



The Supreme Court of South Carolina

ACTION PLANS FOR IMPLEMENTATION OF RECOMMENDATIONS REGARDING THE JUDICIAL DISCIPLINE PROCESS

At the request of the Supreme Court of South Carolina, a Consultation Team sponsored by the American Bar Association Standing Committee on Professional Discipline conducted an in-depth review of the judicial disciplinary system in South Carolina. The Consultation Team prepared a detailed report setting forth its recommendations. Subsequently, this Court referred this matter to the Chief Justice's Commission on the Profession for its review. A special subcommittee of the Commission (the Committee) prepared its own recommendations and comments to the ABA report that the Commission has approved.

This document sets forth this Court's determination regarding each of the recommendations made by the ABA Consultation Team. For each recommendation, there is discussion and an action plan. The appendix to this document shows the provisions of the Rules for Judicial Disciplinary Enforcement contained in Rule 502 of the South Carolina Appellate Court Rules that will be amended, along with commentary regarding these amendments.

Recommendation 1: The Court Should Oversee the Creation of a Formal Annual Budget Process.

The Court agrees that the budgeting process for the disciplinary systems should assure that current needs are met, account for future growth, and foster the recruitment and retention of highly qualified professional staff. However, there is no need to establish a separate budgetary process for those systems apart from the process already established by the Judicial Department. The above goals can be accomplished through the existing budgetary process and programs operated through the Office of the Chief Justice. These include the classification program (a/k/a career path program), which is designed to attract and retain qualified personnel, and the Court's "Director Program," which consists of the department heads in the Judicial Department (including disciplinary counsel) who consider matters of funding and make recommendations to the Chief Justice.

Action Plan:

- (a) Supreme Court: The Chief Justice shall formally implement the current budgeting process which involves the heads of the departments in the Judicial Branch.

Recommendation 2: Members of the Judicial Conduct Commission Should Receive More Intensive and Mandatory Formal Training.

The Court agrees with the Committee that more formal training, including participation in national programs, would enhance both the efficiency and effectiveness of members of the Commission on Judicial Conduct.

Action Plan:

- (a) Supreme Court: Provide for funding, as available, to allow for members of the Commission on Judicial Conduct to participate in national training and conferences. A valuable resource is the National College for Judicial Ethics, sponsored by the American Judicature Society's Center for Judicial Ethics, which provides a forum for judicial conduct commission members to learn about current issues in judicial ethics and discipline.
- (b) Commission Chair, Vice-Chair and Commission Counsel: As funding is available, attend one full national conference or program on ethics, professionalism, and/or judicial discipline each year.
- (c) Commission Counsel: Develop training materials and programs specific to judicial disciplinary enforcement for all Commission members. These materials should be made available electronically.
- (d) Commission Counsel: Hold annual training for all Commission members and make it mandatory for all new appointees.

Recommendation 3: The Judicial Conduct Commission Should Increase Outreach to the Public and the Judiciary.

The Court and the Committee agree with the ABA Consultation Team that more public outreach is necessary. Public confidence in the judicial disciplinary system is vital. Public information as well as the operation of the disciplinary system should be accessible to the public. Additionally, the Court agrees that it would be advantageous to have a system to allow the dissemination of information to Commission members as a tool for efficient communication between the Commission and Commission Counsel.

Action Plan:

- (a) Disciplinary Counsel and Commission Counsel: Work with Department's Information Technology Division to develop an effective web-based communication strategy.
- (b) Commission Chair: Encourage Commission members to participate in the SC Bar Speakers Bureau.
- (c) Commission Chair, Vice-Chair, and Commission Counsel: Join and participate in national organizations for discipline adjudicators. Encourage Commission members to join and participate.

Recommendation 4: The Court should Increase Public Representation on the Judicial Conduct Commission.

The Court and the Committee recommend implementing those portions of the Consultation Team’s recommendation that would increase public representation on the Commission and would require adequate training for public members.

The Court agrees that public membership in the judicial discipline process enhances the effectiveness of the Commission by providing a lay perspective. This perspective is often from the viewpoint of a client, former litigant or juror. In addition, participation by non-lawyers provides assurance to the public that the process is not closed or self-serving. The use of only two public members, however, does create a burden on them that is greater than the burden on the judicial and attorney members as the public members serve on four panels each and judicial and attorney members only serve on one panel each.

The Court will increase the number of public members from two to eight and increase the total Commission membership from 24 to 26 (including the chair and vice-chair). Each panel will consist of four non-public members, two public members and the chair or vice-chair. Implementation of this structure will be phased in, beginning with the addition of two public members (one to each panel) in the first year and then adding the second public member to each panel in the second year or as judicial member attrition allows. Public members of hearing panels may not serve as administrative or hearing panel chairs. Participation of at least one public member to make a hearing panel quorum will not be required.

The Commission has already implemented a plan for annual training for all Commission members. This training will be enhanced by adding orientation sessions for newly-appointed members, developing a written procedure manual, and preparing a training video.

