

# **Rules of the Judicial Qualifications Commission of Georgia**

Article VI, Section VII, Paragraph VII (a) of the Georgia Constitution of 1983 provides that the Supreme Court shall adopt rules of implementation for the removal, suspension, other discipline, or retirement for disability of Georgia judges by the Judicial Qualifications Commission, and Paragraph VI (b) provides that the procedures of the Commission shall comport with due process and shall be subject to review by the Supreme Court. Under OCGA § 15-1-21 (j), the Commission's Investigative Panel "shall promulgate rules for the commission's governance which comport with due process and are not otherwise provided by the Georgia Constitution or this Code section; provided, however, that such rules shall be effective only upon review and adoption by the Supreme Court." Pursuant to this authority, the following are the rules of the Judicial Qualifications Commission as adopted by the Supreme Court. These rules are effective January 1, 2018, and supersede prior rules. Subsequent amendments of these rules having later effective dates are so indicated at the location of the amendments.

# Table of Contents

Preamble .....	1
Terminology.....	1
Section I. Organization and Structure .....	4
Rule 1. Disciplinary Authority.....	4
Rule 2. The Judicial Qualifications Commission .....	4
A. Purpose .....	4
B. Jurisdiction.....	4
C. Appointment of Members.....	4
D. Senate Confirmation.....	5
E. Terms .....	6
F. Removal .....	6
G. Vacancies.....	6
Rule 3. Organization and Authority of the Commission .....	7
A. Panels and Meetings.....	7
B. Officers .....	8
C. Quorum.....	8
D. Expenses.....	8
E. Powers and Duties .....	8
F. Recusal .....	10
Rule 4. Director.....	12
A. Selection .....	12
B. Powers and Duties .....	12
Rule 5. Reserved .....	14
Section II. General Provisions .....	14
Rule 6. Grounds for Discipline; Sanctions; Felony Indictment or Conviction.....	14
A. Grounds for Discipline .....	14
B. Sanctions.....	14
C. Felony Indictment or Conviction.....	15

Rule 7. Standard and Burden of Proof .....	16
Rule 8. Civil Rules Generally Applicable .....	17
Rule 9. Right to Counsel .....	17
Rule 10. Ex Parte Contacts by the Hearing Panel .....	17
Rule 11. Confidentiality .....	17
A. Before Formal Charges .....	17
B. After Filing and Service of Formal Charges .....	18
C. Administrative and Other Matters. ....	18
D. Work Product and Deliberations .....	18
E. Exceptions .....	18
Rule 12. Immunity from Civil Suits.....	20
Rule 13. Service .....	21
A. Notice of Complaint.....	21
B. Formal Charges .....	21
Rule 14. Oaths; Subpoena Power .....	21
A. Oaths .....	21
B. Subpoenas for Investigation.....	22
C. Subpoenas for Deposition or Hearing.....	22
D. Enforcement of Subpoenas .....	22
E. Quashing Subpoena.....	22
F. Witnesses and Fees.....	22
Rule 15. Interim Suspension .....	22
A. Indictment for Felony .....	22
B. Conviction of Felony .....	24
C. Other Grounds.....	24
D. Motion for Reconsideration.....	24
E. Effect on Commission Action.....	25
Rule 16. Notification to Complainant .....	26
Section III. Disciplinary Proceedings.....	26
Rule 17. Screening and Investigation.....	26
A. Screening .....	26
B. Preliminary Investigation.....	27

C. Full Investigation .....	27
D. Disposition After Initiation of Full Investigation .....	28
E. Immunity from Criminal Prosecution .....	29
Rule 18. Use of Allegations From Dismissed Cases .....	32
Rule 19. Formal Charges .....	33
Rule 20. Answer.....	33
A. Time.....	33
B. Waiver of Privilege.....	33
C. Effect of Denial .....	33
Rule 21. Failure to Answer or Appear .....	34
A. Failure to Answer .....	34
B. Failure to Appear .....	34
Rule 22. Discovery.....	34
A. Witnesses.....	34
B. Other Evidence .....	35
C. Exculpatory Evidence .....	35
D. Duty of Supplementation.....	35
E. Completion of Discovery.....	35
F. Failure to Disclose.....	35
G. Resolution of Disputes .....	35
H. Civil Rules Not Applicable .....	35
Rule 23. Discipline By Consent.....	36
A. Approval.....	36
B. Rejection of Sanction.....	36
C. Affidavit of Consent .....	36
D. Order of Discipline .....	37
Rule 24. Hearing .....	37
A. Scheduling .....	37
B. Hearing Panel .....	37
C. Conduct of Hearing .....	38
D. Dismissal or Recommendation for Sanction. ....	38
E. Submission of the Report and Record. ....	38

F. Notice of Exceptions .....	38
Rule 25. Review by the Supreme Court .....	39
A. Docketing .....	39
B. Briefs, Oral Argument, and Supplemental Filings .....	39
C. Notice of Additional Complaints.....	39
D. Decision.....	40
Section IV. Special Proceedings .....	40
Rule 26. Complaint Against a Justice of the Supreme Court.....	40
A. Proceedings Generally.....	40
B. Special Supreme Court .....	40
Rule 27. Cases Involving Allegations of Mental or Physical Incapacity .....	41
A. Initiation of Incapacity Proceeding .....	41
B. Proceedings to Determine Incapacity Generally .....	41
C. Involuntary Commitment or Adjudication of Incompetency .....	41
D. Inability to Properly Defend in a Disciplinary Proceeding .....	42
E. Stipulated Disposition.....	42
F. Reinstatement from Incapacity Inactive Status.....	43
Rule 28. Advisory Opinions.....	44
A. Director’s Opinions .....	44
B. Formal Advisory Opinions .....	45
Rule 29. Special Committee on Judicial Election Campaign Intervention.....	47
A. Designation of Special Committee.....	47
B. Handling of Complaints.....	47
C. Timeliness Requirement. ....	48
D. Confidentiality and Further Proceedings.....	48

## Preamble

The regulation of judicial conduct is critical to preserving the integrity of the judiciary and enhancing public confidence in the judicial system. These Rules reflect a careful balance of a number of competing interests: the rights of judges to fair treatment in the disposition of complaints against them; the judges' interest in the confidentiality of complaints for which the Commission finds there is not reasonable cause to believe that misconduct occurred; the public's concern that complaints against judges are given serious consideration and that judges are held to high standards of behavior; and the interest of the judges and the public in having judicial disciplinary complaints resolved promptly and accurately.

These Rules were drafted based on the 1994 Model Rules for Judicial Disciplinary Enforcement developed by the American Bar Association Center for Professional Responsibility, as revised to reflect Georgia constitutional and statutory law, the history and practice of the Judicial Qualifications Commission of Georgia, and the views of the Commission and the Supreme Court of Georgia on the often complex and difficult issues that arise in the regulation of judicial conduct.

## Terminology

As used in these Rules:

**Censure** means a reprimand by the Supreme Court in the form of a written decision, which shall be imposed by the Supreme Court on the judge in person in open court.

**Commission** means the Judicial Qualifications Commission of Georgia.

**Complaint** means information in any form from any source received by the Investigative Panel that alleges or from which a reasonable inference can be drawn that a judge committed misconduct or is incapacitated. If there is no written complaint from another person, the Director's written statement of the allegations constitutes the complaint.

**Deferred Discipline Agreement** means a confidential agreement between a judge and the Investigative Panel for the judge to undergo treatment, participate in education programs, or take other corrective action. It is only available as a response

to misconduct that can be addressed through treatment, education, or a rehabilitation program.

**Director** means the lawyer working for the Investigative Panel who is in charge of screening and investigating complaints, prosecuting formal charges, drafting reports, handling administrative matters, and performing other duties assigned by the Commission. See Rule 4.

**Formal Charges** means the document that charges the judge with specific acts of misconduct or with a specific incapacity.

**Hearing** means the public proceeding at which the issues of law and fact raised by the formal charges and answer are tried. See Rule 24.

**Hearing Panel** means the panel of the Commission that adjudicates formal charges, makes recommendations to the Supreme Court as to disciplinary and incapacity orders, and issues formal advisory opinions. See Rules 3 and 28; OCGA § 15-1-21 (e) (3).

**Incapacity** means a mental or physical condition that adversely affects a judge's ability to perform judicial functions. Incapacity is distinguished from a disability that does not adversely affect a judge's performance of judicial functions.

**Incapacity Inactive Status** means non-disciplinary involuntary retirement, removal, or suspension of a judge from judicial office because of mental or physical inability to perform judicial functions.

**Interim Suspension** means temporary removal from office pending a final determination in any proceeding under these Rules. See Rule 15.

**Investigation** means 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 the Director after the receipt of a complaint, and a full investigation conducted after approval by the Investigative Panel. See Rule 17.

**Investigative Panel** means the panel of the Commission that determines whether full investigations will be conducted and whether formal charges will be filed, and that is responsible for the prosecutorial and administrative functions of the Commission. See Rule 3; OCGA § 15-1-21 (e) (2).

**Judge** means anyone, whether or not a lawyer, who performs judicial functions under the Constitution and laws of Georgia, including an associate judge, senior judge, special master, magistrate, or municipal judge, or any person who is a judicial candidate for any such office.

**Judicial Candidate** means a person, including an incumbent judge, seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she: (1) appoints or forms a campaign committee, (2) makes a public announcement of candidacy, (3) declares, files, or qualifies as a candidate with the election or appointment authority, or (4) authorizes solicitation or acceptance of campaign contributions or support. A person who is announced as the appointee to fill a judicial position by the Governor or other appointing authority, or who is certified as elected to a judicial position, continues to be a judicial candidate until he or she is sworn into office. Judicial candidates who do not currently hold judicial office are subject to the same Code provisions as judges pro tempore.

**Misconduct** means any conduct by a judge constituting grounds for discipline. See Rule 6.A.

**Private Admonition** means a non-public sanction imposed on a judge by the Investigative Panel with the consent of the judge. See Rule 6.B (6).

**Proceedings** means all steps in the discipline and incapacity system set forth in these Rules.

**Public Reprimand** means a reprimand by the Supreme Court in the form of a written decision, which shall be imposed in person in open court by a judge selected by the Supreme Court.

**Reasonable Cause** means a reasonable ground for belief in the existence of facts warranting the filing of formal charges for discipline or a petition for transfer to incapacity inactive status.

**Record** means all documents filed in the case beginning with the formal charges. The record includes a transcript of the hearing on the formal charges only if a transcript is requested by the respondent, Director, Hearing Panel, or Supreme Court.

**Respondent** means a judge or former judge against whom formal charges have been filed.

**Screening** means examination of a complaint or other information coming to the attention of the Director to determine whether the Commission has jurisdiction and whether the information would constitute judicial misconduct or incapacity if true. See Rule 17.

