

### III. JUDICIAL DISCIPLINE

#### **1. Proceedings Confidential--Violation as Contempt.**

All proceedings involving allegations of misconduct by or the disability of a judge shall be kept confidential until the commission's recommendation to the Supreme Court is filed or the accused requests that the matter be public, or the investigation is predicated upon a conviction of the judge for a crime as defined in SDCL 16-1A-12. All participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding. Any violation by any person of

the requirement of confidentiality shall constitute contempt and shall be punishable as such by the Supreme Court. This section shall not be construed to deny access to relevant information by authorized agencies investigating the qualifications of judicial candidates, other jurisdictions investigating qualifications for admission to practice, or law enforcement agencies investigating qualifications for government employment.

#### **2. Initial Complaint Procedure.**

(a) Each written complaint received by any member of the commission shall be forwarded to the secretary of the commission for dissemination to the commission unless the complaint is against the secretary. In that event, the complaint shall be filed with the chair. The commission shall, however, have the authority to commence an investigation as to any matter under its jurisdiction upon a motion approved by a majority of the commission.

(b) Upon receipt of a written complaint the secretary shall acknowledge receipt of the complaint to the complainant. A complaint must allege facts which would demonstrate:

- (1) a violation of the Judicial Code,
- (2) willful misconduct in office,
- (3) habitual intemperance,
- (4) disability that seriously interferes with the performance of the judge's duties, or
- (5) violation of any constitutional provisions or statutes or conduct that is prejudicial to the administration of justice and brings a judicial office into disrepute.

(c) The commission may, upon review of the complaint, dismiss the complaint if such complaint is frivolous or does not allege facts that would provide jurisdiction to the commission to consider the complaint.

(d) If such complaint is not dismissed, the secretary shall give notice to the judge complained against by forwarding the complaint to the judge and by requesting the judge to respond in writing to the secretary within ten days with an original and six copies of the response for distribution unless such time is extended by the commission.

(e) The secretary shall notify the complainant that the complaint has been forwarded to the judge complained against with a request for a response within ten days and that any response received will be forwarded to the complainant and the complainant will be given an opportunity to reply to the judge's response.

(f) The secretary shall distribute the response of the judge complained against and complainant's reply, if any, to all members of the commission.

### **3. Additional Investigation of Complaint.**

The commission may continue the investigation of the complaint until the matter is ready for commission determination.

An investigation by the commission or by the accused or commission counsel may entail inquiries by mail, consultation with the judge, taking sworn statements and investigation by the commission counsel. In addition, the commission shall be entitled to compel by subpoena the production of books, accounts, and documents relevant to the proceeding. The circuit court of the county in which the witness resides shall have the power to enforce such process.

### **4. Decisions on Complaints.**

The commission shall by mail, or at a meeting which may be in person, by telephone, or video conference, or at a meeting called especially for that purpose, act upon the information before it in one of the following manners, to-wit:

(1) Dismiss the complaint.

(2) Require investigation by commission counsel.

(3) Continue to correspond with the judge complained against, or take such further action as the commission deems appropriate.

(4) In the event that the commission dismisses the complaint, the commission may, by a separate and unanimous vote, expunge the complaint from the judge's record.

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(5) Proceed to formal proceedings.

(6) Issue a private reprimand.

(7) Enter into a Deferred Discipline Agreement.

### **5. Notice to Complainant.**

The commission shall notify the complainant and the judge as to the disposition of the matter, except in the case of a private reprimand. When a private reprimand is issued, the complainant shall be notified that the commission has determined that no formal disciplinary action will be taken.

### **6. Notice of Formal Proceedings.**

(a) After the preliminary investigation has been completed, if the commission concludes by majority vote that formal proceedings should be instituted, the commission shall appoint commission counsel who shall without delay issue a written notice and complaint to the judge advising the judge of the institution of formal proceedings to inquire into the charges against the judge. Such proceedings shall be entitled:

"BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS

Inquiry Concerning Judge \_\_\_\_\_"

(b) The notice and complaint shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and it shall advise the judge of the judge's right to file a written answer to the charges against the judge within thirty days after service of notice and complaint upon the judge.

