

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 12- ~~9048~~

## APPROVAL OF AMENDMENTS TO THE PROCEDURAL RULES FOR THE REMOVAL OR RETIREMENT OF JUDGES

**ORDERED** that:

Pursuant to the Texas Constitution, article V, section 1-a(11), the Procedural Rules for the Removal or Retirement of Judges are amended as follows.

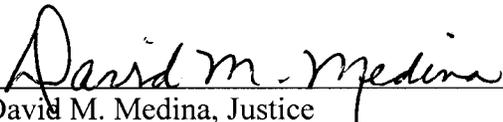
Dated: March ~~26th~~, 2012.

  
Wallace B. Jefferson, Chief Justice

  
Nathan L. Hecht, Justice

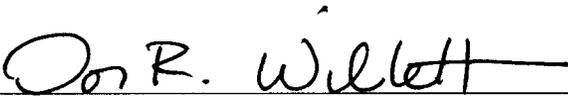
  
Dale Wainwright, Justice

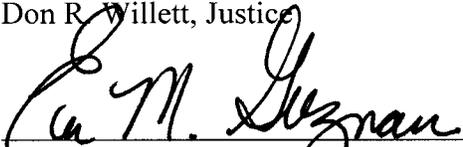
Misc. Docket No. 12 - 9048

  
David M. Medina, Justice

  
Paul W. Green, Justice

  
Phil Johnson, Justice

  
Don R. Willett, Justice

  
Eva M. Guzman, Justice

  
Debra H. Lehrmann, Justice

# PROCEDURAL RULES FOR THE REMOVAL OR RETIREMENT OF JUDGES

(Adopted and Promulgated Pursuant to Article V, Section 1-a(11), Texas Constitution)

## RULE 1. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

- (a) "Commission" means the State Commission on Judicial Conduct.
- (b) "Judge" means any Justice or Judge of the Appellate Courts and District and Criminal District Courts; any County Judge; any Judge of a County Court-at-Law, a Probate Court, or a Municipal Court; any Justice of the Peace; any Judge or presiding officer of any special court created by the Legislature; any retired judge or former judge who continues as a judicial officer subject to assignment to sit on any court of the state; and, any Master or Magistrate appointed to serve a trial court of this state.
- (c) "~~Chairman~~" "Chairperson" includes the acting ~~Chairman~~ Chairperson of the Commission.
- (d) "Special Master" means an individual appointed by the Supreme Court upon request of the Commission pursuant to Article V, Section 1-a, Paragraph (8) of the Texas Constitution.
- (e) "Sanction" means any admonition, warning, reprimand, or requirement that the person obtain additional training or education, issued publicly or privately, by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution. A sanction is remedial in nature. It is issued prior to the institution of formal proceedings to deter similar misconduct by a judge or judges in the future, to promote proper administration of justice, and to reassure the public that the judicial system of this state neither permits nor condones misconduct.
- (f) "Censure" means an order issued by the Commission pursuant to the provisions of Article V, Section 1-a, Paragraph (8) of the Texas Constitution or an order issued by a Review Tribunal pursuant to the provisions of Article V, Section 1-a, Paragraph (9) of the Texas Constitution. An order of censure is tantamount to denunciation of the offending conduct, and is more severe than the remedial sanctions issued prior to a formal hearing.
- (g) "Special Court of Review" means a panel of three court of appeals justices selected by lot by the Chief Justice of the Supreme Court ~~upon~~ on petition, to review a censure or sanction issued by the Commission.
- (h) "Review Tribunal" means a panel of seven court of appeals justices selected by lot by the Chief Justice of the Supreme Court to review the Commission's recommendation for the removal or retirement of a judge as provided in Article V, Section 1-a, Paragraph ~~(8)~~ (9) of the Texas Constitution.

(i) "Formal Proceeding" means the proceedings ordered by the Commission concerning the possibility of public censure, removal, or retirement of a judge.

(j) "Examiner" means the person, including appropriate Commission staff or Special Counsel, appointed by the Commission to gather and present evidence before a special master, or the Commission, a Special Court of Review or a Review Tribunal.

(k) "Shall" is mandatory and "may" is permissive.

