

Rules of Supreme Court for Disciplinary Control of Judges

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RULE 1. DEFINITIONS

(1) “Board” means the Judicial Conduct Board.

(2) “Judge” means the chief justice of the state, an associate justice of the Supreme Court, a superior judge, a district judge, an assistant judge, a probate judge or any other individual who is deemed a judge by Administrative Order No. 10, Code of Judicial Conduct, TERMINOLOGY (11).

(3) “Special counsel” means one or more attorneys appointed by the Board to gather and present evidence in proceedings before the Board or in the Supreme Court.

(4) “Disciplinary counsel” refers to the disciplinary counsel of the Professional Responsibility Board. See Permanent Rules Governing Establishment and Operation of the Professional Responsibility Program, Administrative Order No. 9, Rule 3.A.

(5) “Complaint” means any communication received by the Board concerning alleged acts of misconduct or disability, or any order on the motion of the Board to investigate acts which may constitute misconduct or disability.

(6) “Complainant” means any person, corporation or organization communicating to the Board information about alleged acts of misconduct or disability.

(7) “Deferred discipline agreement” means a confidential agreement between the judge and the Board setting forth conditions for the judge to undergo treatment, counseling, education, or other corrective action. It is available only as a response to misconduct that does not require prosecution and sanctions and that can be addressed through nondisciplinary means.

(8) “Formal complaint” means a written document filed by order of the Board or investigative panel stating probable cause as to specific acts of misconduct or disability which warrant formal action by the Board under the Code of Judicial Conduct and Rules of Professional Conduct and these disciplinary rules.

(9) “Party” means the Board or the judge.

(10) “Investigative panel” means the three-member panel of the Board designated to determine whether a formal complaint will be filed.

(11) “Hearing panel” means five or more members of the Board designated to hold a formal hearing.

(12) “Notice” means service under the Rules of Civil Procedure or service by certified mail, return receipt requested and received, to the last known address of residence of the addressee. Notice also means service as prescribed above on a guardian, guardian ad litem and counsel of record, if any.

(13) “Shall” is mandatory, but not jurisdictional, and “may” is permissive.

(14) “Written warning” means a nonpublic written notice to a judge advising him or her that although the complaint is being dismissed by the Board, the conduct alleged might rise to the level of a violation requiring action if it occurred on multiple occasions.

[Amended September 17, 2001, effective January 1, 2002; December 21, 2010, effective February 21, 2011.]

REPORTER'S NOTES--2011 AMENDMENT

Section 8 is amended to delete the requirement for a verified complaint. The Board believes it is unnecessary and merely adds procedural confusion for complainants.

Section 12 is amended to require that if certified mail is used, service is not adequate unless the return receipt has been received showing delivery on any person authorized to receive service under the Rules of Civil Procedure.

Section 14 is new. It is added to give the Board an intermediate step previously lacking. It is designed for situations in which the Board concludes that a complaint or pattern of complaints raises concerns about a judge's behavior that, although perhaps not rising to the level of an ethical violation requiring further sanction, should be acted upon by the judge to avoid future problems. It is discussed in more detail in Rule 8(2).

RULE 2. SCOPE OF THE RULES

These rules shall be applicable to any complaint charging a judge with:

- (1) violation of the Code of Judicial Conduct;
- (2) violation of the Rules of Professional Conduct;
- (3) offenses involving moral turpitude;
- (4) conviction of a felony;
- (5) misfeasance or malfeasance in office;
- (6) wilful misconduct or conduct prejudicial to the administration of justice although not related to judicial duties nor constituting conduct in office which nevertheless:
 - (a) brings or tends to bring the office into disrepute or disrespect, or
 - (b) renders the judge unfit to act or command public confidence;
- (7) wilful and persistent failure to perform judicial duties;
- (8) habitual intemperance;

- (9)** physical or mental disability that:
 - (a) seriously interferes with the performance of judicial duties, and
 - (b) is likely to be permanent, and
 - (c) will continue to interfere with the performance of judicial duties;
- (10)** temporary physical or mental disability; or
- (11)** violation of the Judicial Branch Policy and Procedures Regarding Gender Bias and Sexual Harassment in the Work Place.

[Amended September 17, 2001, effective January 1, 2002.]

RULE 3. JURISDICTION

(1) Any judge or any individual specially assigned pursuant to law to serve as a judge is subject to the disciplinary jurisdiction and control of the Supreme Court and the Board hereinafter established and defined. The Board has continuing jurisdiction over former judges regarding allegations that misconduct occurred during their judicial service if a complaint is made within three years of the discovery of the grounds for the complaint.

(2) Nothing contained herein shall be construed to deny to the General Assembly its constitutional authority for impeachment, nor to deny to any court those powers which are necessary to maintain control over proceedings conducted before it, nor to deny any court its lawful authority in criminal matters, nor to prohibit the Professional Responsibility Board from investigating or hearing any matter pursuant to its lawful authority, nor to prohibit any professional association from censuring, suspending or expelling its members.

[**Amended** September 17, 2001, effective January 1, 2002; amended September 20, 2001, effective January 1, 2002.]