The Court is in agreement with the Committee that the remaining portions of the ABA team’s recommendation should not be implemented, including decreasing the size of the investigative panels and creating an Administrative Oversight Committee to develop a screening process for public members.

Action Plan:

- (a) Supreme Court: Amend Rule 3 to increase the size of the Commission to 26 members by adding six additional public members and reducing the number of judicial (Circuit Court, Family Court and Master-in-Equity) members by two.^[1]
- (b) Supreme Court: Appoint two additional public members immediately; appoint four additional public members as judicial member attrition allows.

^[1] Rule 4 currently is incorrect in stating that there are 3 panels of 5 members. There are actually 4 panels of 5 members. This error will be corrected with the revision.

- (c) Supreme Court: Amend Rule 4 to allow public members to serve on hearing panels.
- (d) Commission Chair: Reassign panels to distribute public members evenly as the terms of the judicial members end.
- (e) Commission Counsel: Schedule a training/orientation session for new members prior to any scheduled hearings or panel meetings.
- (f) Commission Counsel: Include a special session for public members at the annual full Commission meeting to address those members' unique training needs.
- (g) Commission Counsel: Consult with Bar staff about development of a training video for use in the orientation session for new members.
- (f) Commission Counsel: Prepare and disseminate a Court-approved application form for members of the public interested in serving on the Commission; screen applications and make recommendations to the Court.

Recommendation 5: The Court Should Adopt a Rule Creating a Separate Procedure for Handling Complaints against Its Own Members.

The Court concurs with the Committee's recommendation that clarification is warranted of the procedure currently in place to handle complaints against members of the Court. Rule 27(g) of the South Carolina Rules for Disciplinary Enforcement provides that a justice of the Supreme Court shall recuse himself or herself from any proceedings involving allegations of misconduct or incapacity made against him or her, or where the Code of Judicial Conduct requires recusal. While the Court declines to adopt a rule that would disqualify all members of the Court when a complaint is filed against a member of the Court, it does agree that Rule 27(g) should be clarified to provide that the Chair of the Commission on Judicial Conduct may appoint a lawyer who is not an employee of the Judicial Department to act as disciplinary counsel in the matter. Following recusal of the affected justice, the Chief Justice (or Acting Chief Justice) shall appoint an acting associate justice to replace the recused justice for the duration of the case.

Action Plan

- (a) Supreme Court: Amend Rule 27(g) to clarify the procedures to be followed when formal charges are filed against one of its members.

Recommendation 6: The Court Should Amend the Rules for Judicial Disciplinary Enforcement to Eliminate Investigative Panel Approval to Conduct Full Investigations and Eliminate the Use of Attorneys to Assist.

The Court and the Committee agree that increased discretion to disciplinary counsel would improve case processing efficiency and significantly reduce the time it takes to conclude judicial discipline investigations. The most effective method of accomplishing this is to remove the requirement that disciplinary counsel seek authority from an investigative panel to conduct full investigations. Disciplinary counsel and her staff are trained and experienced professionals. The extra procedural step of going to the investigative panel for a second level of investigative authority is cumbersome and unnecessary.

The Court also believes that it should be within the discretion of disciplinary counsel to issue letters of caution with no finding of misconduct in cases in which there is no evidence of misconduct, but disciplinary counsel believes that the judge should heed a warning about a particular ethical concern. Allowing disciplinary counsel to conclude matters in this way will expedite disposition of minor cases and allow the panels and the Office of Disciplinary Counsel (ODC) to focus attention on more serious matters. The Court shares the concerns of the ABA team and the Committee about the number of older cases as well as delays that appear to be related to a lack of adequate resources.

Attorneys to Assist (ATAs) are rarely used in judicial disciplinary matters. However, ATAs are a valuable resource to ODC and should not be eliminated. (See Recommendation 5 in the Recommendations for Lawyer Conduct for additional discussion.)

The Court also notes that the ABA team recommended amending the Rules for Lawyer Disciplinary Enforcement to provide for complainants to have an opportunity to seek a limited review of dismissals by disciplinary counsel and to clarify discovery procedures. The revisions to implement those recommendations will also be adopted in judicial discipline matters.

Action Plan:

- (a) Supreme Court: Amend Rule 19 to combine preliminary investigation and full investigation.
- (b) Supreme Court: Amend Rules 2(o), 2(p), 4(f)(1), 4(f)(2), 5(b)(1), 11, 14(b), 17(c), and 20 to eliminate reference to full investigation and to conform to changes made to Rule 19.
- (c) Supreme Court: Amend Rules 11, 15(a), and 15(b) to clarify disciplinary counsel's authority to conduct investigations and issue subpoenas.
- (d) Supreme Court: Amend Rules 2(h), 2(q), 4(e), 5(b)(1), and 5(b)(8), to clarify respective roles of Commission, Commission counsel, and disciplinary counsel and to give authority to disciplinary counsel to

issue letters of caution with no finding of misconduct in appropriate cases.