**Supreme Court** means the Supreme Court of Georgia.

## **Section I. Organization and Structure**

### **Rule 1. Disciplinary Authority**

The disciplinary authority of the Commission extends to every judge.

#### *Commentary*

The Commission's authority extends to members of the Supreme Court. See Rule 26.

### **Rule 2. The Judicial Qualifications Commission**

**A. Purpose.** The Judicial Qualifications Commission shall administer the judicial discipline and incapacity system.

#### **B. Jurisdiction.**

(1) Judges. The Commission has jurisdiction over judges regarding allegations that misconduct occurred before or during service as a judge and regarding allegations of incapacity during service as a judge.

(2) Former Judges and Judicial Candidates. The Commission has continuing jurisdiction over former judges and judicial candidates regarding allegations that misconduct occurred before service as a judge or judicial candidate if a complaint is made within one year following service as a judge or judicial candidate.

**C. Appointment of Members.** The Commission shall consist of an Investigative Panel and a Hearing Panel, each of which shall include three categories of members:

(1) Judge: an elected or appointed public official who presides over a court of record;

- (2) Attorney: a lawyer who has been an active status member of the State Bar of Georgia for at least 10 years and is a registered voter in this state; and
- (3) Citizen: an individual who is neither an attorney nor a judge and who is a registered voter in this state. See OCGA § 15-1-21 (f) (1).

The Investigative Panel shall consist of seven members, selected as follows:

- (1) Two judge members, each appointed by the Supreme Court;
- (2) Three attorney members, one appointed by the Governor, one appointed by the President of the Senate, and one appointed by the Speaker of the House of Representatives; and
- (3) Two citizen members, one appointed by the President of the Senate and one appointed by the Speaker of the House of Representatives. See OCGA § 15-1-21 (f) (3) (A).

The Hearing Panel shall consist of three members, selected as follows:

- (1) One judge member appointed by the Supreme Court;
- (2) One attorney member appointed by the Supreme Court; and
- (3) One citizen member appointed by the Governor. See OCGA § 15-1-21 (f) (4) (A).

The State Bar of Georgia may recommend to the respective appointing authorities a list of individuals for consideration to serve as attorney members of the Commission. See OCGA § 15-1-21 (f) (2).

**D. Senate Confirmation.** The names of the appointees shall be submitted by the appointing authorities to the Senate no later than the third Monday in January. Any member appointed to the Commission shall serve until the Senate confirms such appointee, and if an individual's name is not submitted by such deadline, he or she shall not be eligible for confirmation. If an appointee is not confirmed by the Senate, the appointing authority shall promptly submit another appointee's name, notwithstanding the deadline expressed in the preceding sentence. If the Senate is not in session at the time an appointee's term begins or a vacancy is created, an appointee for such term or to fill such vacancy shall serve until his or her name can be submitted to the Senate and his or her appointment can be confirmed at the next regular legislative session. See OCGA § 15-1-21 (g).

**E. Terms.** The terms of Commission members initially appointed for staggered terms beginning July 1, 2017, shall be as set forth in OCGA § 15-1-21 (f) (3) (A) and (f) (4) (A). Successors to such members shall serve for a term of four years beginning on July 1 following their appointment and shall be eligible for reappointment to a second full term. A member appointed to an initial term of less than four years or to fill a vacancy may serve an additional two full terms. See OCGA § 15-1-21 (f) (6).

**F. Removal.** Removal of a panel member for cause shall be by a unanimous vote of all of the appointing authorities for the members of that particular panel. As used in this Rule, the term “for cause” shall include indictment for or conviction of a felony or any offense involving moral turpitude; misconduct, malpractice, malfeasance, misfeasance, nonfeasance, or incapacity; failure to attend three or more panel meetings or hearings in a one-year period without good and sufficient reason; or abstaining from voting, unless recused. See OCGA § 15-1-21 (i) (2).

**G. Vacancies.** A vacancy shall be created by operation of law when a Commission member no longer has the attorney, citizen, or judge designation for which he or she was appointed. Any vacancy for a member shall be filled by the appointing authority, and such appointee shall serve the balance of the vacating member’s unexpired term; provided, however, that if the appointing authority fails to fill a vacancy within 60 days of being notified of such vacancy by the Commission, the Governor shall appoint a replacement member from the same category of member. See OCGA § 15-1-21 (f) (6).

### *Commentary*

[1] The Commission has jurisdiction over the conduct of judges that is alleged to be in violation of the Georgia Code of Judicial Conduct, whether the conduct occurs on or off the bench and whether the judge is full-time, part-time, or pro tempore. To the extent that the conduct of a judge (including a judicial candidate) who is a lawyer also implicates the Georgia Rules of Professional Conduct, the Commission has concurrent jurisdiction with the State Bar of Georgia.

[2] The Commission has jurisdiction over former judges to respond to complaints of misconduct that occurred before or during their service as a judge if a complaint is brought within one year following the last day of the judge’s service. This continuing jurisdiction ensures that judges cannot avoid judicial discipline by resigning before information regarding their misconduct was made known to the Investigative Panel and thereafter seek judicial office with no record of misconduct, and that the

Commission has jurisdiction over judicial candidates who lose elections but may seek judicial office in the future.

[3] Obviously, the Investigative Panel will exercise discretion in initiating an investigation of a former judge. Important factors the Investigative Panel may consider are the seriousness of the complaint, the likelihood that the judge will seek judicial office in the future, and the extent to which the matter can and will be appropriately handled by the State Bar of Georgia as a lawyer disciplinary matter.

[4] Suspension or removal, as authorized under Rule 6.B, may be imposed to allow the record to reflect that the judge who resigned or lost an election was determined to have engaged in conduct that warranted suspension or removal.

[5] Procedures for handling allegations against members of the Supreme Court are set out in Rule 26.

[6] The composition of the Commission, including its membership, appointing authorities, terms of office, and provisions for removal or vacancy of members, was previously determined in part by the Constitution and in part by the Commission Rules. These matters are now determined by statute. See OCGA § 15-1-21. Each category of Commission members (judges, attorneys, and citizens) should be represented on the Commission and its panels in order to balance viewpoints.

### **Rule 3. Organization and Authority of the Commission**

**A. Panels and Meetings.** The Commission is divided into an Investigative Panel of seven members and a Hearing Panel of three members. See Rule 2.C; OCGA § 15-1-21 (e) (1). The Investigative Panel shall meet periodically as determined by the panel. Meetings of the Investigative Panel other than periodic meetings may be called by the chairperson upon the written request of three members of that panel. Meetings of the Hearing Panel may be called by the presiding officer upon the presiding officer's own motion and shall be called by the presiding officer upon the written request of the other two members of the panel. Meetings may be conducted in person, by conference call, or electronically, except that members of the Investigative Panel must be present in person for a meeting with a judge pursuant to Rule 17.C (4) and members of the Hearing Panel must be present in person for a hearing pursuant to Rule 24. Further, except in situations in which the chairperson declares an emergency in his or her sole discretion, members of the Investigative Panel must be present in person at a meeting in order to vote to authorize a full investigation under Rule 17.B (3) or to vote on any action under the provisions of Rule 17.C or 17.D.

**B. Officers.** The Investigative Panel shall annually elect one of its members to serve as chairperson and another to serve as vice-chairperson. The vice-chairperson shall perform the duties of the chairperson whenever the chairperson is absent or unable to act. The judge member of the Hearing Panel shall serve as its presiding officer. See OCGA § 15-1-21 (f) (3) (B) and (f) (4) (B).

**C. Quorum.** A quorum of the Investigative Panel shall require at least four members to be present and shall consist of at least one judge, one attorney, and one citizen. A quorum of the Hearing Panel shall require all members to be present. A decision by a panel shall be by majority vote of the members present except for minor procedural or administrative matters assigned to the Director, chairperson, or presiding officer, as applicable, for a decision as provided by these Rules. See OCGA § 15-1-21 (i) (3).

**D. Expenses.** Members of the Commission shall serve without compensation but shall receive the same daily expense allowance as members of the General Assembly receive, as set forth in OCGA § 28-1-8, for each day such member is in physical attendance at a panel meeting or hearing, plus either reimbursement for actual transportation costs while traveling by public transportation or the same mileage allowance for use of a personal motor vehicle in connection with such attendance as members of the General Assembly receive. Notwithstanding the preceding sentence, no Commission member shall receive such expense allowance or travel reimbursement if he or she is entitled to receive an expense allowance, travel reimbursement, or salary for performance of duties as a state employee. Expense allowances and travel reimbursement shall be paid from moneys appropriated or otherwise available to the Commission. See OCGA § 15-1-21 (i) (4).

**E. Powers and Duties.**

(1) The Investigative Panel shall have the duty and authority to:

(a) promulgate rules for the Commission's governance that comport with due process and are not otherwise provided by the Georgia Constitution or OCGA § 15-1-21; provided, however, that such rules shall be effective only upon review and adoption by the Supreme Court. See OCGA § 15-1-21 (j);

(b) propose amendments to the Georgia Code of Judicial Conduct and these Rules, subject to review and adoption by the Supreme Court;

(c) recommend formal advisory opinions to the Hearing Panel;

(d) select the Director of the Commission; and

(e) authorize the employment of such additional staff as the Commission deems necessary to carry out the powers assigned to the Commission. See OCGA § 15-1-21 (e) (2).

(2) In addition to the duties assigned to the Director in Rule 4, the Investigative Panel may delegate to the Director 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, the Supreme Court, the General Assembly, and the public;

(c) prepare the Commission's budget for its approval and administer the funds;

(d) notify the appropriate appointing authority of vacancies on the Commission;

(e) prepare an annual report of the Commission's activities for presentation to the Commission, the Supreme Court, the General Assembly, and the public; and

(f) inform the judiciary and the public of the existence and operation of the judicial discipline system, including the Investigative Panel's address and telephone number and the disposition of each matter in which public discipline is imposed.

(3) The Investigative Panel shall have the duty and authority to:

(a) review the recommendations of the Director after preliminary investigation and either authorize a full investigation or dismiss the complaint;

(b) decide how to proceed as provided in Rule 17.D (2); and

(c) oversee the prosecution by the Director of formal charges, before the Hearing Panel and the Supreme Court.

(4) The Hearing Panel shall have the duty and authority to:

(a) adjudicate formal charges filed by the Investigative Panel, including ruling on pre-hearing motions, conducting hearings on formal charges and making findings, conclusions, and recommendations to the Supreme Court for sanctions or dismissing the case, pursuant to Rule 24; and

(b) issue formal advisory opinions on its own initiative or on the recommendation of the Investigative Panel, subject to review by the Supreme Court, regarding the Georgia Code of Judicial Conduct. See OCGA § 15-1-21 (e) (3).