RULE 4. THE JUDICIAL CONDUCT BOARD

(1) The Supreme Court shall appoint a Board to be known as the Judicial Conduct Board which shall consist of nine members composed and as follows:

(a) Three shall be judges, active or retired, other than an active justice of the Supreme Court;

(b) Three shall be attorneys admitted to the practice of law in this state; and

(c) Three shall be lay persons, not admitted to the practice of law in this state or any other state, nor an active, retired or resigned judge.

(2) In making its appointments, the Court shall consider attorneys recommended by the Vermont Bar Association, and judges recommended by the Vermont Trial Judges Association. The Supreme Court shall solicit names of interested attorneys and judges from the Vermont Bar Association, the Vermont Trial Judges' Association, and the Board, and shall appoint a successor to fill any unexpired term. The Board shall also be invited to submit names for lay member appointments.

(3) The terms of the members of the Board shall be for staggered terms; three members, consisting of one judge, one attorney, and one lay member shall be appointed for one year; three members, consisting of one judge, one attorney, and one lay member

shall be appointed for two years; and three members, consisting of one judge, one attorney, and one lay member shall be appointed for three years; thereafter all regular terms shall be three years, except that each member, including the members of the current Board, shall remain a member of the Board beyond the term for purposes of taking part in any decision on a matter that was pending at the end of that term. The list of Board members shall be publicly available on the Judicial website.

(4) No member may be appointed for more than two consecutive terms, but a member may be reappointed after a lapse of one full term.

(5) The Court shall annually appoint a Chair and Vice-Chair, who shall both be lawyers. The Court, in its discretion, may reappoint the Chair to the Board for a third consecutive three year term. The Chair shall call and conduct all meetings of the Board and perform such other functions as the Court shall direct. The Vice-Chair shall perform these duties during the absence or incapacity of the Chair. The Board shall have the power to employ clerical persons to assist the Board, subject to the approval of the Court Administrator as to terms of employment including compensation. The Court Administrator shall provide the Board with such supplies and equipment as are necessary for it to discharge its responsibilities.

[Amended September 17, 2001, effective January 1, 2002; Oct. 11, 2006, effective December 11, 2006; December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

Section 2 contains no new language; it is merely a reorganization of language that appeared elsewhere.

Section 3 is amended to delete language relating to a prior amendment, and to make clear that the list of the membership of the Board should be publicly available.

Section 4 is amended because Section 2 clarifies that any unexpired term should be filled.

Section 5 specifies that the Vice-Chair should be a lawyer. This has been the practice of the Board, and the Board feels it is necessary to assure that if the Chair is unavailable, someone with legal training is responsible for chairing any hearings or tending to other matters that must be conducted in the Chair's absence. This section also adds capitalization to the term "Chair" as a matter of form, which continues throughout these amendments.

REPORTERS NOTES--2006 AMENDMENT

Rule 4(5) is added to allow the Court the discretion of allowing the Chair of the Judicial Conduct Board to serve an additional term.

RULE 5. TEMPORARY SUSPENSION

(1) Without recourse to the Board, the Supreme Court may suspend a judge from acting in any judicial capacity, without loss of compensation, when there is pending an

indictment or information charging the judge with a crime punishable under the laws of the United States or any state, as a felony, or as a misdemeanor which adversely affects the judge's ability to perform the duties of office, or when the Board has recommended suspension for misconduct or disability while review is pending in the Supreme Court.

(2) The Supreme Court shall suspend a judge from acting in any judicial capacity, without compensation, when a judge is found guilty of a crime punishable under the laws of the United States or any state, as a felony, or as a misdemeanor which adversely affects the judge's ability to perform the duties of office. If the judgment of conviction is reversed, suspension terminates and the judge shall be paid his or her compensation for the period of suspension. If a judge is temporarily suspended and the judgment of conviction becomes final, the Supreme Court shall suspend the judge for the remainder of the term of office, without compensation.

(3) The Supreme Court shall suspend a judge from acting in any judicial capacity, without loss of compensation, when the judge claims that a physical or mental disability prevents assisting in the preparation of the defense to a formal charge.

(4) Without recourse to the Board, the Supreme Court may suspend temporarily a judge from acting in any judicial capacity, when the judge's physical or mental disability prevents the judge from fulfilling the duties of the office. The Court may base its order upon the consent of the judge, the judge's acceptance of disability insurance payments, reports from one or more physicians, or such other stipulations, documents or evidence as it deems appropriate. The suspension shall be without compensation for such periods as the judge receives disability insurance payments.

(5) Upon the recommendation of the Board, or on its own motion, the Supreme Court may suspend a judge, without loss of compensation, based upon sufficient evidence that the judge poses a substantial threat of serious harm to the public or to the administration of justice, pending final determination of any proceeding under these rules.

(6) The Administrative Judge for Trial Courts may suspend a judge pending an investigation of misconduct. The suspension shall terminate within 30 days of the effective date of the suspension unless a complaint is filed with the Board, and shall terminate within 60 days of the filing of the complaint unless the Supreme Court, upon the recommendation of the Board or on its own motion, orders the suspension to remain in effect pending final disposition of the complaint.