- (e) Disciplinary Counsel: Amend form documents to reflect changes in rules and procedures for investigation.
- (f) Disciplinary Counsel: Restructure case assignments and staff/attorney job descriptions.
- (g) Disciplinary Counsel: Draft and implement plan for transition to new rules and procedures.
- (h) Disciplinary Counsel: Schedule a voluntary meeting of defense counsel to review changes in rules and procedures.
- (i) Disciplinary Counsel: Establish internal, aspirational time standards for completion of investigations; update case management system to implement standards and deadlines.
- (j) Commission Chair: Schedule full Commission meeting to review new rules.
- (k) Disciplinary Counsel: Develop a plan to address old cases and move them towards resolution.
- (l) Commission Counsel: Take immediate action to address the delays in matters pending with hearing panels.
- (m) Supreme Court: Amend Rule 18 to allow for limited right of complainant to seek review of disciplinary counsel dismissal.
- (n) Disciplinary Counsel: Amend form document for dismissal by disciplinary counsel to give notice of limited right to review.
- (o) Supreme Court: Amend Rule 25 to clarify discovery process.

Recommendation 7: The Court Should Adopt Procedures Relating to the Handling of Funds by Magistrates.

The Court and the Committee do not support the recommendation of random audits for magistrates. Although imposition of a random audit procedure might be a deterrent to mismanagement, there is insufficient information to be confident that the cost of implementing such a program would be justified by effective results. The counties are responsible for auditing magistrates. Moreover, the magistrates are subject to a requirement to use the uniform receipting system developed by South Carolina Court Administration. Additionally, ODC participates in frequent seminars specifically for summary court judges to review applicable accounting procedures.

Additionally, the ABA Consultation Team recommends limiting the ability of magistrates to accept cash for fines, fees and costs. The Court agrees and the Judicial Department is actively seeking to implement a uniform State wide system that will allow magistrates to accept credit and debit cards for the payment of fines, fees and costs. This will greatly reduce the need for magistrates to accept cash.

APPENDIX

**REVISIONS TO THE RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT
(RJDE, RULE 502, SCACR)
(with comments)**

RULE 2. TERMINOLOGY

The following terminology is used throughout these rules:

(b) Closed, But Not Dismissed: a manner of disposing of a matter where a panel of the Commission makes a finding that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the judge is deceased, disappeared, incarcerated, physically or mentally incapacitated, or removed from judicial duties, or for other good cause. ~~If the judge files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed reopened and in the full investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be reopened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be reopened. Before a motion can be considered by an investigative panel of the Commission to reopen a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to reopen on the judge and then the judge shall have 10 days to respond thereto. Disciplinary counsel shall notify both the judge and the complainant when a matter is closed, but not dismissed and when a closed, but not dismissed matter is reopened. If the panel declines to reopen the matter, disciplinary counsel shall so advise the judge.~~

[COMMENT: This revision is not directly related to any of the ABA Recommendations. The deleted language has been moved to Rule 19(d)(4) because it describes procedures and rules in the event a matter is closed but not dismissed. This language is more appropriately located in the procedural portion of the Rules than in the Terminology portion.]

(h) Disciplinary Counsel: the lawyer in charge of screening and investigating complaints, prosecuting formal charges and performing other duties assigned by the Commission Supreme Court. See Rule 5.

[COMMENT: This revision helps to clarify the separate roles and functions of the Commission and ODC.]

(o) Investigation: an inquiry into allegations of misconduct, including a search for and examination of evidence concerning the allegations. ~~divided into two stages: a preliminary investigation conducted by disciplinary counsel after the receipt of a complaint and a full investigation conducted after approval by an investigative panel of the Commission. See Rule 19~~

[COMMENT: This revision eliminates reference to the full investigation/preliminary investigation dichotomy in order to implement ABA Recommendation #6.]

(p) Investigative Panel: the panel of the Commission that considers the recommendations of disciplinary counsel with regard to the disposition of cases and acceptance of agreements for resolution of disciplinary matters. The investigative panel also determines whether full investigations will be conducted and whether formal charges will be filed. See Rule 4.

[COMMENT: This revision reflects the shift of investigative discretion from the investigative panel to the disciplinary counsel and eliminates reference to the full investigation/preliminary investigation dichotomy in order to implement ABA Recommendation #6. This revision also more accurately describes the role of the investigative panel.]

(q) Letter of Caution: a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a form of discipline under these rules and does not constitute a finding of misconduct unless the letter of caution specifically states that misconduct has been committed. The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the judge unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.

[COMMENT: This revision grants discretion to the disciplinary counsel to issue letters of caution. Although this change was not specifically recommended by the ABA, ODC recommends this change to further enhance ABA Recommendation #6.]

RULE 3. THE COMMISSION ON JUDICIAL CONDUCT

...

(c) Appointment. The Commission shall be composed of ~~24~~ 26 members appointed by the Supreme Court. ~~14~~ 10 members shall be judges from the circuit court or family court or masters-in-equity. 4 members shall be judges from the magistrate, municipal or probate courts. 4 members shall be active members of the South Carolina Bar who have never held a judicial office. ~~2~~ 8 members shall be public members.

