidence. Disciplinary counsel shall provide the judge with exculpatory evidence relevant to the charges that directly negates the allegations. Exculpatory evidence, for the purposes of disciplinary proceedings, is not evidence of otherwise expected judicial conduct.

(d) Duty of supplementation. The parties have a continuing duty to supplement information required to be exchanged under this rule.

(e) Completion of discovery. To the extent practicable, all discovery shall be completed within forty-five days after the filing of the response or fifteen days before the hearing, whichever is longer.

(f) Failure to disclose. The hearing panel or hearing officer may preclude any party from calling a witness or presenting evidence at the hearing if the witness or evidence has not been disclosed.

(g) Resolution of discovery disputes. The presiding member of the hearing panel or the hearing officer shall resolve all discovery disputes. These rulings shall be final, except on review.

RULE 27. HEARINGS

(a) Appointment of hearing panel. Formal proceedings shall be conducted before a hearing panel consisting of the members of the commission who were not appointed to the investigative panel assigned to review the case.

(b) Duties of presiding member. The presiding member of the hearing panel shall oversee all pre-hearing proceedings, rule on pre-hearing motions, and

preside over the formal hearing. To facilitate the prompt and timely resolution of the case, the presiding member shall prepare a case management order setting forth a schedule and deadlines for each stage of the proceedings, and may order a settlement conference, review discovery procedures with the parties, rule on pre-hearing motions, and conduct pre-hearing conferences to obtain admissions or narrow the issues presented by the pleadings.

(c) Use of hearing officer. If a hearing panel is unable to function within the intent of these rules, the commission shall appoint a hearing officer or a panel of three hearing officers to perform the functions of the hearing panel as set forth in these rules. If a panel of hearing officers is appointed, the composition of the panel shall, if feasible, reflect the membership categories of the commission.

(d) Notice of hearing. The presiding member of the hearing panel or the hearing officer, if one has been appointed pursuant to paragraph (c), shall designate the time and place of the hearing and shall give the judge at least fifteen days' notice thereof.

(e) Settlement conference. At anytime prior to the hearing, the presiding member of the hearing panel may order the parties to participate in a settlement conference conducted by a member of the investigative panel. Any proposed agreement for discipline by consent shall conform with the requirements of Rule 30.

(f) Conduct of hearing. The following rules shall apply to hearings:

(1) Findings of fact shall be based on clear and convincing evidence as that term has been defined by the supreme court.

(2) The Arizona Rules of Evidence shall apply as far as practicable in all commission proceedings, and Rule 122 of the Rules of the Supreme Court shall apply to all requests for electronic and photographic coverage of such proceedings.

(3) Procedural errors or defects not affecting the substantive rights of a judge shall not be grounds for invalidation of commission proceedings.

(4) All testimony shall be under oath.

(5) The judge may be called as a witness.

(6) The parties may present evidence and produce and cross-examine witnesses.

(7) The parties may recommend and argue for a discipline appropriate to the misconduct supported by the evidence, including argument on aggravating and mitigating factors.

(8) The panel or hearing officer may instruct the parties to submit proposed findings, conclusions, and recommendations for discipline or order of dismissal to the hearing panel.

(9) The hearing shall be transcribed by a certified court reporter or recorded for use by the supreme court, and a certified transcript shall be filed with the commission's recommendations. Any party may obtain a copy of the certified transcript at his or her own expense.

(10) Where a member of a hearing panel has not heard the evidence, that member shall not participate in any deliberations or decisions unless he or she has personally considered the whole record, including any recording or certified transcript from portions of the hearing from which that member was absent.

(g) Ex parte communications. Members of an investigative panel, commission staff, disciplinary counsel, the complainant, the judge, and the judge's counsel shall not engage in improper ex parte communications, as defined in Canon 3B(7) of the code, with members of a hearing panel or a hearing officer as to the merits of a case in which the investigative panel has been involved.

(h) Failure to appear. If the judge fails to appear at the hearing, either in person or through counsel, he or she shall be deemed to have admitted the factual allegations that were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance. Absent good cause, the proceedings shall not be continued or delayed based on the judge's failure to appear.

RULE 28. RECOMMENDATIONS

(a) By a hearing panel. The hearing panel may file proposed recommendations at any time after the conclusion of the formal hearing and shall do so no later than fifteen days after the certified transcript of the hearing is filed with the commission. The recommendations shall be served on both parties, and either party may file a motion for reconsideration within ten business days. The motion shall be limited to whether the evidence in the record supports the findings of fact. If a motion is filed, the adverse party may file a response within ten business days, and no reply shall be filed unless ordered by the hearing panel. The hearing panel may accept or reject any objections to the factual findings without further proceedings.