[Amended September 17, 2001, effective January 1, 2002; December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

This section is amended to make it gender-neutral.

RULE 6. GENERAL PROVISIONS

(1) The Board shall have authority to receive information, investigate, dismiss unfounded complaints, enter into deferred discipline agreements, issue written warnings, conduct hearings, and impose sanctions for judicial misconduct and disability.

(2) The Board may determine that the following actions should be taken against a judge: written warning, public reprimand, limitations or conditions on the performance

of judicial duties, suspension for a portion or all of the remainder of the judge's term in office, or other appropriate sanctions.

(3) The Board shall have, but is not limited to, the following powers:

- (a) to hold hearings and subpoena witnesses and exercise requisite process powers;
- (b) to make independent investigations either by members of the Board, disciplinary counsel, or special counsel;
- (c) to require a judge to submit to physical or mental examination by qualified experts; and
- (d) to employ investigators, medical experts, stenographic reporters and other employees, for purposes of a particular matter only, as the Board in its discretion determines to be necessary to carry out its functions and purposes.

(4) The Board shall have authority to submit rules of procedure for the approval of the Supreme Court, and to develop appropriate forms for its proceedings.

(5) The Board may interpret the Code of Judicial Conduct and Rules of Professional Conduct only in connection with specific acts of conduct in matters before the Board, and shall not issue advisory opinions or interpretations. All decisions, orders, and recommendations of the Board shall be in writing.

(6) The Board shall investigate any complaint submitted to it and may investigate conduct or disability upon its own motion.

(7) All communications between or among Board members, all meetings of the Board, and all communications between the Board and disciplinary counsel or special counsel shall be confidential. No member of the Board may discuss the substantive internal communications, or the deliberations, of the Board with anyone outside the Board, its staff or its counsel. Except as otherwise provided by these rules, all papers, files, transcripts and communications in proceedings before the Board shall be confidential. After the service of a Formal Complaint upon a judge, the Formal Complaint, all subsequent pleadings, exhibits and rulings of the Board, and any hearing related to the Formal Complaint, shall be public.

(8) No member of the Board or other employee of the judicial department having knowledge of Board investigations shall disclose or use any Board record, file or communication except in the course of official duty. If both the complainant and the judge agree in writing and the Board agrees, confidentiality may be waived.

(9) Notwithstanding the confidentiality provisions of these rules, in any proceeding for impeachment, retention in office or judicial appointment, the chair of the Board upon written request shall make available to the officers involved in those proceedings information about matters which are pending and which have proceeded beyond the stage of initial inquiry pursuant to Rule 7(1).

(10) The Board may enforce the provisions for confidentiality by appropriate proceedings for contempt before any justice of the Supreme Court.

(11) From time to time, the Board may issue press releases and other public statements explaining the nature of its jurisdiction, procedures for filing complaints, limitations upon its powers and authority, and reports on the conduct of the business of the Board, provided that these releases and reports shall not identify in any manner any person involved in any proceedings before the Board. The Board shall periodically review its operations and procedures and issue an annual report to the Supreme Court, which shall include statistics and any recommendations for rule changes and shall be a

public document.

(12) If there is publicity concerning an investigation of a judge in a proceeding before the Board resulting in substantial unfairness to the judge, the Board may issue a short statement of clarification or correction.

(13) If there is publicity concerning alleged conduct of a judge claimed to constitute serious violation of the Code of Judicial Conduct or Rules of Professional Conduct, or the law, and after an investigation it is determined by the Board that there is no basis for probable cause to file a Formal Complaint, the Board may issue a short explanatory statement.

(14) In any case in which the subject matter becomes public through independent sources, the Board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge to a fair hearing without prejudgment, and to state that the judge denies the allegations.

(15) No judge who is a member of the Board may sit on the Board in any proceeding involving that judge's discipline. No member of the Board may participate in any proceeding in which a judge, in the exercise of judicial duties, would be required by Canon 3E of the Code of Judicial Conduct to disqualify himself or herself. If the Chair is disqualified or unavailable, the Vice-Chair shall assume the Chair's duties. If so many Board members are disqualified on a particular case that a quorum is impossible, the Chair shall appoint the necessary number of pro tempore members. If a member of the Board appears before any judge against whom a Formal Complaint is then pending, that member shall not thereafter participate in any discipline proceeding concerning that complaint.

(16) A quorum to transact business shall be three for an investigative panel, at least one of whom shall be a layperson. No act of an investigative panel shall be valid unless concurred in by a majority of those present and voting. The quorum to transact business for a hearing panel and the Board shall be five, at least one of whom shall be a layperson. No act of a hearing panel or the Board shall be valid unless concurred in by a majority of the Board. All meetings of the Board, investigative panel, and hearing panel shall be held in the state.

(17) The Board shall not function as an appellate court to review the decisions of a court or judge nor exercise superintending or administrative control over determinations of courts or judges.

(18) Except when the Board determines otherwise for good cause, the Board shall not deal with complaints arising out of acts or omissions discovered by the complainant more than three years prior to the date of the complaint. When the last episode of an alleged pattern of recurring judicial conduct arises within the three year period, the Board may consider all prior acts or omissions related to that alleged pattern of conduct, even if the prior acts or omissions are part of a complaint that was previously dismissed.