(c) The notice and complaint shall be served by the personal service of a copy thereof upon the judge, but if it appears to the chair of the commission that, after reasonable effort, personal service could not be

had, service may be made upon the judge by mailing, by prepaid registered or certified mail, copies of the notice and complaint addressed to the judge at the judge's last known residence.

(d) At any stage of formal proceedings, the commission shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge himself, and the production of papers, books, accounts, documents and testimony relevant to the proceedings. The circuit court of the county in which the judge resides shall have the power to enforce process.

(e) The judge and commission counsel shall be entitled to discovery in accordance with the rules of civil procedure after commencement of formal proceedings, subject to the discretionary control of the commission.

### **7. Setting for Hearing Before Commission.**

Upon the filing of an answer to the notice and complaint or upon expiration of the time for its filing, the commission shall order a hearing to be held before it concerning the conduct of the judge. The commission shall set a time and place for hearing and shall give notice of such hearing by registered or certified mail to the judge at least twenty days prior to the date set.

### **8. Hearing.**

(a) At the time and place set for hearing, the commission shall proceed with the hearing whether or not the judge has filed an answer or appears at the hearing. Commission counsel shall present the case in support of the charges in the notice of formal proceedings.

(b) A verbatim record shall be kept of the proceedings of the hearing.

(c) At the hearing before the commission, not less than five members of the commission shall be present when the evidence is produced.

### **9. Evidence.**

The rules of evidence shall apply at the hearing before the commission, and oral evidence shall be taken only on oath or affirmation.

### **10. Procedural Rights of Judge.**

(a) In the formal proceedings, a judge shall have the right to be represented by counsel, the reasonable opportunity to defend against the charges by the introduction of evidence, and the right to examine and cross-examine witnesses. The judge shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary

matter.

(b) Whenever these rules provide for giving notice to or making service of documents upon the judge, such notice or service may be effected by mailing the notice or documents to the judge's counsel of record.

(c) If the judge has been adjudged insane or incompetent, or if it appears to the commission at any time during the proceedings that the judge is not competent to act, the commission shall appoint a guardian ad litem unless the judge has a guardian. In the appointment of such guardian ad litem, consideration may be given to the wishes of the members of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right and 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 a judge, such notice or matter shall be served, given, or sent to the guardian or guardian ad litem.

**11. Interim Suspension.**

Upon the issuance of a written notice and complaint to a judge, or at any time thereafter, the commission may, in its discretion, issue its order directed to the judge ordering the judge to appear before the commission and show cause why the commission should not recommend to the Supreme Court that the judge be suspended from office, with compensation, while the matter is pending. The order to show cause shall be returnable before the commission at a designated place and at a time certain, at which place and time the commission shall consider the question of suspension. Thereafter, the commission, with not less than five members concurring, may recommend to the Supreme Court that the judge be suspended from performing the duties of that judge's office pending final determination of the inquiry. If the commission recommends suspension, such recommendation shall be submitted to the Supreme Court along with a record of the proceedings of the commission in relation to that recommendation.

**12. Amendments to Notice or Answer.**

The commission, at any time prior to its determination, may for good cause allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present a defense against the matters charged thereby.

**13. Conduct of Hearing.**

Should the commission find the complaint to have merit after the investigation is completed, the commission shall afford the judge complained against a reasonable opportunity to state the judge's position with respect to the allegations against the judge. This hearing shall take the form of an informal conference between the commission and the judge complained against or in the alternative, if required by said commission, a formal hearing noticed and conducted in the following manner, to-wit:

(1) Notice to the judge complained against shall be given by a member of the commission or by commission counsel in writing, by certified mail return receipt requested, stating the time, place and date of said hearing when and where said complaint will be considered, requiring the attendance of said judge and advising the judge that he/she may attend with Counsel. Said notice shall be given at least ten days prior to said hearing and have enclosed therewith a copy of these Rules.

(2) A verbatim transcript shall be kept of all formal hearings.