(b) By a hearing officer. The hearing officer may file proposed recommendations at any time after the conclusion of the formal hearing and shall do so no later than fifteen days after the certified transcript of the hearing is filed with the commission. Commission members who have not previously participated in the investigation shall review the findings of fact based on a clearly erroneous standard and the conclusions of law on a de novo basis. The commission so constituted may thereafter adopt, reject, or modify the proposed recommendations. The recommendations shall be served on both parties, and either party may file a motion for reconsideration within ten business days. The motion shall be limited to whether the evidence in the record supports the findings of fact. If a motion is filed, the adverse party may file a response within ten business days, and no reply shall be filed unless ordered by the commission. The commission may accept or reject any objections to the factual findings without further proceedings.

(c) Filing and notice to judge. Recommendations for formal sanctions shall be filed with the clerk of the supreme court and are subject to review in accordance with Rule 29. Recommendations for informal sanctions shall be filed with the commission and are not subject to review by the supreme court. In either case, a copy of the recommendations and notice of the filing shall be promptly served upon the judge and the complainant.

RULE 29. SUPREME COURT REVIEW

(a) Finality of recommendations. A recommendation of censure shall be final unless the judge or disciplinary counsel files a petition to modify or reject the recommendation as provided in paragraph (c). All other recommendations for formal sanctions are subject to review by the supreme court, either by petition or on the court's own motion.

(b) Expedited consideration. Either the judge or disciplinary counsel may petition the supreme court at any time for expedited consideration of a matter.

(c) Petition to modify or reject recommendations. Within fifteen days after the filing of the final recommendations, the judge may file in the supreme court a petition to modify or reject the recommendations, setting forth the grounds. A request for oral argument may also be filed at this time. A copy of the petition shall be served on disciplinary counsel. Within fifteen days of service of the petition, disciplinary counsel may file and serve such response as he or she deems appropriate. No reply to the response is permitted unless requested by the court. All factual argument in these pleadings shall be limited to the record, except as to judicially noticeable material.

(d) Review on court's own motion. If the judge does not file a timely petition to modify or reject recommendations, and the commission has recommended suspension, removal, or retirement from office, within thirty days after the expiration of the time to file a petition to modify or reject recommendations the court may decline review, or it may grant review on its own motion. If the court grants review, the record shall be transmitted to the clerk.

(e) Submission to the court. After the filing of a petition to modify or reject final recommendations and the response thereto, or on the court's own motion, the record shall be transmitted to the clerk of the supreme court. If no timely request for oral argument has been made, the matter shall be deemed submitted to the supreme court for its decision.

(f) Proposed form of order for interim suspension. In the event suspension, removal, or retirement from office is recommended, a proposed form of order shall be filed with the recommendations that gives notice to the judge of the interim suspension required by article 6.1, § 2 of the constitution. After the order has been signed by the chief justice, the executive director shall promptly notify the presiding judge of the court in which the judge sits of the issuance of the order.

(g) Entry of judgment. If the judge does not file a timely petition to modify or reject recommendations, the executive director shall file in the supreme court a form of judgment for signature by the clerk of the court. In the case of a recommendation of censure, the clerk shall expeditiously sign and enter the judgment. In the case of a recommendation of suspension, removal, or retirement from office, the clerk shall expeditiously sign and enter the judgment after entry of the court's order declining review pursuant to paragraph (d) of this rule.

(h) Final determination. The judgment of the supreme court dismissing the case or imposing a sanction shall be regarded as final and shall be effective on the date the judgment or opinion is filed with the clerk of the court.

SECTION E. SPECIAL PROCEEDINGS

RULE 30. DISCIPLINE BY CONSENT

(a) Agreement. At any time prior to the final disposition of a proceeding, a judge may stipulate to any or all of the allegations or charges in exchange for an agreed upon sanction. The agreement shall set forth all material facts relating to the proceeding and the conduct of the judge and shall be signed by the judge and disciplinary counsel.

(b) Approval. The agreement shall be submitted for approval to the hearing panel or hearing officer, as appropriate. If the agreement is accepted, an order shall be entered approving the agreement, subject to review as appropriate under these rules. If the agreement is rejected, it shall be deemed withdrawn and cannot be used by or against the judge in any proceeding.