#### **F. Recusal.**

(1) Each member of the Commission shall be entitled to vote on any matter coming before his or her respective panel unless otherwise provided by this Rule. The chairperson of the Investigative Panel and the presiding officer of the Hearing Panel shall retain a vote on all matters except those in which such chairperson or presiding officer has been recused. No Commission member present at a panel meeting shall abstain from voting unless he or she is recused. See OCGA § 15-1-21 (i) (1).

(2) A member of the Investigative Panel shall recuse himself or herself from any matter in which recusal would be required of a prosecutor under Georgia law and the Georgia Rules of Professional Conduct for lawyers, treating the Commission as the member's client. A member of the Hearing Panel shall recuse himself or herself from any matter in which recusal would be required of a judicial officer under Georgia law and the Georgia Code of Judicial Conduct.

(3) A judge member of either panel shall recuse himself or herself from any matter involving the judge member and from any matter involving a judge of any court in the same judicial circuit as the judge member.

(4) A party to the proceeding may file a motion to recuse a Commission member from the matter within a reasonable time after the party discovers or should have discovered the grounds for recusal. The motion and all evidence thereon shall be presented by accompanying affidavit(s) that shall clearly state the facts and reasons for the belief that bias or prejudice exists, being definite and specific as to time, place, persons, and circumstances of the status, conduct, or statements that demonstrate either bias in favor of any adverse party, prejudice toward the moving party, or that the member's impartiality otherwise might be reasonably questioned. Allegations consisting of bare conclusions and opinions shall not be legally sufficient to support the motion.

(5) Whether raised by motion to recuse or otherwise, the Commission member whose impartiality is questioned shall determine individually whether or not to recuse, although the member may consult with other members of his or her panel.

(6) If a Commission member recuses himself or herself from a matter, he or she shall immediately advise the Director of that decision and shall not participate further in the matter. The recused member shall be replaced as a member for that particular matter if he or she serves on the Hearing Panel or if he or she serves on the Investigative Panel and recusal(s) on the matter will result in the Investigative Panel lacking a quorum or being unable to reach a decision on the matter due to an equal division of the votes on the matter. A recused member shall be replaced as follows:

(a) A judge member shall be promptly replaced by the next judge designated by the Supreme Court to replace a Justice who is recused from a case, as identified by the Clerk of the Supreme Court.

(b) An attorney member shall be promptly replaced by an attorney, not already appointed as a member of the Commission, selected by the Clerk of the Supreme Court at random from the most recent list of attorneys provided by the State Bar of Georgia to the Commission's appointing authorities pursuant to OCGA § 15-1-21 (f) (2).

(c) A citizen member shall be promptly replaced by an individual qualified to serve as a citizen member, selected by the Chief Justice of the Supreme Court from among the citizen members who have served on the Commission as currently or previously constituted.

In requesting the designation of a replacement member, the Director shall advise the Chief Justice or Clerk of the Supreme Court only of the need for a replacement and the judicial circuit in which the judge who is the subject of the matter serves, without identifying the judge by name or the nature of the matter.

### ***Commentary***

[1] Although not constitutionally mandated, these Rules seek to fully separate the investigative and adjudicative functions of the Commission and its members. No matter how fair individual members can be, the system cannot convey the appearance of fairness when members have full access to investigative materials, formulate their decisions to file charges in reliance on the investigative files, and then make adjudicative decisions based on the evidence presented in formal proceedings. This process is in conflict with the fundamental division of investigative and adjudicative responsibilities that is a hallmark of our modern judicial and administrative disciplinary systems. The indicting grand jury does not hear and determine the evidence presented at trial. Such a process may not be regarded as fair by a defendant who is indicted and convicted by the same body.

Thus, the Commission is divided into separate investigative and hearing panels so that no member of the Commission is involved both in deciding whether to file formal charges and in hearing the case on those charges.

[2] The independence of the Commission will be enhanced if the Investigative Panel chooses its own leadership.

[3] No qualified person should be deterred from serving on the Commission by the expenses incurred for service.

[4] It is essential that the Commission have the authority to propose its own rules of procedure to achieve uniformity, continuity, and the equitable and expeditious resolution of recurring issues, subject to the requirements of due process and approval by the Supreme Court.

[5] Educating the public, bar, and judiciary should be an integral part of the enforcement function. Distribution of a detailed annual report is essential to this purpose. To fulfill its educational function, the annual report should contain: a description of the Commission's purpose and function, basic statistics, descriptions of proper and improper judicial conduct, a discussion of the cases decided during the year including private sanctions (without identifying the judges), an explanation of any recommendations for changes in procedure or in the Georgia Code of Judicial Conduct, and an explanation of how to bring a matter before the Commission. The annual report should be widely distributed and available on the Commission's website.

## **Rule 4. Director**

**A. Selection.** The Investigative Panel shall select a Director, who shall be an active status member of the State Bar of Georgia and shall not engage in the practice of law, other than to represent the Commission, and shall not serve in a judicial capacity. See OCGA § 15-1-21 (e) (2) (C). The Director shall not be removed from office except by majority vote of the Investigative Panel. In the event of a vacancy, the Investigative Panel may delegate the Director's powers and duties to another of its staff or to one or more of its members until a new Director is selected.

**B. Powers and Duties.** The Director shall have the duty and authority to:

- (1) receive and screen complaints, refer complaints to other agencies when appropriate, conduct preliminary investigations, recommend to the Investigative Panel and upon authorization conduct full investigations, notify complainants about the status and disposition of their complaints, make recommendations to the Investigative Panel on the disposition of complaints, file formal charges when directed to do so by the Investigative Panel, prosecute formal charges, file notices of exceptions to the findings, conclusions, recommendations for sanctions, or orders of dismissal of the Hearing Panel, and brief and argue matters on review by the Supreme Court;
- (2) maintain records of the operations of the Commission, including minutes of Investigative Panel meetings and receipt of complaints, screening, investigation, and filing of formal charges in judicial discipline and incapacity matters, subject to the requirements of Rule 18;
- (3) compile statistics to aid in the administration of the system, including but not limited to a log of all complaints received, investigative files, and statistical summaries of docket processing and case dispositions;
- (4) prepare the Commission's budget for submission to the Investigative Panel and administer the funds;
- (5) employ, with the Investigative Panel's approval, and supervise other members of the Investigative Panel's staff;
- (6) employ, with the Investigative Panel's approval, and supervise investigators or experts as necessary to investigate and process matters before the Investigative Panel, the Hearing Panel, and the Supreme Court; and
- (7) perform other duties at the direction of the Investigative Panel.

### ***Commentary***

[1] Except as provided in Rule 28.B (2), the Director and the Investigative Panel's other staff must not participate in the Hearing Panel's deliberations, draft decisions, orders, or other documents, or otherwise serve as legal counsel to the Hearing Panel. To the extent the Hearing Panel requires legal or support staff assistance not available from its members, it should contract for the necessary support personnel.

[2] Judicial investigations and prosecutions should be conducted by the Director under the authority of the Investigative Panel. The Director should not use active law enforcement officials or staff to investigate complaints or present cases.

## **Rule 5. Reserved.**

# **Section II. General Provisions**

## **Rule 6. Grounds for Discipline; Sanctions; Felony Indictment or Conviction**

**A. Grounds for Discipline.** Pursuant to Article VI, Section VII, Paragraph VII (a) of the Georgia Constitution of 1983, the grounds for discipline are:

- (1) willful misconduct in office;
- (2) willful and persistent failure to perform the duties of office;
- (3) habitual intemperance;
- (4) conviction of a crime involving moral turpitude; and
- (5) conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

**B. Sanctions.** The following sanctions may be imposed upon a respondent who has committed such misconduct:

- (1) removal by the Supreme Court, with or without a prohibition on seeking or holding judicial office in the future;
- (2) suspension by the Supreme Court, with such conditions and restrictions as deemed appropriate;
- (3) imposition by the Supreme Court of limitations on the performance of judicial duties;
- (4) censure by the Supreme Court;
- (5) public reprimand by order of the Supreme Court;
- (6) private admonition by the Investigative Panel with the consent of the judge, provided that a private admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of the sanction to be imposed, pursuant to Rule 17.D (1);

- (7) deferred discipline agreement; and
- (8) other appropriate disciplinary action.

**C. Felony Indictment or Conviction.** Suspension or removal of a judge based on his or her indictment for a felony by a grand jury of this state or the United States or his or her initial or final conviction of a felony in a court of this state or the United States shall be governed by the procedures and sanctions set forth in Article VI, Section VII, Paragraph VII (b) and (c) of the Georgia Constitution of 1983. See Rule 15.A and 15.B.

*Commentary*

[1] Removal and suspension are the most serious sanctions that can be imposed by the judicial discipline system. They can be imposed only by the Supreme Court, and their use is appropriate when the respondent's misconduct demonstrates that the respondent is unfit to hold judicial office.

[2] In addition to any other qualification for judicial office, if a person has been removed from any judicial office upon order of the Supreme Court after review, that person shall not be eligible to be elected or appointed to any judicial office in this state until seven years have elapsed from the time of such removal. See OCGA § 15-1-13.

[3] In many instances, however, judicial misconduct is of a lesser nature that does not require the judge's removal or suspension, either to protect the public or to preserve the integrity of the judiciary. The facts may indicate that the judge can continue to serve effectively with certain limitations (e.g., limitation to a specific court or docket or participation in a therapy, counseling, or recovery program). In these cases, the Hearing Panel should recommend, and the Supreme Court should exercise its inherent authority to fashion, appropriate limitations and conditions.

[4] A private admonition is a non-public sanction imposed on a judge by the Investigative Panel with the consent of the judge. A private admonition cannot be imposed after the filing and service of formal charges. Only in cases of minor misconduct, when there is little or no injury to the public, the legal system, or the profession, should a private admonition be imposed.

[5] A deferred discipline agreement is a confidential agreement between the judge and the Investigative Panel for the judge to undergo treatment, participate in education programs, or take other corrective action. It is only available as a response

to misconduct that can be addressed through treatment, education, or a rehabilitation program. A deferred discipline agreement can only be entered into prior to the filing and service of formal charges.

[6] Some misconduct is so minor that it is appropriate not to impose any discipline. It is not intended that every transgression of the Georgia Code of Judicial Conduct will result in the imposition of discipline. Whenever the Investigative Panel or the Hearing Panel determines there has been a transgression, it should consider whether disciplinary action is appropriate and the degree of discipline to be imposed through a reasonable and reasoned application of the text of the Code, taking into account such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. See Georgia Code of Judicial Conduct, Scope section, Paragraph [6].

[7] Under these Rules, it is not within the Hearing Panel’s authority to impose public discipline. That is the responsibility of the Supreme Court. The Hearing Panel’s function is to determine facts, make conclusions of law, and recommend sanctions, or dismiss cases when misconduct was not proven. (See Rule 25 regarding review by the Supreme Court.)