(l) "Mail" means First Class United States Mail.

(m) The masculine gender includes the feminine gender.

## **RULE 2. MAILING OF NOTICES AND OF OTHER MATTER**

Whenever these rules provide for giving notice or sending any matter to a judge, the same shall, unless otherwise expressly provided by the rules or requested in writing by the judge, be sent to him by mail at his office or last known place of residence; provided, that when the judge has a guardian or guardian ad litem, the notice or matter shall be sent to the guardian or guardian ad litem by mail at his office or last known place of residence.

## **RULE 3. PRELIMINARY INVESTIGATION**

(a) The Commission may, upon receipt of a verified statement, upon its own motion, or otherwise, make such preliminary investigation as is appropriate to the circumstances relating to an allegation or appearance of misconduct or disability of any judge to determine that such allegation or appearance is neither unfounded nor frivolous.

(b) If the preliminary investigation discloses that the allegation or appearance is unfounded or frivolous, the Commission shall terminate further proceedings.

## **RULE 4. FULL INVESTIGATION**

(a) If the preliminary investigation discloses that the allegations or appearances are neither unfounded nor frivolous, or if sufficient cause exists to warrant full inquiry into the facts and circumstances indicating that a judge may be guilty of willful or persistent conduct which is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, or that he has a disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature, the Commission shall conduct a full investigation into the matter.

(b) The Commission shall inform the judge in writing that an investigation has commenced and of the nature of the matters being investigated.

(c) The Commission may request the judge's response in writing to the matters being investigated.

## **RULE 5. ISSUANCE, SERVICE, AND RETURN OF SUBPOENAS**

(a) In conducting an investigation, hearing, formal proceedings, or other proceedings before a Special Court of Review, the Chairman Chairperson or any member of the Commission, or a special master when a hearing is being conducted before a special master, or member of a Special Court of Review, may, on his own motion, or on request of appropriate Commission staff, the examiner, or the judge, issue a subpoena for attendance of any witness or witnesses who may be represented to reside within the State of Texas.

(b) The style of the subpoena shall be "The State of Texas". It shall state the style of the

proceeding, that the proceeding is pending before the Commission, the time and place at which the witness is required to appear, and the person or official body at whose instance the witness is summoned. It shall be signed by the ~~Chairman~~ Chairperson or some other member of the Commission, or by the special master when a hearing is before the special master, and the date of its issuance shall be noted thereon. It shall be addressed to any peace officer of the State of Texas or to a person designated by the ~~Chairman~~ Chairperson to make service thereof.

(c) A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein.

(d) Subpoenas may be executed and returned at any time, and shall be served by delivering a copy of such subpoena to the witness; the person serving the subpoena shall make due return thereof, showing the time and manner of service, or service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena.

#### **RULE 6. INFORMAL APPEARANCE**

(a) Before terminating an investigation, the Commission may offer a judge an opportunity to appear informally before the Commission.

(b) An informal appearance is confidential except that the judge may elect to have the appearance open to the public or to any person or persons designated by the judge. The right to an open appearance does not preclude placing of witnesses under the rule as provided by Rule 267 of the Texas Rules of Civil Procedure.

(c) No oral testimony other than the judge's shall be received during an informal appearance, although documentary evidence may be received. Testimony of the judge shall be under oath, and a recording of such testimony taken. A copy of such recording shall be furnished to the judge upon request.

(d) The judge may be represented by counsel at the informal appearance.

(e) Notice of the opportunity to appear informally before the Commission shall be given by mail at least ten (10) days prior to the date of the scheduled appearance.

#### **~~RULE 7. RESERVED FOR FUTURE PROMULGATION~~**

#### **COMMISSION VOTING**

(a) A quorum shall consist of seven (7) members. Proceedings shall be by majority vote of those present, except that recommendations for retirement, censure, suspension or removal of any Judge shall be by affirmative vote of at least seven (7) members.

#### **RULE 8. RESERVED FOR FUTURE PROMULGATION**

#### **RULE 9. REVIEW OF COMMISSION DECISION**

(a) A judge who has received from the Commission a sanction in connection with a complaint filed subsequent to September 1, 1987, may file with the Chief Justice of the Supreme Court a written request for appointment of a Special Court of Review, not later than the 30th day after the date on which the Commission issued its sanction.