(a) The Presiding Commissioner shall conduct the hearing.

(b) After advising the accused judge of the right to be heard, to offer witnesses, to be represented by counsel and to have a record kept, the hearing shall be conducted as follows:

FIRST--Commission counsel shall be allowed to make an opening statement.

SECOND--The accused judge, after being sworn, or judge's counsel, shall be permitted to make

an opening statement.

THIRD--Witnesses, including the accused judge, called by commission counsel shall testify after being sworn. Witnesses will be questioned first by commission counsel, then by the accused judge or his/her counsel and thereafter by the commissioners.

FOURTH--Witnesses called by the accused judge after being sworn will then be examined. They will

be examined first by the accused judge or his counsel, then commission counsel, and the commissioners.

FIFTH--Rebuttal and surrebuttal witnesses' testimony may then be taken under oath and subject to examination and cross-examination by commission counsel, the judge or his/her counsel and then the commissioners.

SIXTH--Closing statements by commission counsel, accused judge or judge's counsel and rebuttal by commission counsel with time limits set by Presiding Commissioner.

SEVENTH--Commission discussion off the record and out of hearing of the accused judge.

#### **14. Report of Commission.**

(a) At the conclusion of the hearing, the commission shall promptly prepare a report which shall contain its findings of fact and its recommendations on the issues presented by the notice and complaint of formal proceedings and the answer thereto, if any.

(b) Upon its completion, the commission shall promptly serve a copy of its report upon the judge.

#### **15. Objections to Report.**

Within ten days after service of a copy of the commission's report upon the judge, the judge may file with the commission a statement of objections to the report, setting forth all objections thereto and all reasons in opposition to the findings as sufficient grounds for censure, removal, or retirement.

#### **16. Adoption of Report.**

Promptly after the judge's objections have been received or upon expiration of the time for filing objections, the commission shall proceed to adopt its report and in doing so may make modifications or amendments to the report as may be required in the judgment of the commission by reason of the filed objections.

#### **17. Extension of Time.**

The chair of the commission upon good cause shown may extend the time for filing an answer, commencing a hearing before the commission, or filing a statement of objections to the report of the commission.

#### **18. Hearing Additional Evidence.**

The commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of hearing and shall indicate the matters on which the evidence is to be taken. A copy of such order shall be sent by registered or certified mail to the judge at least ten days prior to the date of hearing.

#### **19. Commission Recommendations.**

If the commission finds good cause from any investigation, it may elect to issue a private reprimand, or make a recommendation to the Supreme Court of public censure, suspension, removal, or retirement of the judge. The affirmative vote of four members of the commission who have considered the record, and at least three of whom were present when the evidence was produced, is required for a recommendation of private reprimand, suspension, censure, removal, or retirement of a judge.

#### **20. Deferred Discipline Agreement.**

If it is determined after an investigation by the commission that the complaint is meritorious, but that formal disciplinary proceedings are not warranted, the commission and the judge may agree in writing to hold the proceedings in abeyance for a definite period, and may enter into a Deferred Discipline Agreement, provided the judge throughout the period complies with specified reasonable conditions. If such an agreement is entered into, complainant shall be notified that the matter is being held in temporary abeyance, but that it remains under active consideration by the commission. Upon

satisfactory compliance, the commission may thereafter dismiss the proceedings and notify the complainant and such other persons as the commission deems appropriate.

**21. Private Reprimand.**

(a) If it is determined after an investigation that the complaint is meritorious and that a private reprimand is warranted, a written report of the findings and proposed action shall be prepared and served by personal delivery or by registered or certified mail upon the accused judge.

(b) The accused judge shall have twenty days in which to accede or object to the findings and proposed action of a proposed private reprimand; silence shall be deemed to be an agreement with the findings and proposed action. After twenty days or upon agreement the commission shall report its findings to the Supreme Court. Upon filing, the findings constitute a private reprimand. The private reprimand shall not be available for public inspection but is available for consideration by the Supreme Court and commission in any future disciplinary actions against the judge.