## **Rule 7. Standard and Burden of Proof**

Charges of misconduct and grounds for transfer to and from incapacity inactive status shall be established by the standard of clear and convincing evidence. The burden of proof in proceedings seeking transfer from incapacity inactive status is on the judge. In all other proceedings, the burden of proof is on the Director.

### ***Commentary***

Judicial (and lawyer) disciplinary cases are neither civil nor criminal in nature but are sui generis. “Clear and convincing evidence” is a standard of proof higher than the civil law standard of “preponderance of the evidence” and lower than the criminal law standard of “beyond a reasonable doubt.” The standard of proof required to sanction a respondent’s conduct is thus commensurate with the importance of protecting the judicial system’s ability to function – more than required to prove a private wrong, but less than required to prove a criminal offense. The same standard is applied in lawyer disciplinary proceedings. When incapacity is raised as a defense, the same burden of proof applies. See Rule 27.D (1).

## **Rule 8. Civil Rules Generally Applicable**

Except as otherwise provided in these Rules, the rules of evidence applicable to non-jury civil proceedings and the rules of civil procedure apply in judicial discipline and incapacity cases.

### *Commentary*

Rules promulgated by the Investigative Panel pursuant to its authority under Rule 3.E (1) (a) take precedence over the civil rules of evidence and procedure. See, e.g., Rule 13 on service, Rule 14 on subpoena power, and Rule 22 on discovery.

## **Rule 9. Right to Counsel**

The judge shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings.

## **Rule 10. Ex Parte Contacts by the Hearing Panel**

Members and staff of the Hearing Panel shall not engage in any ex parte communications regarding a disciplinary or incapacity matter, including with the Director and members and other staff of the Investigative Panel.

### *Commentary*

[1] What constitutes improper ex parte communication is determined by Rule 2.9 of the Georgia Code of Judicial Conduct.

[2] Because of their investigative and prosecutorial roles, the Director and members and other staff of the Investigative Panel are prohibited from ex parte communications only with regard to communications about specific disciplinary matters with members and staff of the Hearing Panel and Justices and staff of the Supreme Court.

## **Rule 11. Confidentiality**

**A. Before Formal Charges.** All information regarding a disciplinary or incapacity matter of a judge shall be kept confidential by the Investigative Panel and

Commission staff before formal charges are filed and served; provided, however, that if prior to filing formal charges the judge and the Investigative Panel agree to a satisfactory disposition of a disciplinary matter other than by a private admonition or deferred discipline agreement, a report of such disposition shall be publicly filed in the Supreme Court. See OCGA § 15-1-21 (k) (1).

**B. After Filing and Service of Formal Charges.**

(1) With respect to an incapacity matter of a judge, all pleadings, information, hearings, and proceedings shall remain confidential; and

(2) With respect to a disciplinary matter of a judge, all pleadings and information shall be subject to disclosure to the public and all hearings and proceedings shall be open and available to the public except to the extent that such pleadings and information or hearings and proceedings could be properly sealed or closed by a court as provided by law. See OCGA § 15-1-21 (k) (2).

**C. Administrative and Other Matters.** With respect to administrative and other matters, all records and information shall be subject to disclosure to the public and all meetings, or portions thereof, shall be open and available to the public, except to the extent such records, information, and meetings would:

(1) disclose disciplinary matters of a judge protected in Rule 11.A;

(2) disclose incapacity matters of a judge protected in Rule 11.A or 11.B (1);

(3) be considered a matter subject to executive session, if the Commission were considered to be an agency under Chapter 14 of Title 50 of the Georgia Code; or

(4) not be required under OCGA § 50-18-72, if the Commission were considered to be an agency. See OCGA § 15-1-21 (k) (3).

**D. Work Product and Deliberations.** The work product of the Commission and its staff and the deliberations of the Commission shall remain confidential. See OCGA § 15-1-21 (k) (4).

**E. Exceptions.** Notwithstanding the other provisions of this Rule, information regarding a disciplinary or incapacity matter of a judge may be disclosed to the general public or to specific persons or agencies when:

(1) the privilege of confidentiality has been waived by the individual who was the subject of the Commission's investigation; or

(2) the Investigative Panel or the Hearing Panel determines that disclosure is necessary:

- (a) in the interest of justice and to protect the public;
- (b) because an emergency situation exists;
- (c) because a judge is under consideration for another state or federal position;
- (d) in response to a valid court order or subpoena; or
- (e) as provided in Rule 29. See OCGA § 15-1-21 (1).

### *Commentary*

[1] In the initial stages of the disciplinary case, confidentiality is necessary to protect a judge's reputation from unfounded charges and to protect witnesses from possible recriminations while a claim is being investigated.

[2] Disclosing the existence of complaints that were considered and dismissed is unfair to the judge and undermines the work of the Commission. It is unfair to allow any adverse inferences to be drawn from the mere existence of a complaint when it was not substantial enough to state a possible ground for discipline. The Commission will have greater credibility if it does not release information about dismissed complaints under any circumstances. If the judge wishes to have such information disclosed, the judge may release the information.

[3] Once the formal charges have been filed and served upon the judge, the policy emphasis shifts from confidentiality to the public's right to know. The integrity of the judicial system is better protected by an open public hearing than by a closed hearing. It is no longer possible to protect the identity of the witnesses because their identity must be disclosed through the discovery to which the respondent is entitled.

[4] Disclosures that the Investigative Panel or the Hearing Panel may determine to be necessary under Rule 11.E (2) (a) or (b) include disclosures to law enforcement authorities and potential victims of substantial evidence that a judge has committed, is committing, or is intending to commit a serious crime, and similar disclosures to attorney disciplinary authorities regarding serious violations of the Georgia Rules of Professional Conduct by judges who are lawyers. The timing and extent of such disclosures is at the discretion of the Investigative Panel.

[5] When the alleged misconduct or incapacity of a judge who is the subject of a complaint has been publicized and the public would expect the Commission to be investigating such conduct, the Investigative Panel may authorize the chairperson or the Director to publicly confirm the existence of such an investigation pursuant to Rule 11.E (2) (a).

[6] The Commission's administrative records and meetings that do not disclose specific, confidential disciplinary and incapacity matters should be available and open to the public like the records and meetings of other governmental agencies in this state.

[7] The Constitution provides for confidentiality of certain findings and records of the Commission in proceedings under Rule 15.A. See Rule 15.A (4).

## **Rule 12. Immunity from Civil Suits**

Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission or one of its panels, shall be absolutely privileged, and no civil action predicated upon such information or testimony shall be instituted against any complainant, witness, or his or her counsel. See OCGA § 15-1-21 (m).

### ***Commentary***

[1] This Rule does not cover immunity from criminal prosecution. Immunity from criminal prosecution for witnesses in judicial disciplinary proceedings is covered by Rule 17.E. It is crucial that persons with information about misconduct feel free to bring matters to the Commission. Complainants and witnesses will not come forward without some protection.

[2] Complainants, witnesses, and their counsel should be granted absolute immunity, as qualified immunity does not protect against the threat of a civil lawsuit because it does not apply to acts done with malice. The judge may file suit alleging malice and force the complainant or witness to undergo the expense of defending the suit. Qualified immunity therefore does not serve to encourage cooperation with the disciplinary process.

[3] Immunity from civil action attaches only to communications made to the Commission or its staff and to testimony given in the proceeding. If the complainant

or witness publicly discloses the information, immunity does not apply to the public disclosure. The complainant, witness, or attorney remains liable in a civil action if he or she publicly makes a false allegation about a judge.

[4] Commission members and staff must be free from harassment. They have immunities from civil suits pursuant to the Georgia Tort Claims Act, OCGA § 50-21-20 et seq., the official immunity provision of Article I, Section II, Paragraph IX (d) of the Georgia Constitution of 1983, and the common law of quasi-judicial immunity. These immunities assure the independence of the Commission and eliminate a major deterrent to service on it.

### **Rule 13. Service**

**A. Notice of Complaint.** Service of notice that a complaint has been received shall be made by regular mail to the judge's address of record on file with the State Bar of Georgia (for judges who are members of the Bar), the Administrative Office of the Courts (for judges who are not members of the Bar), or at such other address provided in writing to the Director.

**B. Formal Charges.** Service 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 Director, by registered or certified mail, or by statutory overnight delivery. Delivery of all other papers or notices shall be made in accordance with the Civil Practice Act.

#### *Commentary*

Because of geographical limitations, personal service may be difficult and expensive. Moreover, it is awkward and difficult to serve a judge personally, and with current security concerns, the process server may have great difficulty effectuating personal service.

### **Rule 14. Oaths; Subpoena Power**

**A. Oaths.** Oaths and affirmations may be administered by any member of the Commission or the Director in matters under full investigation or any other person authorized by law.

**B. Subpoenas for Investigation.** After a full investigation is authorized pursuant to Rule 17.B (3), the Director or the chairperson may compel by subpoena the attendance of the judge or witnesses and the production of pertinent books, papers, and documents for purposes of investigation. The Investigative Panel may issue subpoenas for specific witnesses or documents at the request of a judge under investigation.

**C. Subpoenas for Deposition or Hearing.** After formal charges are filed, the Director and the respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents at a deposition or hearing held under these Rules.

**D. Enforcement of Subpoenas.** Upon proper application, the Superior Court in the county in which the attendance or production is required may enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

**E. Quashing Subpoena.** Any attack on the validity of a subpoena shall be heard and determined by the Investigative Panel or the Hearing Panel before which the matter is then pending or by the court wherein enforcement of the subpoena is being sought. Any resulting order is not appealable prior to entry of a final order in the proceeding, except appeal of a court order pursuant to the interlocutory appeal procedures set forth in OCGA § 5-6-34 (b).

**F. Witnesses and Fees.** Subpoena fees and costs shall be the same as those provided for in proceedings in Superior Court.

### *Commentary*

A judge presiding over an action to enforce or quash a subpoena should be cognizant of the rules governing disqualification in the Georgia Code of Judicial Conduct and applicable case law, particularly if the judge who is a party to the action serves in the same judicial circuit.

## **Rule 15. Interim Suspension**

**A. Indictment for Felony.** Upon indictment of any judge for a felony by a grand jury of this state or of the United States, the Attorney General or district attorney shall transmit a certified copy of the indictment to the Hearing Panel of the Commission.

