

# Appendix A

## Terminology Section Changes

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

“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 with the commission in a case involving formal proceedings beginning with the notice and statement of formal charges, including the ~~transcript or digital recording~~ of the hearing if recommendations are filed with the supreme court.

#### 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.~~ The executive director is authorized to employ individuals to fill the other staff positions authorized by the commission. The executive director serves at the pleasure of the commission and other employees serve at the pleasure of the executive director.

(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~~ ensuring that all allegations of judicial misconduct that are brought to the attention of the commission are promptly investigated and resolved in accordance with the commission's rules and administrative policies. The executive director may assist disciplinary counsel in the investigation and processing 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~~ assigned by the commission or executive director.

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

## Rule 9. Public Access and Confidentiality

(a) Public access. As a general rule, complaints against judges shall be ~~disclosed~~ available to the public following, but not before, final disposition, except in formal proceedings, as set forth below.

(i) Dismissed Cases: ~~In dismissed cases, however,~~ only the complaint and the commission's order shall be public after all identifying information pertaining to an individual or court has been redacted.

(ii) Other Informal Proceedings: ~~In informal proceedings,~~ the record, as defined in these rules, 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.

(iii) Motions for Reconsideration: motions for reconsideration will not generally be made public, except when specifically authorized by the commission.

(iiv) FIn-formal proceedings; the record 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, except as provided in the preceding paragraph, are confidential.

(c) Discretionary disclosure.

(i) The commission may disclose a complaint to a judge and a judge's response to a complainant at any time upon request by the complainant and a finding by the commission that such disclosure is necessary in the interests of justice.

(ii) 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.

(d) Unless otherwise ordered by the commission, complainants, respondent judges and witnesses or other individuals involved in complaint investigations are not prohibited from disclosing the existence of proceedings or from disclosing any documents or correspondence served on or provided to those persons.

~~(d)~~ (e) 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~~ commission staff, 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.

(f) Press Releases. Commission staff may issue press releases for the purpose of informing the public regarding formal proceedings.

(g) Notification of Commission Action. Commission staff shall notify the chief or presiding judge of the state, county, or municipality in which any respondent judicial officer receiving a sanction for ethical misconduct serves.

Rule 12. ~~Service~~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, or using electronic mail as agreed upon by disciplinary counsel and the judge or judge's counsel. Delivery of all other papers or notices, including a request for a response to a complaint, shall be made by first class mail or electronic 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.

(d) Confidentiality. Documents obtained through a commission subpoena are confidential except to the extent they are made part of the record in a formal proceeding and thereby made available to the public as set forth in Commission Rule 9.

| Rule 15. Privileged Communications and 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.

## 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.

(b) Dismissal with comments. The commission may dismiss a complaint with confidential comments, including, but not limited to, an advisory letter reminding a judge of ethical obligations or recommending changes in behavior or procedures, or a warning letter alerting a judge to the potential consequences of conduct that creates an appearance of impropriety.

(c) Consultation. The commission, or the executive director and/or disciplinary counsel at the commission's direction, 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. The commission may also encourage a judge to participate in professional counseling, judicial education, mentoring or other similar activities.

(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 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~~ commission may use the source of information that raised an allegation of judicial misconduct (e.g. news reports) as a complaint, or may prepare a written statement of allegations that then constitutes ~~the~~ a 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 of commission at its next scheduled meeting. A complaint that is not dismissed shall be referred to disciplinary counsel for further investigation. Commission staff shall evaluate each complaint received and recommend an appropriate disposition to the commission as a whole or to an investigative panel, including, but not limited to, dismissal after initial screening or after further investigation, the imposition of an informal sanction, or the filing of formal charges.~~

## Rule 22. Investigation

(a) Preliminary investigation. Disciplinary counsel, or another member of the commission staff at the request of disciplinary counsel, shall conduct a preliminary investigation of ~~all complaints that is not dismissed during initial screening~~not recommended for dismissal. 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~~ shall consider the matter and take the action it deems appropriate.

(b) Request for response from judge. As part of ~~the~~ a preliminary investigation, ~~commission staff may notify the judge~~ may be notified of the substance of the complaint and ~~afforded~~ provide 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~~ further investigation may be required to resolve a complaint or that sufficient evidence may already exist to support formal charges against a judge, either disciplinary counsel or the executive director may request that the commission chair appoint a three-member investigative panel ~~shall be appointed~~ as provided in Rule 3(f).

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

(e) Use of information from closed cases. Unless otherwise prohibited, the commission may rely on information in a closed file ~~may be used during an investigation or any subsequent proceeding~~ in subsequent proceedings to show a pattern of misconduct, to determine the severity of the sanction in the subsequent matter, or to exonerate a judge, providing that the existence of the closed 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~~ that prior complaint comes to light and is disclosed to the judge.

(f) Finding of reasonable cause. At the conclusion of ~~a full~~ an 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 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, consistent with the general civil practice of “notice pleading”. 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. The presiding member of the appointed hearing panel or the hearing officer appointed pursuant to Rule 27(c) shall rule on all requests to amend the formal charges.

## 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.~~ After the filing of formal charges, the presiding member of the hearing panel or the hearing officer shall issue a Case Management Order setting forth, among other logistical information, the date of the hearing and the deadline for completion of discovery. Discovery shall conclude forty-five days after the filing of the response to the statement of charges or fifteen days before the hearing, whichever is longer.

(f) Failure to disclose. The hearing panel or hearing officer ~~may~~ shall preclude any party from calling a witness or presenting evidence at the hearing if the witness or evidence ~~has~~ was not been ~~disclosed before the conclusion of the discovery period, absent extraordinary circumstances.~~

(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 to the supreme court.

## 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 any time~~Any time prior to the hearing, the presiding member of the hearing panel ~~or hearing officer, as the case may be,~~ may order the parties to participate in a settlement conference conducted by a member of the investigative panel, or a former commission member who agrees to serve as settlement judge. 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. In determining the applicability of evidentiary rules in a particular case, where there is no precedent in the judicial discipline context in Arizona, the hearing panel shall look to Arizona Supreme Court authority in the attorney discipline context for guidance in interpreting the phrase "as far as practicable."

(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~~ digitally recorded using court recording software similar to that in use in superior court for use by the supreme court, and a ~~certified transcript~~ copy of the digital recording shall be filed with the commission's recommendations. Any party may obtain a copy of the ~~certified transcript~~ digital recording 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 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. This rule does not preclude commission staff from providing administrative assistance to a hearing panel or hearing officer, nor related administrative or scheduling communications between staff and a hearing panel or hearing officer.

(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~~shall 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~~digital recording of the hearing is ~~filed~~finalized and available to the commission and respondent judge~~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~~shall 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~~digital recording of the hearing is ~~filed with the commission~~finalized and available to the commission and respondent judge. 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. Where an investigative panel referred the matter to the full commission, which then directed the filing of formal charges, the members of the commission who did not sit on the investigative panel did not previously participate in the investigation for purposes of this rule. 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, as well as a copy of the statement of formal charges, respondent's answer, if any, and Rule 30 agreement, if applicable, 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, consisting of all documents filed with the commission in the formal case that have not previously been transmitted to the supreme court, shall be transmitted to the clerk of the supreme court.

(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, consisting of all documents filed with the commission in the formal case that have not previously been transmitted to the supreme court, 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.

### 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, which may be served via electronic mail, 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.