(19) (a) A complaint shall be filed with the Board by delivering it or by sending it by regular mail to the Chair. The Chair shall keep a docket in which the filing of all complaints and their final disposition shall be recorded. This docket shall not be available for inspection as a public record. A copy of each complaint shall be furnished to each member by the Chair.

(b) The Chair shall also keep a separate docket to record all Formal Complaints and their final disposition. This docket shall be available for inspection as a pub-

lic record.

(20) Neither unwillingness nor neglect of a complainant to sign a complaint or to prosecute a charge, nor settlement, compromise or restitution shall in itself justify abandonment of an investigation into the conduct of a judge.

(21) An investigation or formal action by either the Board or the Professional Responsibility Board shall not preclude any action by the other.

(22) For good cause shown, the Chair may extend for periods of time not exceeding thirty days, the time for filing an answer, or for the commencement of a formal hearing or hearing to take additional evidence.

(23) The raising of mental or physical condition as a defense shall constitute a waiver of patient privilege.

(24) A judge suspended by the Supreme Court from the practice of law shall be suspended for the remainder of the judge's term in office, without compensation.

(25) The members of the Board shall be reimbursed for all reasonable expenses incurred by them in connection with their duties as members of the Board and nonjudiciary members shall receive per diem compensation equivalent to that provided by law for comparable boards and commissions. The commissioner of finance and management shall issue a warrant for the compensation and expenses of each member of the Board when submitted on vouchers approved by the court administrator.

(26) The Board shall review the public report of compensation for extra-judicial activity, expense reimbursement and gifts filed annually by each judge pursuant to Canon 4H of the Code of Judicial Conduct and Administrative Directive No. 6 of the Supreme Court. The Board need take no further action after such review unless concerns are raised regarding potential violations of the Code of Judicial Conduct.

(27) The Board, the Professional Responsibility Board, and the Administrative Judge for Trial Courts may exchange any otherwise confidential information that they believe is relevant to each other's responsibilities. The Board shall disclose to the Supreme Court any information that is requested by the Court, including information otherwise deemed confidential under these rules.

[**Amended** September 17, 2001, effective January 1, 2002; August 15, 2006, effective October 16, 2006; December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

Sections 1 and 2 are amended to add references to written warnings and public reprimands as options for the Board.

Sections 7 and 8 are amended to clarify the scope of confidentiality of Board proceedings

Section 11 is amended to clarify that the report is directed to the Supreme Court, and to make it a public document.

Section 13 is amended to capitalize "Formal Complaint," to distinguish the complaints issued by the Board from those that come to the Board from others. This form is used throughout the amendments.

Section 15 is changed and replaced by 7 above.

Section 15, previously § 16, is changed to delete reference to retire-

ment. The intent is to delete such responsibilities from the jurisdiction of the Board, as is made clear by the amendments deleting old §§ 24 and 25, below. The other amendments are merely for clarity and gender-neutrality but are not intended to change the meaning of this section.

Section 18, previously § 19, is designed to clarify the statute of limitations in Board matters and to delete an outdated reference to the prior rules.

Old §§ 24 and 25 are deleted to remove jurisdiction over retirement matters from the Board. The Board believes that these are matters to be dealt with by other entities, and do not relate to the Board's duties regarding conduct matters.

Section 25 is clarified to make clear that judges do not get per diem reimbursement for attending Board meetings or hearings, as their Board duties are part of their employment for which they receive a salary

Section 26 is amended to clarify that the Board's role in reviewing judges' financial disclosures is limited to addressing any conduct issues.

Section 27 is amended to clarify that the Board may share information with the Supreme Court when requested, and that it may both give and receive otherwise confidential information to the other listed entities.

REPORTERS NOTES--2006 AMENDMENT

Rule 6(17) reduces the quorum for the Judicial Conduct Board to transact business from seven to five. The size of the Board was increased from seven to nine persons pursuant to the amendments adopted September 2001, effective January 1, 2002. Often, Board members have conflicts of interest that require recusal from a particular matter. These recusals and unavailability for routine reasons such as illness, vacation and work conflicts make it difficult at times for the Board to maintain a quorum of seven persons. Actions by the Board or hearing panel require a majority of the full Board. Rule 6(17) also adds language to assure the involvement of a lay member in any actions of the panels or the Board.

RULE 7. INITIAL INQUIRY, INVESTIGATION, AND FORMAL COMPLAINT

(1) Initial inquiry. Upon receipt of a complaint, its own motion, or request of the Supreme Court, the Board shall send a copy of the complaint or its motion to the judge, and shall inform the judge and the complainant that an initial inquiry is being undertaken. The initial inquiry shall consist of a review of the complaint and any additional records the Board deems necessary, such as the docket sheet, copies of court filings, a written, audio, or video record, a written response from the judge, or other relevant materials. No interviews of witnesses or of the judge shall occur as part of the initial inquiry. The Chair may appoint a member of the Board or a screening committee to make that initial inquiry and report back to the Board. Following the initial inquiry, the Board may dismiss the complaint, pursue a deferred discipline agreement, issue a written warning, or order a preliminary investigation.