(1) The Hearing Panel shall, subject to subsection (A) (2) of this Rule, review the indictment, and if the Hearing Panel determines that the indictment relates to and adversely affects the administration of the office of this indicted judge and that the rights and interests of the public are adversely affected thereby, the Hearing Panel, on behalf of the Commission, shall suspend the judge immediately and without further action pending the final disposition of the case or until the expiration of the judge's term of office, whichever occurs first. During the term of office to which such judge was elected and in which the indictment occurred, if a nolle prosequi is entered, if the public official is acquitted, or if after conviction the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he or she was suspended. While a judge is suspended under this subsection and until initial conviction by the trial court, the judge shall continue to receive the compensation from his or her office. After initial conviction by the trial court, the judge shall not be entitled to receive the compensation from his or her office. If the judge is reinstated to office, he or she shall be entitled to receive any compensation withheld under the provisions of this subsection. For the duration of any suspension under this subsection, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in the Georgia Constitution or the laws enacted in pursuance thereof.

(2) The Hearing Panel shall not review the indictment for a period of 14 days from the day the indictment is received. This period of time may be extended by the Hearing Panel. During this period of time, the indicted judge may, in writing, authorize the Hearing Panel to suspend him or her from office. Any such voluntary suspension shall be subject to the same conditions for review, reinstatement, or declaration of vacancy as are provided in this subsection for a non-voluntary suspension.

(3) After any suspension is imposed under this subsection, the suspended judge may petition the Hearing Panel for a review. If the Hearing Panel determines that the judge should no longer be suspended, he or she shall immediately be reinstated to office.

(4) The findings and records of the Commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for

any purpose. The finding and records of the Commission shall not be open to the public.

(5) Reserved.

(6) If a judge who is suspended from office under the provisions of this subsection is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the judge shall be reinstated to office. The judge shall not be reinstated under this provision if he or she is not so tried based on a continuance granted upon a motion made only by the defendant.

**B. Conviction of Felony.** Upon initial conviction of any judge for any felony in a trial court of this state or the United States, regardless of whether the judge has been suspended previously under subsection (A) of this Rule, such judge shall be immediately and without further action suspended from office. While a judge is suspended from office under this subsection, he or she shall not be entitled to receive the compensation from his or her office. If the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he or she was suspended and shall be entitled to receive any compensation withheld under the provisions of this subsection. For the duration of any suspension under this subsection, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in the Georgia Constitution or the laws enacted in pursuance thereof.

**C. Other Grounds.** Except as provided in subsections (A) and (B) of this Rule, upon motion by the Investigative Panel and receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, which may include evidence that the judge has been charged with or convicted of a crime under circumstances not covered by subsection (A) or (B) of this Rule, the Supreme Court may suspend the judge with pay or transfer the judge to incapacity inactive status with pay pending a final determination in any proceeding under these Rules.

**D. Motion for Reconsideration.** A judge suspended or transferred to incapacity inactive status under subsection (C) of this Rule may apply to the Supreme Court for reconsideration of the order. The Supreme Court may direct the Hearing Panel to conduct an expedited proceeding and make a recommendation on such motion for reconsideration.

**E. Effect on Commission Action.** Interim suspension of a judge shall not preclude action by the Commission on the same conduct that was the basis for a criminal charge. Acquittal, dismissal, or conviction of the criminal charge shall not preclude proceedings by the Commission on the conduct that was the basis for the charge. If a judge is suspended or transferred to interim inactive status pursuant to subsection (C) of this Rule the Commission shall expedite his or her disciplinary proceedings.

*Commentary*

[1] The procedures regarding a judge who is indicted for or convicted of a felony are established by Article VI, Section VII, Paragraph VII (b) and (c) of the Georgia Constitution of 1983, which are incorporated into subsections (A) and (B) of this Rule.

[2] In determining whether to proceed on a disciplinary complaint when criminal charges have been filed, the Director and the Investigative Panel should consider the effect that a disciplinary investigation might have on the criminal investigation. Where it is appropriate, the Director should consult with the criminal prosecutor or law enforcement authority before proceeding.

[3] If the judge is found not guilty or if the judge's conviction is reversed on appeal, the Supreme Court should review the order of interim suspension and either continue it under Rule 15 or vacate it. An acquittal or dismissal does not preclude proceedings by the Commission because the standard of proof for judicial discipline requires clear and convincing evidence, not proof beyond a reasonable doubt, and because the alleged conduct may constitute grounds for misconduct under Rule 6.A but not be a violation of the criminal laws.

[4] Certain alleged misconduct poses such an immediate threat to the public or the administration of justice that the judge should be suspended from the bench immediately, pending a final determination of the ultimate discipline to be imposed. Interim suspension is also appropriate when the judge's continuing conduct is causing or is likely to cause serious harm to the administration of justice.

[5] In such cases, it is appropriate for the Supreme Court to impose an interim suspension or transfer to incapacity status to maintain public confidence in the judiciary. See Rule 26 regarding cases in which a member of the Supreme Court is charged with a crime. Additional review of such an interim suspension or transfer to incapacity status may be provided on motion for reconsideration by the Supreme Court, which may first direct the Hearing Panel to conduct an expedited proceeding

on the matter and to make a recommendation, particularly where development of a factual record is required.

## **Rule 16. Notification to Complainant**

The Director 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 10 days of the final disposition of the proceeding.

### *Commentary*

It is advisable for the Director to keep the complainant informed of the status of the case throughout the proceedings. Providing notice to complainants of the final disposition in all cases is vital to maintaining public confidence in the judicial disciplinary system. When a complaint has been dismissed, the notification to the complainant should include a brief summary of the facts and reasoning upon which the decision to dismiss was made. When final disposition is by private admonition or deferred discipline agreement, the complainant should be notified that action was taken on the matter without specifying the nature of the disposition.

## **Section III. Disciplinary Proceedings**

### **Rule 17. Screening and Investigation**

**A. Screening.** The Director shall evaluate all information coming to the Director's attention by complaint or from other sources that alleges judicial misconduct or incapacity. When a Commission member receives information relating to the alleged misconduct or incapacity of a judge, the member shall provide such information to the Director. See OCGA § 15-1-21 (j). If the information would not constitute misconduct or incapacity if true, the Director shall dismiss the complaint, subject to reconsideration by the Investigative Panel. If the information raises allegations that would constitute judicial misconduct or incapacity if true, the Director shall conduct a preliminary investigation.

## **B. Preliminary Investigation.**

(1) The Director may 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 the Investigative Panel authorizes a full investigation pursuant to Rule 17.C.

(2) When the Director believes there is evidence supporting the allegations against a judge, he or she shall recommend to the Investigative Panel that the panel authorize a full investigation. The Director 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, the Director shall recommend that the matter be dismissed.

(3) The Investigative Panel shall review the Director's recommendations and either dismiss the complaint or authorize a full investigation. See OCGA § 15-1-21 (j).

## **C. Full Investigation.**

(1) Within 10 days after the Investigative Panel authorizes a full investigation, the Director shall give the following notice to the judge:

(a) a specific statement of the allegations being investigated and the canons or rules allegedly violated, with the provision that the investigation can be expanded if appropriate;

(b) the judge's duty to respond if requested pursuant to Rule 17.C (3);

(c) the judge's opportunity to meet with the Director or the Investigative Panel pursuant to Rule 17.C (4); 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, the Director must give notice to the judge before the Investigative Panel considers a disposition.

(3) The Director may request that the judge file a written response within 10 days after service of the notice under Rule 17.C (1).

(4) Before the Investigative Panel determines its disposition of the complaint under Rule 17.D, the judge, the Director, or the Investigative Panel may request a meeting

by the judge with the Director or the Investigative Panel. The appearance may be on the record, with advance notice, at the request of the judge, the Director, or the Investigative Panel. The judge may appear with or without counsel, who may present additional information by proffer.

(5) Members of the Investigative Panel shall be present in person to participate in a panel meeting with a judge. See Rule 3.A.

#### **D. Disposition After Initiation of Full Investigation.**

(1) The Investigative Panel may consider any of the following dispositions:

- (a) dismissal;
- (b) private admonition 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;
- (f) other sanctions as provided by Rule 6.B; or
- (g) resolution of the matter by the judge's agreement to resign or retire, with or without the judge's agreement not to seek or hold judicial office in the future.

(2) If the Investigative Panel finds a violation pursuant to Rule 6 for which the imposition of discipline is not warranted, it may dismiss. If the Investigative Panel finds that there is reasonable cause to believe the judge committed misconduct:

- (a) it may propose to the judge a private admonition, a deferred discipline agreement, or an agreement by the judge to resign or retire, and if the judge consents, it shall admonish the judge or implement the deferred discipline agreement or the agreement to resign or retire;
- (b) if the judge does not consent to the admonishment, or the deferred discipline or resignation or retirement, the Investigative Panel may direct the Director either to file formal charges or dismiss the complaint; or
- (c) it may direct the Director to file formal charges.

**E. Immunity from Criminal Prosecution.** Whenever a witness invokes his or her privilege against self-incrimination as a basis for refusing to answer a question or to produce other evidence that may be relevant to a discipline or incapacity proceeding, the Director, after authorization by the Investigative Panel, may ask the Attorney General or the appropriate district attorney to apply to the Superior Court for immunity from criminal prosecution. See OCGA § 24-5-507.

### *Commentary*

[1] The Director is authorized to screen complaints because complaints that fail to state grounds for discipline may represent a large portion of those received by the Commission. However, the complainant shall be entitled to seek reconsideration by the Investigative Panel, and the Investigative Panel may also review the dismissals to determine that the screening is being done properly.

[2] The term “complaint” includes information received by telephone, news items, and any other source and includes complaints initiated by either the Director or the Investigative Panel or the Director on their own motions. See the definition of “Complaint” in the Terminology Section. The Director and the Investigative Panel may consider complaints submitted anonymously or confidentially in the same manner as other complaints in order to ensure that lawyers, court personnel, or litigants can bring misconduct and incapacity to the attention of the Commission without the fear of retaliation.

[3] The Director need not notify a judge of every complaint made against the judge. For example, it is not necessary to notify a judge of a complaint that is dismissed after screening on the ground that it does not state facts constituting misconduct. Also, the Director may want to withhold the fact of a complaint from a judge until after a preliminary investigation has been conducted. The Director should notify the judge of the complaint within 10 days after the Investigative Panel authorizes a full investigation unless the panel determines that notice should be deferred. The Investigative Panel should permit deferral only where necessary to protect the identity of a witness who may suffer harm. The Director must notify the judge before the Investigative Panel considers a disposition, in order to ensure that the Investigative Panel can consider all the facts, including the judge’s statement, before determining whether to dismiss the case, file formal charges, or offer the respondent a deferred discipline agreement, private admonition, or agreement to resign or retire.

[4] During a preliminary investigation, the Director and any staff or investigators assisting the Director should be cognizant in seeking evidence and conducting

interviews of the objective of maintaining the confidentiality of the proceeding, particularly before the Investigative Panel has authorized a full investigation.