(d) Terms. Commission members shall serve for a term of 4 years and shall be eligible for reappointment. ~~In making initial appointments to the Commission, the Supreme Court shall specify a term for each member to insure that the terms of the members are staggered.~~ A member assigned to a hearing panel may continue to participate in the hearing and decision of a matter despite the expiration of the member's term if the hearing began before the expiration of the term.

[COMMENT: These revisions would increase the number of public or lay members on the Commission on Judicial Conduct to implement ABA Recommendation #4. This revision would also eliminate the provisions for the initial appointments of Commission members, as it is no longer necessary.]

RULE 4. ORGANIZATION AND AUTHORITY OF THE COMMISSION

...

(b) Panels and Meetings. The members of the Commission, other than the chair, vice-chair and public members, shall be divided by the chair into ~~3~~ 4 panels of 6 members. Each panel shall be composed of ~~3~~ 2 members who are judges from the circuit court, judges from the family court or masters in equity; 1 member who is a judge from the magistrate, municipal or probate courts; ~~and~~ 1 attorney member and 2 public members. The panels shall be assigned to serve as an investigative panel or a hearing panel as designated by the chair. If the panel is assigned to serve as an investigative panel, the chair shall add either the chair or the vice-chair ~~and one public member~~ to the panel to increase its membership to 7. The chair may rotate the assignments of the panels as investigative or hearing panels, and may rotate membership on the panels; provided, however, that no member shall sit on both the investigative and hearing panel for the same proceeding. Panels shall meet when scheduled by the Commission. The full Commission shall meet periodically as determined by the Commission to consider administrative matters. Meetings of the Commission other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of 3 members of the Commission.

[COMMENT: This revision is necessary to implement the portion of ABA Recommendation #4 that would increase the number of public members of the Commission on investigative panels and allow for participation by public members on hearing panels.]

...

(e) Powers and Duties of the Commission.

...

(2) In addition to the duties assigned to ~~disciplinary counsel~~ and Commission counsel in Rules ~~5 and~~ 6, the Commission may delegate to ~~either the disciplinary counsel or~~ the Commission counsel the duty and authority to:

(A) maintain the Commission's records;

(B) maintain statistics concerning the operation of the Commission and make them available to the Commission and the Supreme Court;

(C) prepare an annual report of the Commission's activities for presentation to the Supreme Court and the public; ~~and~~

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

(E) monitor judges for compliance with conditions of discipline and deferred discipline and refer judges who fail to comply to disciplinary counsel for contempt proceedings; and,

(F) supervise attorneys, court reporters, and other staff as the Supreme Court may provide to the Commission.

[COMMENT: These revisions reflect the changes that have already been implemented by the Commission with the hiring of Commission counsel. These revisions also eliminate the authority of the Commission to delegate responsibilities to the disciplinary counsel. The purpose of these changes is to further delineate the separate roles and functions of the Commission and ODC.]

(f) Powers and Duties of Investigative Panel. An investigative panel shall have the duty and authority to:

(1) review the recommendations of the disciplinary counsel after preliminary investigation and either ~~authorize a full investigation~~ issue a letter of caution with or without a finding of misconduct, issue notice of intent to impose a confidential admonition, enter into a deferred discipline agreement, consider an agreement for discipline by consent, authorize formal charges, refer the matter to another agency, or dismiss the complaint;

~~**(2)** review the recommendations of disciplinary counsel after full investigation and approve, disapprove or modify the recommendations as provided in Rule 19(d)(2), to include dismissal of the complaint;~~

~~**(3)**~~ **(2)** designate a member of the panel to preside over the investigative panel in the absence of the chair or vice-chair of the Commission; ~~and~~

~~**(4)**~~ **(3)** declare a matter closed but not dismissed prior to the filing of formal charges; and,

(4) after proper notice, ~~to~~ re-open a matter that has been previously dismissed or closed but not dismissed.

[COMMENT: These revisions are necessary to reflect the proposed changes to Rule 19. They eliminate the full investigation/preliminary investigation dichotomy and clarify the role of the investigative panel. These changes help implement ABA Recommendation #6.]

RULE 5. DISCIPLINARY COUNSEL

(b) Powers and Duties. Disciplinary counsel shall have the authority and duty to:

(1) receive and screen complaints, dismiss complaints, issue letters of caution with no finding of misconduct, refer complaints to other agencies when appropriate, conduct ~~preliminary~~ investigations, ~~recommend to an investigative panel of the Commission and upon authorization conduct full investigations,~~ notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after ~~full~~ investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

...

(8) perform other duties at the direction of the Commission or the Supreme Court.

(c) Appointment of ~~Members of Bar~~ Attorneys to Assist Disciplinary Counsel. The Supreme Court may appoint such additional active members of the South Carolina Bar as it deems appropriate to assist the disciplinary counsel in performing disciplinary counsel's duties under this rule. Subject to such policies as the Office of Finance and Personnel of the Judicial Department may establish, these attorneys shall be reimbursed for reasonable and necessary expenses incurred pursuant to their duties.