(2) Investigation. In any case in which the Board decides that an investigation is necessary, it shall engage disciplinary counsel or special counsel to carry out investiga-

tion. The Board shall inform the judge that a preliminary investigation is being initiated and shall give the judge at least thirty days to respond. The person or persons appointed to conduct an investigation shall present a recommendation to either the Board or to an investigative panel consisting of three members appointed by the Board Chair. Any three-member panel shall consist of one judge, one attorney, and one lay member of the Board.

(3) Determination of Probable Cause. Where probable cause exists, in determining whether or how to proceed further the Board may consider the seriousness of the transgression, whether there is a pattern of violations by the judge, and the effect of the judge's actions on others or on the judicial system. The Board in its discretion may proceed to the Formal Complaint process, pursue a deferred discipline agreement, issue a written warning, dismiss the complaint, or pursue any other action authorized by these rules. If the investigation reveals to the satisfaction of the Board that no probable cause exists for a Formal Complaint, it shall dismiss the complaint. When a complaint is dismissed, the Board shall issue a closure letter in conformity with Rule 11.

(4) Formal Complaint. A Formal Complaint shall consist of a short and plain statement of the charges against the judge and the alleged facts upon which the complaint is based, and shall advise the judge of the right to file a written answer within twenty-one days of service, to be represented by counsel, to cross-examine witnesses, and to produce evidence on the judge's behalf. The Formal Complaint shall be served under Rule 1(12).

[**Amended** September 17, 2001, effective January 1, 2002; April 21, 2006, effective July 1, 2006; December 21, 2011, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

The title of this section is changed as part of a reorganization to separate out different types of proceedings into separate rules

Section 1 defines an Initial Inquiry more clearly than before, and lists what that inquiry may involve. This is in part designed to address concerns raised to and by the Board about separating Board members from direct conversations with judges or complainants, so that there is no issue about whether a Board member can become a witness based on something said in those conversations. The goal is to limit Initial Inquiries to review of documents and court records, including transcripts of court proceedings (whether paper, audio, or video). This section also adds written warnings as an option at the conclusion of an Initial Inquiry. The final part of the section is deleted because it is addressed below in Rules 8(1) and Rule 11.

Old § 2 has been replaced by Rule 8(3) below.

Section 2, formerly § 3, clarifies the time period for a judge to respond to a Preliminary Investigation.

Section 3, formerly § 4, attempts to set forth some of the considerations for whether to proceed with a Formal Complaint or other option when probable cause has been found. The seriousness of the transgression, whether there is a pattern of violations by the judge, and the effect of the judge's actions on others or on the judicial system are all considerations that the Code

of Judicial Conduct expressly make relevant. Vermont Code of Judicial Conduct, Preamble, § 5 (“[I]t is not intended, however, that every transgression will result in disciplinary action. Whether discipline is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on 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 also, Cynthia Gray, [How Judicial Conduct Commissions Work](#), 28 *Justice System Journal* 405, 417 (2007) (“[c]hoosing the proper sanction in judicial discipline proceedings ‘is an art, not a science, and turns on the facts of the case at bar’”) (citation omitted).

Section 4, formerly § 5, is not new but has been moved from a different location in the former version of the rules (former Rule 8(1)).

REPORTERS NOTES--2008 AMENDMENT

This rule was originally added effective January 1, 2002, and extended through June 30, 2008. During the second extension, the Board imposed one additional deferred discipline agreement. The Board's experience with that agreement was also positive.

REPORTERS NOTES--2006 AMENDMENT

Rule 7(2) was originally added effective January 1, 2002, with an expiration date of December 31, 2004. The provision allowed for deferred discipline agreements. Prior to December 31, 2004, the Board did impose one deferred discipline agreement. The Board's experience with that agreement was positive.

RULE 8. ALTERNATIVES TO A FORMAL COMPLAINT

(1) Dismissal. If the Board determines that the complaint is unfounded, or that there is otherwise insufficient cause for further proceedings, it shall dismiss the complaint and advise the complainant and the judge in a written letter of its action and the reasons therefor.

(2) Written warning. The Board may issue a nonpublic written warning when it concludes that (a) the conduct is potentially a violation of the Code if proved, but is not established by clear and convincing evidence, or (b) the conduct is potentially a violation of the Code but on its own is so minor that discipline is not warranted, or (c) for other reasons the Board concludes that a Formal Complaint is not warranted. A written warning is intended to alert the judge that the alleged conduct might rise to the level of a violation requiring action if it occurred on multiple occasions, and to provide suggestions for improvement when appropriate. Conduct that has been the subject of a written warning may later be used as the basis for a Formal Complaint if further complaints are filed within three years of the date the first complaint was filed with the Board. The fact that a judge has been the subject of one or more written warnings may be considered in determining the appropriate level of any later sanction.