[5] When giving notice, the Director should inform the judge of the nature of the allegations, the Code provisions alleged to have been violated, the duty of the judge to respond if requested, the judge's opportunity to meet with the Director or the Investigative Panel, and the possibility of resolving the complaint by agreement. The Director should advise the judge that since the investigation is ongoing, facts may be discovered that will change the violations charged.

[6] If the Director requests a written response from the judge, the Director should state when the judge is to respond and advise the judge where he or she may find a copy of these Commission Rules. If either the judge, the Director, or the Investigative Panel requests an opportunity for the judge to meet with the Director or the Investigative Panel, the judge may have counsel present at the meeting.

[7] In reviewing a complaint after investigation, the Investigative Panel should consider the Director's recommendation, including any memoranda on the law, together with the investigative file. The investigative file should include the statements of the complainant, the witnesses, if any, and the respondent, as well as relevant documents and other evidence.

[8] If the Investigative Panel decides to impose a private admonition, the panel should condition the private admonition upon the judge's execution of a waiver of the right to a hearing. Such a waiver should bar the judge from objecting to the use at a subsequent proceeding against the judge of the findings that are the basis for the admonition. The private admonition should be in writing.

[9] A deferred discipline agreement may be entered into only with the consent of the judge. The agreement sets forth conditions imposed by the Investigative Panel with which the judge must comply in order to avoid the reinstatement of disciplinary proceedings. The agreement must be in writing. A deferred discipline agreement does not constitute a finding that misconduct was committed. It is appropriate only when the alleged misconduct is minor, that is, it does not reflect on the judge's fitness for office, and when the underlying cause of the misconduct can be addressed through a treatment or rehabilitation program. Upon successful completion of the program, the complaint will be dismissed. If the judge fails to complete the program, the Investigative Panel may proceed to determine whether to dismiss the complaint against the judge, impose a private admonition with the consent of the judge, or

direct the Director to file formal charges or a petition for transfer to incapacity inactive status.

[10] The ultimate sanction for judicial misconduct or incapacity is the removal or involuntary retirement of the judge, with or without a prohibition on the judge's seeking or holding judicial office in the future. A judge may always voluntarily resign or retire, but doing so unilaterally does not preclude the Commission from proceeding with an investigation and seeking sanctions by order of the Supreme Court, if only to ensure that the judge does not seek or hold judicial office in the future. If a judge believes that his or her removal from office or involuntary retirement would be the likely result of the full process provided by these Rules and that he or she would prefer to terminate the process before formal charges are filed by agreeing to resign or retire, with or without a prohibition on seeking or holding judicial office in the future, and if the Investigative Panel believes that this result would be a fair disposition of the matter and is in the interests of justice, there is no need to continue the process and delay that result. Indeed, this will often be the best means of resolving matters in which the judge's misconduct or incapacity is serious and readily provable.

[11] Such an agreement to resign or retire must be in writing; in the agreement, the judge may admit to all or certain of the allegations against him or her, or agree that such allegations could be properly proved in a hearing, or neither confirm nor deny the allegations, but the agreement must indicate that the judge is resigning or retiring in light of an investigation by the Commission. Pursuant to OCGA § 15-1-21 (k) (1), the Director must file a report of such an agreement reached in a disciplinary matter publicly in the Supreme Court, so that the public is notified that the judge resigned or retired due to a Commission investigation and to avoid such speculation about judges who resign or retire under other circumstances. A copy of such report shall also be provided to the Hearing Panel for informational purposes. The Director shall also file a report of such an agreement reached in an incapacity matter confidentially with the Hearing Panel and the Supreme Court for informational purposes.

[12] An agreement to resign or retire is a contract between the judge and the Investigative Panel, is not reviewed or approved by the Hearing Panel or the Supreme Court and is not a court order. If the judge violates the agreement, the Investigative Panel may seek to enforce the agreement as a contract with the judge, or it may seek to rescind the agreement and direct the Director to file formal charges.

[13] Such agreements are not permitted for intermediate public sanctions that allow a judge to continue in office, such as suspension, limitations on the performance of judicial duties, censure, and public reprimand, or for temporary judicial incapacity, as decisions to leave in office a judge who allegedly has committed significant misconduct or suffers from a significant physical or mental incapacity should be made by the Supreme Court on recommendation of the Hearing Panel. Likewise, an agreement to resign or retire is not authorized after formal charges are filed; after that point, discipline by consent is governed by Rule 23.

[14] A stay of the proceedings may be appropriate when there is an ongoing civil or criminal action against the judge, so as not to interfere with the expeditious litigation of the court action.

## **Rule 18. Use of Allegations From Dismissed Cases**

If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose in any judicial or lawyer disciplinary proceeding against the judge. If additional information becomes known to the Director regarding a complaint that has been dismissed before the filing of formal charges, the allegations may be reconsidered with the permission of the Investigative Panel.

### ***Commentary***

[1] A judge should not be subject forever to possible disciplinary action based on a complaint that has been investigated and dismissed. It is implicit in a dismissal of a complaint alleging misconduct within the jurisdiction of the judicial discipline system that the Investigative Panel has found insufficient evidence to go forward with charges. It is unfair to use these inadequately supported complaints to establish a pattern or practice of misconduct. If, however, additional evidence is discovered that adds substance to the allegations of a previously dismissed complaint, it is appropriate to reconsider the allegations of the original complaint. In determining whether to reconsider allegations, the Investigative Panel may wish to consider factors such as the length of time elapsed, the alleged harm caused, possible disruption to the judicial system, the extent of the original investigation, the good faith of the complainant, and other appropriate factors.

[2] These Rules do not adopt any statute of limitations as to incumbent judges. The conduct of a judge, no matter when it has occurred, is always relevant to the question of fitness for office. The time between the commission of alleged misconduct and

the initiation of a complaint based on the conduct is relevant to whether and to what extent discipline should be imposed, but is not relevant to limit the Commission's power to investigate. As to former judges and judicial candidates, see Rule 2.B (2).

## **Rule 19. Formal Charges**

The formal charges shall give fair and adequate notice of the nature of the alleged misconduct or incapacity. The Director shall file the formal charges with the Hearing Panel. The Director shall cause a copy of the formal charges to be served upon the respondent or respondent's counsel pursuant to Rule 13 and shall file a copy of the formal charges and proof of service with the Clerk of the Supreme Court.

### *Commentary*

[1] The formal charges should be drawn with clarity and specificity. From them the respondent should be able to ascertain the allegations and the provisions of the Georgia Code of Judicial Conduct alleged to have been violated or the alleged incapacity. In many instances, the formal charges will not be identical to the allegations of the original complaint. Often the investigation of a complaint will lead to the elimination of some allegations and the clarification of others. New, related allegations may come to light, some of which may be much more serious than those in the complaint. Sometimes the Investigative Panel will choose not to pursue certain allegations.

[2] The Clerk of the Supreme Court shall act as the clerk for the Hearing Panel.

## **Rule 20. Answer**

**A. Time.** The respondent shall file a written answer with the Clerk of the Supreme Court and serve a copy on the Director within 30 days after service of the formal charges, unless the time is extended by the Hearing Panel.

**B. Waiver of Privilege.** The raising of a mental or physical condition as a defense constitutes a waiver of medical privilege pursuant to Rule 27.D (4).

**C. Effect of Denial.** The answer should contain denials of those factual allegations known or believed to be untrue. The answer should also specify those factual allegations as to which the respondent lacks knowledge or information sufficient to

form a belief; this has the effect of a denial. All other factual allegations in the formal charges are deemed admitted. The answer may also contain affirmative and other defenses and may assert that the conduct alleged in the formal charges is not misconduct.

### *Commentary*

The respondent is required to answer the formal charges as a part of a judge's duty as a public official.

## **Rule 21. Failure to Answer or Appear**

**A. Failure to Answer.** Failure to answer the formal charges shall constitute an admission of the factual allegations.

**B. Failure to Appear.** If the respondent should fail to appear when specifically so ordered by the Hearing Panel or the Supreme Court, the respondent shall be deemed to have admitted the factual allegations in the formal charges. Absent good cause, the Hearing Panel or Supreme Court shall not continue or delay proceedings because of the respondent's failure to appear.

## **Rule 22. Discovery**

**A. Witnesses.** Within 30 days of the filing of an answer, the Director and the respondent shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. The Director or the respondent may withhold such information only with permission of the presiding officer of the Hearing Panel, who may 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 presiding officer's review of the withholding request is to be in camera, but the party seeking withholding must advise the other 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. The Director and the respondent may take depositions only of witnesses to be called at the hearing and other witnesses who are unavailable to testify. Depositions of other persons may be

taken only with permission of the presiding officer of the Hearing Panel and only for good cause shown.

**B. Other Evidence.** The Director and the respondent shall exchange:

(1) non-privileged evidence relevant to the formal charges, documents to be presented at the hearing, and non-privileged witness statements and summaries of interviews with witnesses who will be called at the hearing; and

(2) other material only upon good cause shown to the presiding officer of the Hearing Panel.

**C. Exculpatory Evidence.** The Director shall provide the respondent with exculpatory evidence relevant to the formal charges.

**D. Duty of Supplementation.** Both parties have a continuing duty to supplement information required to be exchanged under this Rule.

**E. Completion of Discovery.** All discovery shall be completed within 90 days of the filing of the answer, unless extended for good cause by the presiding officer of the Hearing Panel.

**F. Failure to Disclose.** The Hearing Panel may preclude either party from calling a witness at the hearing if the party has not provided the opposing party with the witness's name and address, any statements taken from the witness, or summaries of any interviews with the witness.

**G. Resolution of Disputes.** Disputes concerning discovery shall be determined by the presiding officer of the Hearing Panel, who may in his or her discretion refer the dispute to the full Hearing Panel for decision. The decisions of the Hearing Panel may not be appealed to the Supreme Court before the entry of the final order.

**H. Civil Rules Not Applicable.** Proceedings under these Rules are not subject to the Civil Practice Act regarding discovery except those rules relating to depositions and subpoenas.

### *Commentary*

[1] "Witnesses to be called at the hearing" include witnesses whose testimony will be presented by deposition.

[2] Liberal exchanges of non-privileged information should be encouraged, because they facilitate the trial of the charges. However, the presiding officer of the Hearing

Panel should monitor closely the extent of discovery permitted and the time for obtaining such discovery in order to prevent counsel from using discovery as a means of delay.

[3] Under this Rule, the number of persons who may be deposed is limited to avoid building delay into the process and to protect persons who will not testify at trial. Subpoena power is covered in Rule 14.

[4] In determining whether to preclude a party from calling a witness at the hearing for failure to disclose required information, the Hearing Panel may take into consideration the prejudice to the party calling the witness if the witness is not called and the extent to which the opposing party will be prejudiced by the lack of advance disclosure.