[COMMENT: This revision eliminates the full investigation/preliminary investigation dichotomy]

RULE 11. EX PARTE CONTACTS

Members of the Commission, ~~a hearing officer,~~ and Commission counsel shall not engage in *ex parte* communications regarding a case, except that before making a determination to file formal charges in a case pursuant to Rule 19(d) ~~(2)~~ (4), members of the investigative panel assigned to that case may communicate with disciplinary counsel as required to perform their duties in accordance with these rules and the chair and vice-chair may entertain requests for permissive disclosure pursuant to Rule 12(c) ~~and requests for subpoenas for investigation pursuant to Rule 15(b)(1)~~ made by disciplinary counsel without notice to the judge. Where disciplinary counsel makes a request to the chair or vice-chair pursuant to either Rule 12(c) or ~~19(b)(1)~~ without notice to the judge, the request shall so state and set forth the reason that notice is not being given. *Ex parte* communications shall include any communication which would be prohibited by Section 3B(7) of the Code of Judicial Conduct, Rule 501, SCACR, if engaged in by a judge.

[COMMENT: This change eliminates reference to the requirement that disciplinary counsel seek permission of the chair or vice-chair for subpoena authority in order to conform this rule to the changes in Rules 15 and 19.]

RULE 12. ACCESS TO DISCIPLINARY INFORMATION

...

(a) General Rule. Except as otherwise provided in these rules or ordered by the Supreme Court, ~~all complaints, proceedings, records, information or orders relating to an allegation of misconduct or incapacity shall be confidential and shall not be disclosed to the public. While the matter remains confidential,~~ the members of the Commission, the staff of the Commission, the disciplinary counsel, the staff of the disciplinary counsel, the members of the Supreme Court and the staff of the Supreme Court shall not in any way reveal the existence of the complaint, while the matter remains confidential, except to persons directly involved in the matter and then only to the extent necessary for a proper disposition of the matter. A violation of this provision may be punished as a contempt of the Supreme Court.

...

[COMMENT: Although these revisions do not specifically address any of the ABA Recommendations, it clarifies the extent to which the existence of a complaint may be revealed. Although the “gag rule” was eliminated with the passage of the Rules for Disciplinary Enforcement in January 1997, the provisions of Rule 12 continue to cause confusion among members of the Bar, judges, and complainants. Although ODC, the Commission, and the Court and its staff must keep investigations confidential, the judge and the complainant are not subject to contempt for revealing them.]

RULE 14. TIME, SERVICE AND FILING

...

(b) Extending and Diminishing Time Prescribed by These Rules.

...

(2) By Disciplinary Counsel. Disciplinary counsel may extend the time for responses due from a judge under Rules ~~19(b)(1), 19(c)(3), and 23(a)~~ for one or more periods not to exceed 30 days in the aggregate for each.

(3) By the Parties. Disciplinary counsel and the judge may, by written agreement, extend the time to respond under Rule ~~19(b)(1), 19(c), or 23(a)~~ after the execution and delivery by both parties of an agreement for discipline by consent or deferred disciplinary agreement for the duration of the period the agreement is awaiting a final disposition and for a period of 30 days thereafter if the Agreement is not accepted.

(4) By the Supreme Court. Except for those periods of time that may be extended by the Commission under (1) above, the Supreme Court or any justice thereof may grant an extension of time to perform any act required by these Rules. The Supreme Court or any justice thereof may shorten any time period prescribed by these rules.

(c) Service. Service upon the judge of formal charges in any disciplinary or incapacity proceedings ~~or of the notice required by Rule 19(c)(1)~~ shall be made by personal service upon the judge or the judge's counsel by any person authorized by the chair of the Commission or by registered or certified mail to the judge's last known address. Service of all other documents shall be made in the manner provided by Rule ~~233(b)~~ 262(b), SCACR.

[COMMENT: These revisions eliminate reference to Rule 19(b)(1) to conform to the changes made to Rule 19. These revisions also eliminate disciplinary counsel's authority to grant extensions of time to respond to formal charges as that decision should be made by the hearing panel chair. This reflects the current practice.]

RULE 15. OATHS; SUBPOENA POWER

(a) Oaths. Oaths and affirmations may be administered by any member of the Commission, disciplinary counsel ~~in matters under full investigation~~, or any other person authorized by law to administer oaths and affirmations.

(b) Subpoenas for Investigation.

~~(1) Prior to a full investigation being authorized, Disciplinary counsel may compel by subpoena the attendance of the judge or witnesses and the production of pertinent books, papers, documents (whether in typed, written, digital, electronic or other format), and other tangible evidence, for the purposes of investigation with the approval of the chair or vice-chair of the Commission upon a showing of exigent circumstances. Exigent circumstances may include, but are not limited to, instances where there is reason to believe that evidence may be destroyed or altered if a subpoena is not issued; or where it appears the judge may pose a substantial threat of serious harm to the public or to the administration of justice and the subpoena is necessary to ascertain whether it is appropriate to seek an interim suspension under Rule 17.~~

~~(2) After a full investigation is authorized pursuant to Rule 19(b)(3), disciplinary counsel may compel by subpoena the attendance of the judge or witnesses and the production of pertinent books, papers, documents (whether in typed, written, digital, electronic or other format), and other tangible evidence, for purposes of investigation. The investigative panel Commission chair, vice-chair, or Commission Counsel may issue subpoenas for specific witnesses or documents at the request of the judge under investigation after a full investigation has been authorized or direct disciplinary counsel to subpoena witnesses or documents and provide the subpoenaed information to the investigative panel Commission chair, vice-chair or Commission Counsel.~~

...