(3) Deferred discipline agreement. The Board may propose a deferred discipline agreement in any case in which it believes a violation has occurred but (a) the conduct is not a serious violation, and (b) the conduct did not appear to cause significant harm to any person, and (c) the judge admits the violation, and (d) there is no evidence of a pattern of similar violations by the judge, and (e) it appears to the Board that the conduct at issue is not likely to be repeated by the judge. Such an agreement may also be entered into if the Board considers it important to avoid future violations (for example, by assuring that substance abuse treatment or counseling is obtained) even when the current violation might not otherwise merit a Formal Complaint.

Deferred discipline may not be imposed except by agreement. The agreement may impose terms and conditions as an alternative to discipline. Such terms and conditions may include, but are not limited to, education, psychological counseling, substance abuse programs, monitoring or review by the Administrative Judge or other suitable person, and--with the concurrence of the Administrative Judge--limitations on the performance of judicial duties. The Board may direct the Administrative Judge to monitor compliance with the conditions of the agreement, and may direct the judge to document compliance. The Board shall inform the Administrative Judge and the complainant that the complaint has resulted in a deferred discipline agreement, but unless the judge consents in writing, shall not inform the complainant of the terms of the agreement. If such an agreement is entered into after the filing of a Formal Complaint, the fact that a deferred discipline agreement has been entered into shall be made public, although the terms thereof shall remain confidential except when disclosure is permitted pursuant to Rules 6.(8), 6.(9), or 6.(27), above. In addition, such agreements may be reviewed and considered by the Board if relevant to determining whether to proceed on any future complaint filed with the Board, or what sanction to impose in any future proceeding before the Board.

Copies of all deferred discipline agreements, once signed by the Board and the judge, shall be provided to the Supreme Court.

Upon successful completion of all terms or conditions, the complaint will be dismissed. Subject to the disclosure provisions of Rule 6, the deferred discipline agreement shall remain confidential upon dismissal. A judge's failure to comply with a material term or condition of the agreement, without just cause, may result in the revocation of the agreement and further disciplinary action authorized by these rules, and may constitute an independent basis for discipline separate from the underlying complaint.

If the judge does not consent to enter into a deferred discipline agreement, the Board may pursue any other action authorized by these rules.

[**Amended** December 21, 2011, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

This Rule has a new heading, again as part of reorganizing the rules based upon the nature of the proceedings.

Section 1 has been moved from former Rule 7(1).

Section 2 is new, and defines the circumstances when a written warning may be appropriate. The Board feels that it should have a means of warning a judge that his or her conduct, although not rising to the level of a

sanctionable offense, raises concerns for the Board. For example, there have been concerns that a particular judge's demeanor in the courtroom has led to repeated complaints from litigants, although the Board concluded that, standing alone, the incidents did not violate the Code. The Board feels that having a means of alerting a judge to such concerns and the need to address them would be an appropriate addition to its options for improving the public's trust in and respect for the judiciary.

Section 3 is a revision of the Deferred Discipline procedure. The first paragraph adds detailed criteria for when such agreements are appropriate. The Board believes that these agreements are a useful addition to the options for resolving complaints to the Board. Most states have something of this nature. See, e.g., Cynthia Gray, [How Judicial Conduct Commissions Work](#), *28 Justice System Journal* 405, pp. 412-13 (2007) (“They are used if the misconduct is a relatively minor, isolated mistake that is not likely to be repeated and the judge has acknowledged the mistake and agrees to take steps to improve, has not previously been disciplined for the same conduct, and has not recently been disciplined for any misconduct.”).

The second paragraph of § 3 is in part unchanged from the prior rule (former Rule 7(2)). The last two sentences are new, and provide for (1) public notice that such an agreement has been entered into if it occurs after the filing of a Formal Complaint, and (2) consideration of Deferred Discipline Agreements if future complaints are filed against the judge.

The last two paragraphs of this section are carried forward from the former rule unchanged.

Deferred discipline was originally approved by the Supreme Court as a temporary rule in 2002, with sunset provisions. It has been renewed since then but has continued to have sunset provisions. This amendment would eliminate the sunset and make deferred discipline a permanent part of the rules.

This section also adds a new requirement that the Board promptly forward copies of all deferred discipline agreements to the Supreme Court. This provision will allow the Court to monitor the use and content of this alternative to formal discipline.

RULE 9. PROCEEDINGS AFTER THE FILING OF A FORMAL COMPLAINT

(1) Within twenty-one days of service of a Formal Complaint, the judge may file an answer with the Board. The answer shall contain all defenses. No further pleadings need be filed. Failure to answer or to deny misconduct or disability shall be deemed an admission of the charges. The Chair may permit late filing of an answer upon a showing of mistake, inadvertence, surprise or excusable neglect.

(2) At any time prior to its final order of recommendation, the Board or investigative panel may allow or require amendments to the formal complaint or answer. The Formal Complaint may be amended to conform to the proof or to state additional facts, either before or after the commencement of the hearing. If the Formal Complaint is amended, the judge shall be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged thereby.

(3) If the Board concludes that a judge who is the subject of a complaint is incompetent to defend against the charges, it shall appoint a guardian ad litem unless the judge has a guardian who will represent the judge. In appointing a guardian ad litem, the Board shall consult with and consider the wishes of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right or privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent, and whenever these rules provide for serving or giving notice or sending any matter to the judge, a copy of the notice or matter shall also be served upon the guardian or guardian ad litem.