(c) Modification. If the hearing panel or hearing officer wishes to modify the agreement, the parties shall be notified in writing of the nature and substance of the proposed modifications. Within fifteen days or such reasonable time as the hearing panel or hearing officer orders, the parties may approve or reject the proposed modifications. If any party does not accept the proposed modifications, the agreement shall be withdrawn and cannot be used by or against the judge in any proceeding.

RULE 31. INTERIM REASSIGNMENT

At any time after the institution of a preliminary investigation, when it appears that a judge poses a substantial threat of serious harm to the public or the administration of justice, the investigative panel may recommend to the chief justice of the supreme court that the judge be reassigned pending a final determination of any proceeding under these rules. The panel's recommendation shall be filed with the clerk of the court and served on the judge, who may file objections to the recommendation. The chief justice's ruling on the recommendation shall continue in effect until final disposition of all pending proceedings against the judge, unless earlier vacated or modified.

RULE 32. MEDICAL EXAMINATION

(a) Authority to order. After the institution of a preliminary investigation and before the filing of a notice of formal proceedings, an investigative panel may order a judge, at the commission's expense, to submit to a physical or mental examination by one or more licensed physicians or psychologists appointed by the investigative panel to conduct such an examination.

(b) Use of examination results. The medical practitioners shall examine the judge to determine the judge's mental or physical condition to hold judicial office. The examination may include any laboratory and other tests deemed necessary by the examining medical practitioners. The results of the examinations and tests shall be reported in writing to the investigative panel and copies shall be furnished to the judge, the judge's counsel, or guardian ad litem. These medical reports may be reviewed by an investigative panel in connection with a finding of reasonable cause or may be received in evidence in any subsequent hearing.

(c) Failure or refusal to be examined. The failure or refusal of a judge to submit to a medical examination ordered by the investigative panel shall preclude the judge from presenting evidence of the results of medical examinations done on the judge's behalf. An investigative or hearing panel may consider such a refusal or failure as evidence that the judge has an incapacity that seriously interferes with the performance of judicial duties and is or is likely to become permanent.

RULE 33. INCAPACITY PROCEEDINGS

(a) Initiation of proceeding. An incapacity proceeding may be initiated by a complaint, by a claim of inability to defend in a disciplinary proceeding, or by an order of involuntary commitment or adjudication of incompetency.

(b) Conduct of proceeding. All incapacity proceedings shall be conducted in accordance with the procedures for disciplinary proceedings, except that the purpose of the incapacity proceedings shall be to determine whether the judge suffers from an incapacity that is permanent or likely to become permanent and that seriously interferes with the judge's ability to perform judicial duties. If the commission concludes that the judge suffers from an incapacity, it shall recommend retirement of the judge. Review of the recommendation and entry of judgment shall be pursuant to Rule 29. Raising a mental or physical condition as a defense to or in mitigation of formal charges constitutes a waiver of medical privilege as to the particular condition at issue.

(c) Appointment of guardian ad litem. If it appears to the commission at any time during the proceedings that the judge is not competent to defend himself or herself, the commission may appoint a guardian ad litem for the judge. The guardian ad litem may exercise any right and make any defense for the judge with the same force and effect as if exercised or made by the judge, if competent. Whenever these rules provide for serving notice to a judge, the notice shall be served to the guardian ad litem.

RULE 34. COMPLIANCE PROCEEDINGS

(a) Compliance procedure. Whenever the commission or supreme court enters an order of discipline that includes terms and conditions prescribing behavior or requiring a corrective course of action by the judge, commission staff shall investigate, evaluate, and report on compliance with the order. If the commission has reason to believe that further disciplinary action is appropriate, the commission may reopen any suspended matter, hold additional hearings, or initiate further proceedings consistent with these rules.

(b) Certificate of compliance. Upon completion of a course of action prescribed by the commission, the judge may submit an application for a certificate of compliance and such other information in support of the application as the judge deems appropriate. The commission shall consider the application and supporting material and may find that the judge has complied with or satisfied the terms and conditions of the disciplinary order. If the commission finds the application persuasive, it may dispense with further compliance proceedings and may issue a certificate or order certifying the judge's compliance with the disciplinary order. Alternatively, the commission may deny the application and may recommend to the supreme court, with or without an additional hearing, further disciplinary action consistent with these rules.

(c) Other powers. This rule does not limit any other power to enforce an order of the commission or decision of the supreme court.

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