[COMMENT: In order to eliminate the preliminary investigation/full investigation dichotomy, it is necessary to grant disciplinary counsel authority to issue oaths and subpoenas without consulting the Commission.]

RULE 17. INTERIM SUSPENSION

...

(c) Failure to Respond to Notice of Full Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a judge has failed to fully respond to a notice of full investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c) ~~(5) or (6)~~ (3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that judge on interim suspension.

...

[COMMENT: These revisions remove references to full investigation.]

RULE 18. NOTIFICATION TO COMPLAINANT; NO LIMITED RIGHT TO REVIEW

(a) Notification to Complainant. Disciplinary counsel shall provide written acknowledgment of every complaint, if the complainant is known, and notify the complainant in writing of the final disposition of a proceeding under these rules. Notification in writing shall be mailed within 20 days of the decision disposing of the proceeding. ~~Although entitled to notice, a complainant is not a party to the proceeding and is not entitled to appeal or otherwise seek review of the dismissal or other disposition of a proceeding.~~

(b) Limited Right to Review. ~~Although entitled to notice, a complainant is not a party to the proceeding. However, upon notice of a dismissal by disciplinary counsel pursuant to Rule 19(d)(1), a complainant may seek review by the investigative panel. Disciplinary counsel shall inform the complainant of the following review process in the notice of dismissal. The complainant may seek review by submitting a request to the disciplinary counsel in writing within 30 days of the date of the notice of dismissal. Upon receipt of the request for review, disciplinary counsel shall provide the judge with a copy of the request. The judge may submit a written response within 15 days. Disciplinary counsel shall submit the complainant's request and the judge's response, if any, for consideration at the next meeting of the investigative panel. Notification in writing shall be mailed to the complainant and the judge within 20 days of the investigative panel's decision. The complainant is not entitled to appeal or otherwise seek review of a dismissal or referral by disciplinary counsel pursuant to Rule 19(a) or of any decision, action, or disposition by the investigative panel, the hearing panel, the Commission chair or vice-chair, or the Supreme Court.~~

[COMMENT: These revisions implement the portion of ABA Recommendation #4 in the section related to Lawyer Conduct that recommends an opportunity for a complainant to seek review of dismissal of a complaint. It should be also included in the Rules for Judicial Disciplinary Enforcement. The consultation team recommended that appeals be heard by hearing panels. Because no hearing panel is assigned a matter that is dismissed and because hearing panels do not regularly meet, it would be more efficient to have the investigative panel review a complainant's objection to a dismissal of a complaint. Because it would not be appropriate for one investigative panel to review the determination made by another investigative panel, the review process is limited to dismissals by disciplinary counsel. This rule does not provide for review of confidential dispositions or public sanctions. These revisions do not implement the portion of the ABA Recommendation that recommends providing a copy of the lawyer's response to the complaint.]

RULE 19. SCREENING AND INVESTIGATION

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

(b) Preliminary Investigation. (1) ~~Disciplinary counsel shall conduct all investigations.~~ Disciplinary counsel may issue subpoenas pursuant to Rule 15(b), conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints., ~~provided that no subpoena shall issue to obtain testimony or evidence until an investigative panel of the Commission authorizes a full investigation pursuant to Rule 19(c) or the chair or vice-chair of the Commission authorizes the issuance of a subpoena pursuant to Rule 15(b)(1).~~ Disciplinary counsel shall issue a notice of investigation, to the judge with a copy of the complaint or information received, requesting that the judge ~~to~~ file a response to the allegations in the ~~complaint~~ notice; provided, however, that disciplinary counsel may seek permission of the chair or vice-chair to dispense with the requirement to make this request or to dispense with the requirement to provide the judge with a copy of the complaint or information received. The judge shall file a written response ~~with disciplinary counsel to a request~~ within 15 days of notice to do so from disciplinary counsel. The written response must include the judge's verification that it is complete and accurate to the best of the judge's knowledge and belief.

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

~~(3) The investigative panel shall review disciplinary counsel's recommendation for a full investigation and either dismiss the complaint, refer the matter to another agency, issue a letter of caution without a finding of misconduct, issue a letter of caution with a finding of minor misconduct, if both the judge and disciplinary counsel consent, or authorize a full investigation.~~

~~(4) If the matter is dismissed or referred to another agency, disciplinary counsel shall notify the judge of the action and shall provide the judge with~~

a copy of the complaint if the judge has not already received a copy of the complaint.

(c) Full Investigation Requirements of Notice of Investigation.

