

Hon. Louis Frank Dominguez, Chairman
Commission on Judicial Conduct
1501 W. Washington, Suite 229
Phoenix, Arizona 85007
Telephone: (602) 452-3200
Email: cjc@courts.az.gov

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:	Supreme Court No. R-12-_____
PETITION TO AMEND	Petition to Amend Rules 23 and 27
RULES 23 and 27, Rules of the Commission on Judicial Conduct	Rules of the Commission on Judicial Conduct

Pursuant to Rule 28, Rules of the Supreme Court, Louis Frank Dominguez, Chairman of the Arizona Commission on Judicial Conduct (commission), respectfully petitions this Court on behalf of the commission to adopt amendments to Rules 23 and 27, Rules of the Commission on Judicial Conduct, governing the procedure for review of informal commission cases and formal hearings before the commission, as proposed in the attached Appendix A. The commission believes these changes are necessary to clarify the review procedures, and to ensure respondent judges are fully aware of their options as well as their rights pursuant to these procedures.

I. Background and Purpose of the Proposed Rule Amendments

a. Background

In 2006, the Supreme Court adopted changes to the commission's rules including changes to Rule 23, which sets forth the process of review available in informal commission cases. In part, the purpose of the changes to Rule 23 was to clarify the rule's meaning. In the

intervening years, the commission has determined that the alternatives for review pursuant to current subsections (b) and (c) remain unclear.

Notably, among other changes, the commission in 2005 specifically proposed that the word “formal” be removed from the heading in Rule 23(c), which read “Request for formal hearing.” At the time, members believed that something other than the “formal hearing” described later in the rules should be available for judges seeking review of the imposition of an informal sanction. For whatever reason, although the Court adopted the proposed changes by order, the word “formal” was never removed from that heading.

Based on the experience of recent years, the commission now believes it is appropriate to leave the heading as it is and to clarify that a respondent judge seeking review through a hearing is entitled to the full panoply of due process rights and protections that are described in subsequent rules referencing the formal hearing process. Similarly, when an evidentiary hearing reveals facts supporting the imposition of a stronger sanction than the informal sanction previously imposed, the commission members must have the authority to submit appropriate recommendations to the Court.

b. Description and Purpose of Specific Amendments

The proposed amendments are modest in scope and purpose. There is a minor structural change to provide respondent judges proper notice that the opportunities available in subsections (b) and (c) are mutually exclusive alternatives. The remaining changes are intended to provide complete and fair notice of what each alternative entails in light of recent experiences with respondents who found the rule’s current text confusing. All of the changes described in this section are highlighted in Attachment A.

Rule 23

While the rule is currently titled “Commission Review” only the latter two subsections actually deal with review. Further, although the text of subsection (c) states that the “request for a formal hearing” option is an alternative to subsection (b)’s “motion for reconsideration,” this has not apparently been sufficiently clear for respondent judges to understand that they must select one or the other, rather than both. The commission thus recommends altering the title and structure of the rule to fully reflect the nature of the rule and the fact that a respondent judge must select only one of the two options for review.

Rule 23(b) [New Rule 23(b)(1)]

The commission believes its review processes have never been intended to allow a respondent judge the opportunity, absent extraordinary circumstances, to present new evidence or argument that he or she failed to provide before the initial disposition of the complaint. Recent experience taught the commission that the failure of the rule to contain an explicit restriction left respondent judges with the impression that they need not provide a full and complete evidentiary response when first asked and could instead provide additional evidence with a motion for reconsideration or at the time of a related appearance before the commission. The commission thus recommends additional language to more explicitly clarify this limitation.

Rule 23(c) [New Rule 23(b)(2)]

This provision should provide a judge with full due process rights and protections, and ensure the commission members have the authority to make whatever recommendation is appropriate based on the facts established during a hearing. The commission thus recommends the proposed changes clarifying the hearing process available to a respondent judge who has received an informal sanction.

Rule 27(g)

The commission members recommend a technical change to reference the current Code of Judicial Conduct, rather than the previous version.

II. Contents of the Proposed Rule Amendments

Rule 23. Disposition and 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) Review. Within fifteen days of the mailing of an informal disposition order, review of the order may be sought by filing one of the following alternative motions.

(1) 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. Absent extraordinary circumstances, it will only consider factual information and evidence provided to the commission before the date of the disposition order.

~~(e)(2) 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 consistent with Rules 27-29 subject to the following provisions; 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.~~

(a) The hearing shall be conducted before the commission rather than a hearing panel or hearing officer, and all duties of the "presiding member" referenced in Rules 25-29 shall be performed by the commission's chairperson or the chairperson's designee.

(b) Formal charges shall be filed pursuant to Rule 24 except that no investigative panel finding of reasonable cause is required. All other provisions of Rule 24 apply.

(c) Rules 27(a), (c), and (e), and Rule 28(b) do not apply.

(d) Disciplinary Counsel and the judge or the judge's attorney may stipulate to otherwise limit or specify the scope or conduct of the hearing only with the approval of the commission chairperson or the chairperson's designee.

Rule 27. Hearings

(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)~~ Canon 2, Rule 2.9 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.

RESPECTFULLY SUBMITTED this ___ day of January, 2012.

By: _____
Hon. Louis Frank Dominguez, Chairman
Commission on Judicial Conduct

Appendix A
(Rules 23 and 27 as amended)

Rule 23. Disposition and 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) Review. Within fifteen days of the mailing of an informal disposition order, review of the order may be sought by filing one of the following alternative motions.

(1) Motion for reconsideration. 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. Absent extraordinary circumstances, it will only consider factual information and evidence provided to the commission before the date of the disposition order.

(2) Request for formal hearing. The judge may file a request for a hearing conducted consistent with Rules 24-29 subject to the following provisions:

(a) The hearing shall be conducted before the commission rather than a hearing panel or hearing officer, and all duties of the “presiding member” referenced in Rules 25-29 shall be performed by the commission’s chairperson or the chairperson’s designee.

(b) Formal charges shall be filed pursuant to Rule 24 except that no investigative panel finding of reasonable cause is required. All other provisions of Rule 24 apply.

(c) Rules 27(a), (c), and (e), and Rule 28(b) do not apply.

(d) Disciplinary Counsel and the judge or the judge’s attorney may stipulate to otherwise limit or specify the scope or conduct of the hearing only with the approval of the commission chairperson or the chairperson’s designee.

Rule 27. Hearings

(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 2, Rule 2.9, 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.