(b) Within 15 days after appointment of the Special Court of Review, the Commission shall furnish the petitioner and each justice on the Special Court of Review a charging

document which shall include a copy of the sanction issued as well as any additional charges to be considered in the de novo proceeding and the papers, documents, records, and evidence upon which the Commission based its decision. The sanction and other records filed with the Special Court of Review are public information upon filing with the ~~Court~~ Special Court of Review.

(c) Within 30 days after the date upon which the Commission files the charging document and related materials with the Special Court of Review, the Special Court of Review shall conduct a hearing. The Special Court of Review may, if good cause is shown, grant one or more continuances not to exceed a total of 60 days. The procedure for the hearing shall be governed by the rules of law, evidence, and procedure that apply to civil actions, except the judge is not entitled to trial by jury, and the Special Court of Review's decision shall not be appealable. The hearing shall be held at a location determined by the Special Court of Review, and shall be public.

(d) Decision by the Special Court of Review may include dismissal, affirmation of the Commission's decision, imposition of a lesser or greater sanction, or order to the Commission to file formal proceedings.

(e) The opinion by the Special Court of Review shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

## **RULE 10. FORMAL PROCEEDINGS**

### **(a) NOTICE**

(1) If after the investigation has been completed the Commission concludes that formal proceedings should be instituted, the matter shall be entered in a docket to be kept for that purpose and written notice of the institution of formal proceedings shall be issued to the judge without delay. Such proceedings shall be entitled:

"Before the State Commission on Judicial Conduct Inquiry Concerning a Judge, No. \_\_\_\_\_"

(2) The notice shall specify in ordinary and concise language the charges against the judge, and the alleged facts upon which such charges are based and the specific standards contended to have been violated, and shall advise the judge of his right to file a written answer to the charges against him within 15 days after service of the notice upon him.

(3) The notice shall be served by personal service of a copy thereof upon the judge by a member of the Commission or by some person designated by the ~~Chairman~~ Chairperson, and the person serving the notice shall promptly notify the Commission in writing of the date on which the same was served. If it appears to the ~~Chairman~~ Chairperson upon affidavit that, after reasonable effort during a period of 10 days, personal service could not be had, service may be made by mailing, by registered or certified mail, copies of the notice addressed to the judge at his chambers and at his last known residence, and the date of mailing shall be entered in the docket.

**(b) ANSWER**

Within 15 days after service of the notice of formal proceedings, the judge may file with the Commission an original answer, which shall be verified, and twelve legible copies thereof.

**(c) SETTING DATE FOR HEARING AND REQUEST FOR APPOINTMENT OF A SPECIAL MASTER**

(1) Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall set a time and place for hearing before itself or before a special master and shall give notice of such hearing by mail to the judge at least 20 days prior to the date set.

(2) If the Commission directs that the hearing be before a special master, the Commission shall, when it sets a time and place for the hearing, transmit a written request to the Supreme Court to appoint a special master for such hearing, and the Supreme Court shall, within 10 days from receipt of such request, appoint an active or retired District Judge, a Judge of a Court of Civil Appeals, either active or retired, or a retired Justice of the Court of Criminal Appeals or Supreme Court to hear and take evidence in such matters.

**(d) HEARING**

(1) At the time and place set for hearing, the Commission, or the special master when the hearing is before a special master, shall proceed with the hearing as nearly as may be according to the rules of procedure governing the trial of civil causes in this State, subject to the provisions of Rule 5, whether or not the judge has filed an answer or appears at the hearing. The examiner or other authorized officer shall present the case in support of the charges in the notice of formal proceedings.

(2) The failure of the judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for removal or retirement. The failure of the judge to testify in his own behalf or his failure to submit to a medical examination requested by the Commission or the master may be considered, unless it appears that such failure was due to circumstances unrelated to the facts in issue at the hearing.

(3) The proceedings at the hearing shall be reported by a phonographic reporter or by some qualified person appointed by the Commission and taking the oath of an official court reporter.