~~(1) Within 30 days after the investigative panel authorizes a full investigation,~~ When issuing notice of investigation pursuant to Rule 19(b), disciplinary counsel shall give the following notice to the judge:

(A) a specific statement of the allegations being investigated and the canons or other ethical standards allegedly violated, with the provision that the investigation can be expanded if deemed appropriate by disciplinary counsel;

(B) the judge's duty to respond pursuant to Rule 19~~(e)~~~~(3)~~ (b);

(C) the judge's opportunity to meet with disciplinary counsel pursuant to Rule 19~~(c)~~~~(5)~~ (3); and,

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

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

~~**(3)** Disciplinary counsel may request that the judge file a written response within 30 days after service of the notice under Rule 19(e)(1).~~

~~**(4)** Upon issuance of an order of interim suspension by the Supreme Court, disciplinary counsel may dispense with the usual requirement in Rule 19(b)(1) of requesting an initial response from the judge so suspended and the matters referenced in the petition for interim suspension shall be deemed in full investigation and a notice of that investigation shall be served and a response thereto made in accordance with the provisions of Rule 19(c).~~

(5) (3) Before disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the judge may request that the judge appear before disciplinary counsel to respond to questions. The appearance shall be on the record and the testimony shall be under oath or affirmation. If disciplinary counsel requests the judge's appearance, disciplinary counsel must give the judge 20 days' notice.

~~(6) Disciplinary counsel is authorized to issue subpoenas pursuant to Rule 15(b) once a full investigation has been approved. Disciplinary counsel shall conduct all investigations.~~

~~(7) (4) Any person giving testimony pursuant to either Rule 19(c)(5) or 19(c)(6) shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.~~

[COMMENT: These revisions eliminate the full investigation/preliminary investigation dichotomy and implement procedures for streamlining the functions of disciplinary counsel. These changes help implement ABA Recommendation #6. These revisions also include a requirement that the judge verify the response to the notice of investigation.]

(d) Disposition After Full Investigation.

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

~~(A) dismissal;~~

~~(B) admonition, letter of caution or deferred discipline agreement;~~

~~(C) the filing of formal charges;~~

~~(D) the filing of a petition for transfer to incapacity inactive status;~~

~~(E) referral to an appropriate agency; or~~

~~(F) a stay.~~

(1) Upon completion of an investigation, if disciplinary counsel believes that no misconduct has been committed, and a written caution or warning is not appropriate to conclude the matter, disciplinary counsel may dismiss the complaint.

(2) If disciplinary counsel believes that no misconduct has been committed, but a written caution or warning is appropriate to conclude the matter, disciplinary counsel may issue a letter of caution with no finding of misconduct.

(3) If disciplinary counsel believes there is evidence supporting the allegations against a judge, disciplinary counsel may:

(A) propose an agreement for discipline by consent to the judge pursuant to Rule 21;

(B) recommend to an investigative panel that the matter be concluded with a letter of caution or a confidential admonition; or,

(C) recommend to an investigative panel that formal charges be filed.

(2)(4) The investigative panel may adopt, reject or modify the recommendations of disciplinary counsel.

(A) If the investigative panel finds no violation or a violation pursuant to Rule 7 for which the imposition of a sanction is not warranted, it may dismiss or issue a letter of caution.

(B) If the investigative panel finds that there is reasonable cause to believe the judge committed misconduct for which the imposition of a sanction is warranted, it may accept an agreement for discipline by consent pursuant to Rule 21; it may execute a deferred discipline agreement; it may admonish the judge pursuant to the provisions of Rule 19(d)~~(3)~~(5); or, it may direct disciplinary counsel to file formal charges.

(C) If the investigative panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the judge is deceased, disappeared, incarcerated, or physically or mentally incapacitated, or for other good cause, the panel may designate the matter closed but not dismissed. If the judge files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed re-opened and in the investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be re-opened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be re-opened. Before a motion can be considered by an investigative panel of the Commission to re-open a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to re-open on the judge and then the judge shall have 10 days to respond thereto. Disciplinary counsel shall notify both the judge and the complainant when a matter is closed, but not dismissed and

when the matter is re-opened. If the panel declines to re-open the matter, disciplinary counsel shall so advise the judge.

(3)(5) When the investigative panel finds reasonable cause to conclude that the judge has committed misconduct, but finds that public discipline is not warranted, it may issue notice to the judge that it intends to impose a confidential admonition as a final disposition of the matter(s). Notice to the judge shall include a copy of the confidential admonition and shall be served on the judge in accordance with Rule 14(c). The notice of intent shall state the judge's right to object and that any such objection need not include any grounds therefor. The confidential admonition shall thereafter be imposed unless the judge both files with the Commission and serves on disciplinary counsel a written objection within ~~thirty~~ 30 days of mailing of the notice. If the judge objects to the imposition of the confidential admonition in conformity with the requirements of this rule, disciplinary counsel shall file formal charges.