(4) Discovery shall be permitted as provided for in the Rules of Civil Procedure. No materials made confidential by Rule 6.(7) shall be discoverable, and no depositions may be taken of Board members or counsel to the Board. However, all records reviewed by the Board in its initial inquiry shall be discoverable. This shall not be construed to make public any communications among Board members, the Board and special or disciplinary counsel, or other records otherwise made confidential by law or rule.

(5) Upon the filing of an answer or upon the expiration of the time for its filing, the Board shall set a deadline for any discovery. The evidentiary hearing shall be held before a hearing panel consisting of at least five members of the Board, at least one of whom shall be a lay member. The Board shall set a time and place for the hearing and shall give notice of the hearing to the judge at least twenty days prior to the hearing date. The Chair shall name the hearing panel and shall preside or designate a member to serve as the presiding officer.

(6) The judge shall have the right to appear personally and by attorney and to answer the charge, to present evidence in his or her defense, to examine and cross-examine witnesses, to secure subpoenas, to have a guardian ad litem appointed if indicated, and to secure a transcript of the evidence, findings, conclusions and recommendations.

(7) The hearing shall conform to the rules of procedure and evidence governing the trial of civil actions. Special counsel or disciplinary counsel shall be designated by the Board to present the evidence in support of the Formal Complaint. The failure of the judge to appear in person or by counsel may be treated as a waiver of all defenses and a concession of the violation.

(8) The presiding officer shall make rulings on procedure and evidence during the hearing.

(9) The panel may initiate contempt proceedings before a single justice of the Supreme Court if a witness or judge fails to appear or fails to comply with any order of the Board or the Supreme Court in connection with a Board proceeding.

(10) Oral evidence shall be taken only on oath or affirmation.

(a) Witnesses summoned by the panel shall be paid the same fees and mileage for attendance and travel as are paid in civil actions. Unless otherwise provided for by law, the Board shall not pay fees for attendance and travel to witnesses summoned by a party other than the Board. The party summoning the witness shall pay the fees. Any expert witness appointed by the panel shall receive a fee as an expert witness which shall be set by the Board.

(b) When the judge has been exonerated of the charges, upon application, the Supreme Court may direct, at its discretion, that such portion of the costs and expenses

of the judge as it deems equitable shall be borne by the state.

(11) The formal hearing shall be recorded by a stenographic reporter or by other means designated by the Chair. The judge may arrange to procure a copy of the transcript at his or her own expense. The judge shall have the right, without any order or approval, to record the proceeding or to have all or any portion of the testimony in the proceeding transcribed at the judge's expense, except that the taking of photographs in the hearing room or radio or television broadcasting or transmitting of the formal hearing during the progress of the hearing or during any recess shall not be permitted except upon order of the Board in accordance with [V.R.C.P. 79.2](#).

[Amended September 17, 2001, effective January 1, 2002; renumbered and amended December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

This section is given a new heading to aid in reorganizing the topics addressed in the rule.

The former §1 has been deleted because the Board did not feel the format of a complaint needed to be described in the rule and because the other portions of this section have been moved elsewhere.

Section 1 contains only formatting changes and deletes the requirement for extra copies of every filing.

The amendments to § 2 contain only formatting changes.

Section 3 is unchanged but has been moved from former Rule 8(1).

Section 4 is amended to clarify what is discoverable when there is a contested matter. This has been an area of confusion for parties and the Board, and this amendment is designed to clarify what is and is not discoverable.

Section 5 is amended to add a period for discovery if the judge desires it. The other changes are merely grammatical.

The changes to § 6 are merely grammatical.

Section 7 is amended to make clear that whenever a Formal Complaint is issued, the Board will use counsel to present the case. The amendment also treats a failure to appear as an admission of a violation.

Section 8 is amended to delete the provision for a majority vote on evidentiary issues. The Board feels that this is properly the Chair's role. The amendment also deletes the statement that the rules do not diminish a judge's constitutional rights. It was unclear what this was designed to address, and it goes without saying in any case.

Section 9 is amended to clarify when contempt proceedings might be used.

Section 10 is amended to delete unnecessary language, and to clarify who pays for a summons to a witness.

Section 11 is amended to delete the mandatory preparation of a written transcript in proceedings leading to disciplinary action. If the Board has no need for a transcript, there should be no mandate to procure one.

RULE 10. DISPOSITION REPORT AFTER FORMAL HEARING

(1) The hearing panel shall issue a written order containing its findings of fact, conclusions of law, and the sanction imposed, if any, within thirty days of the completion of the formal hearing. The hearing panel shall rely only on the record in reaching its final order. Any finding of a violation shall be based upon clear and convincing evidence. The panel may, if it deems it appropriate, reserve its decision on the appropriate sanction and have a separate hearing on that question after any finding of a violation is made.