## **Rule 23. Discipline By Consent**

**A. Approval.** At any time after the filing of formal charges and before final disposition, the respondent may agree with the Director in writing that a stated sanction should be imposed in exchange for the judge's admission of some or all of the formal charges or the judge's admission that evidence exists with which the Director could properly prove some or all of the formal charges. The agreement shall be submitted to the Hearing Panel, which shall either:

- (1) reject the agreement; or
- (2) file the agreement with the Supreme Court for approval.

**B. Rejection of Sanction.** If the stated sanction is rejected by the Hearing Panel or the Supreme Court, the admission shall be withdrawn and cannot be used against the respondent in any proceedings.

**C. Affidavit of Consent.** A respondent who consents to a stated sanction shall sign an affidavit stating that:

- (1) the respondent consents to the sanction;
- (2) the consent is freely and voluntarily rendered;
- (3) there is presently pending a proceeding involving allegations of misconduct; and

(4) the facts set forth in the affidavit are true.

**D. Order of Discipline.** The Commission shall file the agreement and affidavit with the Supreme Court. These documents shall remain confidential until the agreement is accepted by the Supreme Court. The Supreme Court shall either reject the agreement or enter the order disciplining the respondent. The final order of discipline shall be based upon the formal charges and the conditional admission.

### *Commentary*

[1] Disposition of certain matters before formal charges are filed is governed by Rule 17.B.

[2] Either the respondent or the Director may initiate negotiations on discipline by consent, but both parties must agree to the stipulated discipline. The agreement, if approved, is proof that sufficient evidence supports the pertinent formal charges.

[3] Discipline by consent is beneficial to all participants. It enables the respondent who acknowledges fault to avoid the personal anxiety and expense of further proceedings, and it relieves the public and the judicial discipline system of the time-consuming and expensive necessity for such proceedings.

[4] In the event the proposed stipulated discipline is disapproved by the Hearing Panel or the Supreme Court or the matter is returned for formal proceedings for any reason, the respondent's admissions cannot be used against the respondent.

## **Rule 24. Hearing**

**A. Scheduling.** Upon receipt of the respondent's answer or upon expiration of the time to answer, the presiding officer of the Hearing Panel shall schedule a public hearing and notify the Director, the respondent, and other members of the Hearing Panel of the date, time, and place of the hearing. The presiding officer may also schedule status and pre-hearing conferences and, in consultation with the other members of the Hearing Panel, may issue pre-hearing orders and other orders necessary for the just and efficient conduct of the hearing. See Rule 8; OCGA § 9-11-16.

**B. Hearing Panel.** The hearing shall be conducted by the Hearing Panel, the members of which shall be present in person. See Rule 3.A.

### **C. Conduct of Hearing.**

- (1) All testimony shall be under oath.
- (2) The Director shall present evidence on the formal charges.
- (3) The Director may call the respondent as a witness.
- (4) Both parties shall be permitted to present evidence and produce and cross-examine witnesses.
- (5) The hearing shall be recorded verbatim. Whenever a transcript is requested by the respondent, the Director, the Hearing Panel, or the Supreme Court, a transcript of the hearing shall be produced promptly.
- (6) The Hearing Panel may request from the Director and the respondent proposed findings, conclusions, and recommendations for sanctions or dismissal.

**D. Dismissal or Recommendation for Sanction.** The Hearing Panel shall either dismiss the case or recommend a sanction to the Supreme Court. The Hearing Panel shall decide a matter only upon the concurrence of at least two members of the panel.

**E. Submission of the Report and Record.** Within 30 days after the hearing or after the filing of the transcript if one was requested, the Hearing Panel shall file with the Supreme Court the record of the proceeding and a report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions, and the order of dismissal or recommendation for sanction. The Hearing Panel shall at the same time serve the report and a copy of the proposed record upon the respondent and the Director. If the respondent or the Director has objections to the proposed record, he or she may have the record settled by the Hearing Panel's presiding officer. See OCGA § 15-1-21 (n).

**F. Notice of Exceptions.** Within 20 days of receipt of the Hearing Panel's report, the respondent and the Director may file with the Supreme Court notice of exceptions to the findings, conclusions, or recommendations for sanction or order of dismissal of the Hearing Panel. The failure to file notice of exceptions constitutes acceptance of the findings of fact, conclusions of law, and order of dismissal or recommendation for sanction.

### ***Commentary***

[1] Under these Rules, the Investigative Panel determines whether the Director has sufficient grounds to conduct a full investigation. After investigation, the Investigative Panel determines whether reasonable cause exists to believe

misconduct was committed. After the Hearing Panel conducts the hearing, it determines whether to recommend discipline to the Supreme Court or to dismiss the case.

[2] If formal charges are not answered and are deemed admitted, or if the respondent fails to appear, the hearing shall be for the purpose of determining the appropriate sanction. See Rule 21.

[3] A disciplinary proceeding is not a criminal proceeding. The respondent may not decline to testify but may claim the protection of the Fifth Amendment. However, the Hearing Panel may make a negative inference upon a failure to testify.

[4] The Director and the respondent are encouraged to stipulate to any issue of fact or law so as to shorten the time for the hearing.

## **Rule 25. Review by the Supreme Court**

### **A. Docketing.**

(1) The Clerk of the Supreme Court shall docket any case in which the Hearing Panel recommended a sanction or the respondent or the Director filed a notice of exceptions.

(2) In cases the Hearing Panel has dismissed to which no exceptions were filed, the dismissal shall be final unless the Supreme Court orders a review within 30 days.

### **B. Briefs, Oral Argument, and Supplemental Filings.**

(1) The Director and the respondent shall file briefs as directed by the Supreme Court. The Director or the respondent may request oral argument as provided in Supreme Court Rule 51.

(2) If the Supreme Court desires an expansion of the record or additional findings, it shall remand the case to the Hearing Panel with appropriate directions.

(3) The Supreme Court may order additional briefs or oral argument as to the entire case or specified issues.

**C. Notice of Additional Complaints.** If during review by the Supreme Court the Director receives another complaint against the respondent, the Director shall confidentially advise the Supreme Court and the respondent.

#### **D. Decision.**

(1) The Supreme Court shall file a written decision dismissing the case or imposing a sanction. All decisions issued by the Supreme Court shall be published in the official Georgia Reports for the guidance of other judges and for public information.

(2) The Supreme Court may accept, reject, or modify in whole or in part the findings and conclusions of the Hearing Panel.

## **Section IV. Special Proceedings**

### **Rule 26. Complaint Against a Justice of the Supreme Court**

**A. Proceedings Generally.** A complaint against a Justice of the Supreme Court, including a complaint alleging incapacity, shall proceed in the same manner as a complaint against any other judge, except as set forth in this Rule.

**B. Special Supreme Court.** Upon either a motion by the Director or the Supreme Court's own motion for interim suspension of a Justice pursuant to Rule 15.A, or a finding of reasonable cause to believe a Justice committed misconduct or has an incapacity by the Investigative Panel under Rule 17.B (2), a special supreme court shall be constituted. The special supreme court shall consist of nine judges selected from the list of judges maintained by the Supreme Court and routinely used to select replacement Justices when a Justice is disqualified from or not participating in a case. See Supreme Court Rule 57.

#### ***Commentary***

[1] The Supreme Court is a collegial body. Granting it the authority to discipline its own members would create appearances of impropriety and of conflicts of interest. This Rule provides for the selection of a special supreme court to serve in this situation, comprised of judges who have been deemed qualified to decide other Supreme Court cases when Justices are disqualified.

[2] As in other cases, the Investigative Panel and the Justice may agree to a deferred discipline agreement, private admonition, or agreement to resign or retire. See Rule 17.D.

[3] Nothing in these Rules is intended to preclude the General Assembly from initiating impeachment proceedings against a Justice under its constitutional authority.

## **Rule 27. Cases Involving Allegations of Mental or Physical Incapacity**

**A. Initiation of Incapacity Proceeding.** An incapacity proceeding can be initiated by complaint, by a claim of inability to defend in a disciplinary proceeding, or by an order of involuntary commitment or adjudication of incompetency.

**B. Proceedings to Determine Incapacity Generally.** All incapacity proceedings shall be conducted in accordance with the procedures for disciplinary proceedings, except:

(1) the purpose of the incapacity proceedings shall be to determine whether the judge suffers from a physical or mental condition that adversely affects the judge's ability to perform judicial functions;

(2) all of the proceedings shall be confidential, except as provided in Rule 11.E; and

(3) if the Supreme Court concludes that the judge is incapacitated to hold judicial office, it may enter any order appropriate to the circumstances, the nature of the incapacity, and the probable length of the period of incapacity, including:

(a) retiring the judge, if the incapacity is a disability that constitutes a serious and likely permanent interference with the performance of the duties of office;

(b) transferring the judge to judicial incapacity inactive status; and

(c) if a judicial disciplinary proceeding against the judge is pending and the Supreme Court concludes that the judge is incapacitated to defend, deferring the disciplinary proceeding, pursuant to Rule 27.D (2).

**C. Involuntary Commitment or Adjudication of Incompetency.** If a judge has been judicially declared incompetent or is involuntarily committed on the grounds of incompetency or incapacity by a final judicial order after a judicial hearing, the Supreme Court, upon receipt of a certified copy of the order, shall enter an order immediately transferring the judge to temporary judicial incapacity inactive status. A copy of the order shall be served, in the manner the Supreme Court shall direct,

upon the judge, his or her guardian, or the director of the institution to which the judge has been committed.

#### **D. Inability to Properly Defend in a Disciplinary Proceeding.**

(1) If in the course of a disciplinary proceeding a judge alleges an inability to assist in the defense due to mental or physical incapacity, the Director shall notify the Supreme Court. The Supreme Court shall immediately transfer the judge to temporary judicial incapacity inactive status pending a determination by the Supreme Court of the incapacity pursuant to Rule 27.B. A determination by the Hearing Panel that the judge is able to assist in his or her own defense is interlocutory and may not be appealed before entry of a final order in the proceeding.

(2) If, pursuant to Rule 27.B, the Supreme Court determines the claim of inability to defend is valid, the disciplinary proceeding shall be deferred. Any investigation of the disciplinary complaint may continue, as may the investigation of an incapacity complaint. The judge shall be retained on judicial incapacity inactive status until the Supreme Court grants a petition for reinstatement to active status. If the Supreme Court considering the petition for reinstatement to active status determines that the petition shall be granted, the Supreme Court shall also determine the disposition of the interrupted disciplinary proceedings.

(3) If, pursuant to Rule 27.B, the Supreme Court determines that the claim of inability to defend is invalid but that the judge is incapacitated to hold judicial office, the disciplinary proceeding shall resume. The judge shall be retained on temporary judicial incapacity inactive status.