~~(e) Subsequent Complaints. Provided, notwithstanding the other provisions of this Rule 19, where a judge is already subject to a pending full investigation, disciplinary counsel may include information received related to additional misconduct in a subsequent complaint or revealed in an investigation in a notice of full investigation, an amended notice of full investigation or a supplemental notice of full investigation without leave of the Commission and disciplinary counsel may dispense with seeking an initial response regarding such new information from the judge as would otherwise be required by Rule 19(b)(1).~~

[COMMENT: These revisions create a procedure for disposition of cases under the new system. They eliminate the full investigation/preliminary investigation dichotomy and implement disciplinary counsel's authority to issue letters of caution with no finding of misconduct. These revisions also include language removed from Rule 2(b) setting forth the procedures for the closed but not dismissed disposition.]

RULE 20. USE OF ALLEGATIONS FROM DISMISSED CASES MOTION BY DISCIPLINARY COUNSEL TO RE-OPEN DISMISSED COMPLAINTS

If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose unless the complaint is re-opened by the Commission. A complaint dismissed prior to the filing of formal charges may be re-opened by an investigative panel upon motion of disciplinary counsel upon a finding by the investigative panel that there is new information concerning the matter dismissed, an additional complaint has been filed against the same judge involving related or similar allegations, or other good cause. Prior to a motion to re-open being decided, a copy of the motion to re-open containing the grounds therefor shall be served on the judge by disciplinary counsel, and the judge shall then have 10 days thereafter to file a written response with the Commission. The judge and the complainant shall be notified by disciplinary counsel as to the panel's decision on the motion to re-open. ~~A matter reopened shall be deemed in the stage of investigation it was in when dismissed except as the investigative panel might otherwise direct.~~

[COMMENT: This revision deletes language rendered unnecessary by the elimination of the preliminary investigation/full investigation dichotomy.]

RULE 25. DISCOVERY

(a) Exchange of Witness Lists. Initial Disclosure. Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange:

(1) the names and addresses of all persons known to have knowledge of the relevant facts;

(2) non-privileged evidence relevant to the formal charges;

(3) the names of expert witnesses expected to testify at the hearing and affidavits setting forth their opinions and the bases therefor; and,

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

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the judge. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request. ~~The hearing panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing.~~

(b) Other Evidence Pre-Hearing Disclosure. Within 20 days of the date of the filing of an answer, the administrative chair of the hearing panel shall set a date for the exchange of witness lists and exhibits no later than 30 days prior to the scheduled hearing. Disciplinary counsel and respondent shall exchange:

~~(1) non-privileged evidence relevant to the formal charges, documents exhibits to be presented at the hearing, names and addresses of witnesses to be called at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded); and,~~

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

~~(3) Provided, Copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from~~

the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under Rule 25(h).

(c) Depositions. Depositions shall only be allowed if agreed upon by the disciplinary counsel and the respondent, or if the chair of the hearing panel or the chair's designee grants permission to do so based on a showing of good cause. The chair or the chair's designee may place restrictions or conditions on the manner, time and place of any authorized deposition.

(d) Exculpatory Evidence. Notwithstanding any other provision of this rule, disciplinary counsel shall provide respondent with exculpatory evidence relevant to the formal charges.

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

(f) Completion of Discovery. All discovery shall be completed within 60 days of the filing of the answer.

(g) Failure to Disclose. If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews, or other evidence required to be disclosed or exchanged under this rule, the hearing panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely disclosed exculpatory material, the hearing panel may require the matter to be disclosed and grant a continuance, or take such other action as may be appropriate.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the hearing panel. Review of these decisions shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

(i) Pre-Hearing Conferences. The hearing panel may require the respondent and disciplinary counsel to participate in a pre-hearing conference in person or by telephone. Either party may request a pre-hearing conference. Scheduling of a pre-hearing conference is at the sole discretion of the chair of the hearing panel.

[COMMENT: These revisions clarify the requirements for discovery and address concerns about fairness and timeliness of the discovery process. They divide the discovery process into two phases: initial disclosure and pre-hearing disclosure. For example, the current rules require the exchange of two lists of names: those who are known to have knowledge

of the relevant facts under Rule 25(a) and witnesses who will be called at the hearing under Rule 25(b)(1). The current heading for 25(a) “Exchange of Witness Lists” is a misnomer that causes some confusion during the discovery period. These revisions clarify the difference between the two required lists. This revision also requires the parties to exchange all evidence within 20 days of the filing of the answer and adds a specific requirement for exchange of names of experts and their opinions. A provision for optional pre-hearing conferences is also included.]

RULE 27. REVIEW BY SUPREME COURT

...

(g) Recusal. A justice of the Supreme Court shall not participate in any proceeding involving allegations of misconduct or incapacity against the justice, or in any proceeding where recusal is required under the Code of Judicial Conduct. Upon notice of recusal, the Chair of the Commission on Judicial Conduct may appoint a lawyer who is not an employee of the Judicial Department to act as disciplinary counsel in the matter. Following recusal of the affected justice, the Chief Justice (or Acting Chief Justice) shall appoint an acting justice to replace the recused justice for the duration of the case.

...

[COMMENT: The additional provision defines the procedure for handling any proceedings involving allegations of misconduct or incapacity against one of the justices where recusal is required]