(2) A copy of the order shall be mailed to the judge, guardian, guardian ad litem, special counsel or disciplinary counsel, the complainant, and the judge's counsel of record, if any. The panel shall also promptly file a copy of the order, together with the record of its proceedings, with the Supreme Court

(3) If no appeal is served on the Chair and filed with the Supreme Court within 30 days of the Board's mailing of the hearing panel decision, and the Court does not otherwise order review on its own motion, an order of the panel other than an order imposing a suspension shall become final. Such an order shall have the same force and effect as an order of the Supreme Court. No order of suspension, however, shall become final and effective, even when no appeal is filed, unless ordered by the Court.

[**Amended** September 17, 2001, effective January 1, 2002; renumbered and amended December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

This rule is given a new title to clarify that it relates only to orders issued after hearings.

Section 1 is amended to read more clearly, to require that the final order be in writing, and to make clear a practice that has been used in the past, permitting bifurcation of the merits and the sanction hearing.

Section 3 is amended to clarify where an appeal must be served and filed, and to read more clearly.

RULE 11. CLOSURE REPORTS

To assure public awareness of the work of the Board, at the conclusion of every matter before the Board, a public Closure Report shall be issued and posted on the judiciary's web site. It shall also be distributed in the same manner as decisions of the Vermont Supreme Court. The Closure Report shall not identify the complainant, the judge, or any other person by name. It shall contain a summary of the complainant's allegations and the resolution of the case. If the case was dismissed, it shall contain the reasons for dismissal. In any case where a Formal Complaint was filed, the closure report shall consist of copies of the Formal Complaint and any written decision issued by the Board, which shall both be posted on the web site.

[**Adopted** December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

This rule is new. It is designed to make the public more aware of the Board's role in monitoring judicial conduct. Although aspects of the Board's work have been designated public in the existing rules, they have generally been public in name only because no procedure has existed for disseminating the information in a manner likely to actually reach the public. Litigants whose complaints are dismissed may at times feel that no action is ever taken against judges. "Judicial conduct commissions hold an awkward position in the justice system. The public, pointing to the high complaint-dismissal rate, accuses them of white-washing judicial misconduct. The media generally discovers them only in the event of a scandal, accusing them of being secretive and obscure." Cynthia Gray, [How Judicial Conduct Commissions Work](#), 28 *Justice System Journal* 405, 417 (2007). The Board believes that it is important to public trust in the process that it be made known that action is taken by the Board when appropriate. Thus, this amendment proposes dissemination of the public information by posting on an easily accessible location on the judiciary website and by dissemination in the manner in which the Court's decisions are publicly distributed (e.g., by email).

RULE 12. REVIEW BY THE SUPREME COURT

(1) All final decisions of the hearing panel which fully dispose of an entire proceeding may be appealed as of right to the Supreme Court by the judge or the counsel designated by the Board to prosecute the complaint pursuant to the Vermont Rules of Appellate Procedure, which rules shall govern the proceedings on appeal except where these rules establish a different procedure.

(2) The appeal shall be filed with the clerk of the Supreme Court within thirty days of the Board's mailing of the hearing panel's final order. A copy shall simultaneously be served upon the Board Chair.

(3) If no appeal is filed, the Court may order review on its own motion within 30 days of the date the hearing panel decision is filed with the Court. The Court may modify or remand a hearing panel decision only upon notice to the judge or the judge's counsel and the attorney designated by the Board to prosecute the complaint, and an opportunity to be heard.

(4) If the Supreme Court desires an expansion of the record or additional findings with respect to the hearing panel's order, it may remand the matter to the Board, with appropriate directions, while retaining jurisdiction. In such cases, the appeal shall be stayed until the filing of the additional record.

(5) Findings of fact by the hearing panel shall not be set aside unless clearly erroneous.

(6) All Board orders suspending a judge for any period of time shall be reviewed by the Supreme Court whether or not an appeal is filed. No suspension shall become effective until the Court issues a written order affirming or modifying such suspension.

[**Amended** September 17, 2001, effective Jan. 1, 2002; renumbered and amended December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

Section 2 is amended to clarify the date from which the thirty day appeal period is counted and to assure that notice of an appeal is served upon the Chair of the Board.

Section 4 is amended for clarity.

Section 6 is new, and is intended to clarify the provisions of Rule 10(3), which stays all suspensions from office until the Supreme Court adopts them.

RULE 13. COMPLAINT AGAINST A MEMBER OF THE SUPREME COURT

(1) A complaint against a member of the Supreme Court shall proceed in the same manner as a complaint against any other judge, except as set forth in this rule.

(2) Upon a motion of the Board or the Court for the temporary suspension of a member of the Supreme Court under Rule 5, a Special Supreme Court shall be constituted to hear the matter. The Special Supreme Court shall consist of five judges appointed by the Administrative Judge for Trial Courts, or the next senior trial judge if the Administrative Judge is unavailable, under the process established by the Administrative Judge for the appointment of pro tempore judges to the Supreme Court in cases where a justice of the Court is disqualified.

(3) The Special Supreme Court shall hear any appeal from a decision of a hearing panel involving a complaint against a member of the Supreme Court.

[**Amended** September 17, 2001, effective Jan. 1, 2002; renumbered December 21, 2010, effective February 21, 2011.]

REPORTERS NOTES--2011 AMENDMENT

The only change to this Rule is its number.