(4) The raising of mental or physical condition as a defense to or in mitigation of formal charges constitutes a waiver of medical privilege.

#### **E. Stipulated Disposition.**

(1) The Hearing Panel shall designate a qualified medical, psychiatric, or psychological expert to examine the judge prior to the hearing on the matter. The Hearing Panel may designate an expert agreed upon by the Director and the judge. The expert or experts shall report to the Supreme Court and the parties.

(2) After receipt of the examination report, the Director and the judge may agree upon proposed findings of fact, conclusions, and order. The stipulated disposition shall be submitted to the Hearing Panel for a recommendation to the Supreme Court

of approval or rejection. The final decision on the recommendation shall be made by the Supreme Court.

(3) If the Supreme Court accepts the stipulated disposition, the Supreme Court shall enter an order in accordance with its terms. If the stipulated disposition is rejected by the Supreme Court, it shall be withdrawn and cannot be used against the judge in any proceedings. If the Supreme Court rejects the stipulated disposition, the Supreme Court shall order that the hearing proceed.

#### **F. Reinstatement from Incapacity Inactive Status.**

(1) No judge transferred to temporary incapacity inactive status may resume active status except by order of the Supreme Court.

(2) Upon the filing of a petition for transfer to active status, the Supreme Court may take or direct whatever action it deems necessary or proper to determine whether the incapacity has been removed, including a direction for an examination of the judge by qualified medical or psychological experts designated by the Supreme Court.

(3) With the filing of a petition for reinstatement to active status, the judge shall be required to disclose the name of each psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the judge has been examined or treated since the transfer to incapacity inactive status. The judge shall furnish to the Supreme Court written consent to the release of information and records relating to the incapacity if requested by the Supreme Court or court-appointed medical or psychological experts.

#### ***Commentary***

[1] Incapacity to perform judicial functions must be distinguished from a disability that does not adversely affect a judge's ability to perform judicial functions. Incapacity proceedings should be initiated any time information comes to the attention of the Director, the Commission, or the Supreme Court that a judge is incapacitated. This information can come from any source, including a complainant, a judicial adjudication in a civil or criminal action, or a claim of inability to defend by a respondent judge in a judicial disciplinary proceeding. If, during the course of a judicial disciplinary proceeding, the Director receives information that the judge is incapacitated, the Director should initiate an incapacity investigation.

[2] "Involuntary commitment" does not include a temporary commitment for purposes of evaluation or examination.

[3] It is important that incapacity not be treated as misconduct. Willful conduct should be clearly distinguished from conduct that is beyond the control of the judge.

[4] The order transferring the judge to temporary incapacity inactive status should clearly state the conditions the judge must meet to be reinstated to active status.

[5] If the judge in a disciplinary proceeding alleges inability to conduct a defense because of present incapacity, the judge should be transferred immediately to temporary incapacity inactive status to protect the administration of justice. A proceeding to determine whether the judge is in fact incapacitated should be initiated immediately. If the judge is found to be incapacitated, the Supreme Court may remove or retire the judge or allow the transfer to temporary incapacity inactive status to remain in force until the judge establishes that the incapacity has terminated. Once the incapacity has terminated, the proceedings alleging misconduct should be determined. If it is determined that the claim of current incapacity is unsubstantiated, the proceedings predicated on the allegations of misconduct should be immediately resumed.

[6] With the exceptions provided in Rule 11.E, incapacity proceedings should remain confidential, because the proceedings involve medical or psychological evidence or other personal information about the judge.

[7] Petitions for reinstatement from incapacity inactive status should be filed with the Supreme Court.

[8] Factual issues underlying petitions for reinstatement should be assigned to the Hearing Panel for recommendation to the Supreme Court.

[9] The filing of a petition for reinstatement from temporary incapacity inactive status must be accompanied by a waiver of doctor-patient or other privilege so that the Supreme Court may obtain the information needed to evaluate the claim of rehabilitation. This waiver applies only to information relating to the incapacity upon which the transfer to incapacity inactive status was predicated.

## **Rule 28. Advisory Opinions**

**A. Director's Opinions.** The Director and any other staff member designated by the Director or the Investigative Panel shall be authorized to render a Director's opinion concerning his or her interpretation of the Georgia Code of Judicial Conduct as applied to a given state of facts. The Director's opinion should address prospective conduct and may be issued in oral or written form. A Director's opinion is the

opinion of the Director or staff member and is neither a defense to any complaint nor binding on the Investigative Panel, the Hearing Panel, or the Supreme Court, but action in accordance with and in reasonable reliance upon a written Director's opinion shall be considered in mitigation of discipline. If the person requesting a Director's opinion desires, the Director may transmit the opinion to the Hearing Panel for discretionary consideration of the drafting of a proposed formal advisory opinion.

## **B. Formal Advisory Opinions.**

(1) On its own initiative, on the recommendation of the Investigative Panel, or at the request of any person, the Hearing Panel shall be authorized to draft a proposed formal advisory opinion concerning a proper interpretation of the Georgia Code of Judicial Conduct as applied to a given state of facts. The proposed formal advisory opinion should address prospective conduct and may respond to a request for review of a Director's opinion or a direct request for a formal advisory opinion.

(2) When a formal advisory opinion is requested, the Hearing Panel should review the request and make a preliminary determination whether a proposed formal advisory opinion should be drafted. Factors to be considered by the Hearing Panel include whether the issue is of general interest to the members of the judiciary, the State Bar of Georgia, or the public; whether a genuine ethical issue is presented; the existence of opinions on the subject from other jurisdictions; the presence and relevant scope of prior opinions from Georgia; and the nature of the prospective conduct. The Hearing Panel may request the Director to provide research and an initial draft of a proposed formal advisory opinion.

(3) When the Hearing Panel makes a preliminary determination that a proposed formal advisory opinion should be drafted, it shall publish the proposed formal advisory opinion on the website of the Commission and in an official publication and/or on the website of the Administrative Office of the Courts and the State Bar of Georgia, and shall solicit comments. After a reasonable time for receipt of comments, the Hearing Panel shall make a final determination either to file the proposed formal advisory opinion as drafted or as modified with the Supreme Court for review, or to reconsider its decision and decline to file the proposed formal advisory opinion.

(4) After the Hearing Panel makes a final determination that the proposed formal advisory opinion should be drafted and filed, the formal advisory opinion shall be filed with the Supreme Court and republished on the Commission's website and in an official publication and/or on the website of the Administrative Office of the Courts and the State Bar of Georgia. Unless the Supreme Court grants review as provided herein, the formal advisory opinion shall be binding only on the Commission and the person who requested the opinion, and the Supreme Court shall treat the opinion as persuasive authority only. Within 20 days of the filing of the formal advisory opinion, the Hearing Panel or any person aggrieved by the proposed formal advisory opinion may file a petition for discretionary review thereof with the Supreme Court. The petition shall designate the formal advisory opinion sought to be reviewed. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Hearing Panel. The Supreme Court shall set a briefing schedule and may order oral argument. The Supreme Court shall review the formal advisory opinion and make a final determination either by written opinion, or by order, and shall state whether the formal advisory opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

(5) If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all judges and shall be published in the official Georgia Reports and on the website of the Commission. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

(6) The Commission and the Supreme Court shall consider compliance with an approved or modified formal advisory opinion to be evidence of a good faith effort to comply with the Georgia Code of Judicial Conduct, but only to the extent that the underlying facts are identical. Action in compliance with and in reasonable reliance upon a formal advisory opinion not reviewed by the Supreme Court shall be considered in mitigation of discipline.

(7) The name of a person requesting a Director's opinion or formal advisory opinion will be kept confidential unless the person waives such confidentiality.

## **Rule 29. Special Committee on Judicial Election Campaign Intervention**

**A. Designation of Special Committee.** In every year in which a general election is held in this state and at such other times as the Investigative Panel may deem appropriate, the chairperson shall name three members to a Special Committee on Judicial Election Campaign Intervention (“Special Committee”), whose responsibility shall be to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. The committee shall consist of the senior judge, attorney, and citizen member of the Investigative Panel if available, and if not, the next most senior member from the respective membership category. The objective of the Special Committee shall be to alleviate unethical campaign practices in judicial elections, and to that end, the committee shall have the following authority.

**B. Handling of Complaints.** Upon receipt of a complaint or other information facially indicating a violation by a judicial candidate of any provision of Canon 4 of the Georgia Code of Judicial Conduct during the course of a campaign for judicial office, the Director shall immediately forward a copy to the Special Committee members and the committee shall direct the Director to:

(1) Seek informally, from the complainant and/or the subject of the complaint, such further information on the allegations of the complaint as the committee may deem necessary.

(2) Conduct such additional preliminary investigation as the committee may deem necessary.

(3) Determine whether the allegations of the complaint warrant speedy intervention and further investigation and, if not, dismiss the complaint and so notify the complainant.

(4) If further investigation is deemed necessary, request confidential written responses from the subject of the complaint and the complainant on the following schedule:

(a) within three business days of receiving such a request from the committee, a written response from the subject of the complaint;

(b) the committee will share the subject’s written response on a confidential basis with the complainant, who shall be requested to provide a written response within three business days; and

(c) the committee will share the complainant's response on a confidential basis with the subject of the complaint, who shall be requested to submit a written rebuttal within one business day.

In the event a complaint is filed within two weeks before a judicial election, or if circumstances otherwise dictate, the committee may accelerate this schedule or eliminate steps (b) and (c) as the committee deems necessary and consistent with due process. Each of the above papers must be served on the committee only and shall be kept confidential except as described above. The identity of the complainant will remain confidential until the committee's decision is communicated to the parties, unless that confidentiality is waived by the complainant. Any party breaching the confidentiality of this process shall be subject to a Public Statement as set forth in this Rule.

If the Special Committee determines after the papers from the parties are reviewed that the allegations do not warrant speedy intervention, the committee shall dismiss the complaint or refer it to the full Investigative Panel for such other action as may be appropriate under these Rules, and shall so notify the complainant and the subject of the complaint.

If it is determined that the allegations do warrant speedy intervention, the special Committee is authorized to:

- (a) immediately release to the complainant and the subject of the complaint a non-confidential Public Statement setting out the violations reasonably believed to exist; and/or
- (b) refer the matter to the full Investigative Panel for such other action as may be appropriate under these Rules.

**C. Timeliness Requirement.** To the extent practicable, the Special Committee shall seek to complete the process outlined in this Rule within 10 days of receiving a complaint.

**D. Confidentiality and Further Proceedings.** Except as specifically authorized in this Rule and Rule 11.E, the proceedings of the Special Committee shall remain confidential. In no event shall the committee have the authority to file formal charges or otherwise dispose of the complaint against any candidate for judicial office, which authority is reserved to the full Investigative Panel under Rule 17.D.