(c) A judge may accede to a private reprimand either affirmatively or by silence within twenty days of service of the commission's findings and proposal of private reprimand, or the judge may within the same twenty-day period demand as of right that formal proceedings be initiated.

**22. Final Judgment.**

A final judgment of conviction of a judge for any crime shall be conclusive evidence of the judge's commission of that crime in any disciplinary proceedings instituted against the judge based upon the conviction.

**23. Judge's Duty to Respond to Commission Board.**

It shall be the duty of every judge to promptly and appropriately respond to any complaint or letter by the commission. In the event the judge shall fail to do so, such judge may be subject to sanction by the commission, or, after hearing upon order to show cause, disciplined by the Supreme Court.

**24. Costs and Expenses of Judicial Disciplinary Proceedings.**

Costs and expenses incurred by the commission in the investigation or prosecution of any disciplinary proceeding under this chapter shall be paid by the Unified Judicial System, provided, however, that the expenses of a disciplinary proceeding may, in the discretion of the Supreme Court, be assessed against the judge who is the subject of such proceeding.

**25. Consent by Judge by Retirement--Contents of Affidavit.**

A judge who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to retirement or resignation, but only by delivering to the commission an affidavit in the following form:

IN THE SUPREME COURT    OF THE STATE OF SOUTH DAKOTA

In Re:	)	
_____	)	RETIREMENT (RESIGNATION)
(Name)	)	AFFIDAVIT

State of _____	)	ss	
County of _____	)		

I, \_\_\_\_\_, being duly sworn on oath, depose and say that my business address is \_\_\_\_\_ (Building No. and Name, if any, or Box No.), \_\_\_\_\_ (Street address, if any), \_\_\_\_\_ (City), \_\_\_\_\_ (State), \_\_\_\_\_ (Zip Code); that my residence address is \_\_\_\_\_ (No. Street), \_\_\_\_\_ (City), \_\_\_\_\_ (State), \_\_\_\_\_ (Zip Code). I retire (resign) as a (Supreme Court Justice, a Circuit Court Judge, a Magistrate Judge) as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(Signature of Judge)

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(Signature of Officer Administering Oath)

My Commission Expires: \_\_\_\_\_

**26. Retirement or Resignation by Consent--Public Disclosure of Order.**

Upon receipt of a judge's retirement or resignation affidavit, the commission shall file it with the Supreme Court. The Court may, in its discretion, enter an order removing the judge based thereon. The affidavit and the order removing the judge shall be a matter of public record.

**27. Certification of Commission Recommendation to Supreme Court.**

Upon recommending the censure, removal, or retirement of a judge, the commission shall promptly file a copy of the recommendation, certified by the chair of the commission, together with the transcript and the findings and conclusions, with the clerk of the Supreme Court and shall immediately make service thereof by personal delivery or by registered or certified mail upon the judge.

**28. Review of Commission Proceedings.**

(a) Within thirty days of service of the commission's findings, conclusions and recommendation, the judge may file an original and five copies of a formal petition with the Supreme Court for modification or rejection of the commission's recommendation. The petition must be based upon the record, specify the grounds relied upon, and be accompanied by a brief in support thereof. Three copies of the petition and brief must be served upon the commission, and proof of such service must be filed with the Supreme Court at the time of the filing of the petition.

(b) Within twenty days of service of the petition and supporting brief, the commission may serve and file the original and five copies of an answering brief.

(c) Within fifteen days of service of the commission's brief, the judge may serve and file the original and five copies of a reply brief.

(d) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the commission.

**29. Disposition by Supreme Court.**

Based upon the report and recommendations of the commission, the Supreme Court may establish such procedure as it deems appropriate, including referral of said matter for the taking of testimony and

making of findings and recommendations. Such reference may be to any circuit court judge in the state or to a referee or referees deemed to be qualified to serve in that capacity. Upon consideration of the commission's findings, conclusions and recommendation, the judge's petition to modify or reject such recommendation, if any, and the report of the referee, if any, the Court shall render such judgment as the matter requires.

SL 1997, ch 326 (Supreme Court Rule 97-23).