(4) When the hearing is before the Commission, not less than ~~six~~ seven members shall be present while the hearing is in active progress. The ~~Chairman~~ Chairperson, when present, the Vice-~~Chairman~~ Chairperson in the absence of the ~~Chairman~~ Chairperson, or the member designated by the ~~Chairman~~ Chairperson in the absence of both, shall preside. Procedural and other interlocutory rulings shall be made by the person presiding and shall be taken as consented to by the other members unless one or more calls for a vote, in which latter event such rulings shall be made by a majority vote of those present.

**(e) EVIDENCE**

At a hearing before the Commission or a special master, legal evidence only shall be received as in the trial of civil cases, except upon consent evidenced by absence of objection, and oral evidence shall be taken only on oath or affirmation.

**(f) AMENDMENTS TO NOTICE OR ANSWER**

The special master, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may 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 his defense against the matters charged thereby.

**(g) PROCEDURAL RIGHTS OF JUDGES**

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

(2) When a transcript of the testimony has been prepared at the expense of the Commission, a copy thereof shall, upon request, be available for use by the judge and his counsel in connection with the proceedings, or the judge may arrange to procure a copy at his expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at his expense.

(3) If the judge is adjudged insane or incompetent, or if it appears to the Commission at any time during the proceedings that he is not competent to act for himself, the Commission shall appoint a guardian ad litem unless the judge has a guardian who will represent him. In the appointment of a guardian ad litem, preference shall be given, so far as practicable, to 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.

**(h) REPORT OF SPECIAL MASTER**

(1) After the conclusion of the hearing before a special master, he shall promptly prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings had and his findings of fact based on a preponderance of the evidence with respect to the issues presented by the notice of formal proceedings and the answer thereto, or if there be no answer, his findings of fact with respect to the allegations in the notice of formal proceedings. The report shall be accompanied by an original and two copies of a transcript of the proceedings before the special master.

(2) Upon receiving the report of the special master, the Commission shall promptly send a copy to the judge, and one copy of the transcript shall be retained for the judge's use.

**(i) OBJECTIONS TO REPORT OF SPECIAL MASTER**

Within 15 days after mailing of the copy of the special master's report to the judge, the examiner or the judge may file with the Commission an original and twelve legible copies of a statement of objections to the report of the special master, setting forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for removal or retirement. A copy of any such statement filed by the examiner shall be sent to the judge.

**(j) APPEARANCE BEFORE COMMISSION**

If no statement of objections to the report of the special master is filed within the time provided, the findings of the special master may be deemed as agreed to, and the Commission may adopt them without a hearing. If a statement of objections is filed, or if the Commission in the absence of such statement proposes to modify or reject the findings of the special

master, the Commission shall give the judge and the examiner an opportunity to be heard orally before the Commission, and written notice of the time and place of such hearing shall be sent to the judge at least ten days prior thereto.

**(k) EXTENSION OF TIME**

The ~~Chairman~~ Chairperson of the Commission may extend for periods not to exceed 30 days in the aggregate the time for filing an answer, for the commencement of a hearing before the Commission, and for filing a statement of objections to the report of a special master, and a special master may similarly extend the time for the commencement of a hearing before him.

**(l) HEARING ADDITIONAL EVIDENCE**

(1) 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 to the judge at least ten days prior to the date of the hearing.

(2) The hearing of additional evidence may be before the Commission itself or before the special master, as the Commission shall direct; and if before a special master, the proceedings shall be in conformance with the provisions of Rule 10(d) to 10(g) inclusive.

**(m) COMMISSION ~~VOTE~~ RECOMMENDATION**

If, after hearing, upon considering the record and report of the special master, the Commission finds good cause therefore, ~~by affirmative vote of six of its members~~, it shall recommend to the Review Tribunal the removal, or retirement, as the case may be; or in the alternative, the Commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition. ~~Six votes are required for a recommendation of removal or retirement.~~

**RULE 11. REQUEST BY COMMISSION FOR APPOINTMENT OF REVIEW TRIBUNAL**

Upon making a determination to recommend the removal or retirement of a judge, the Commission shall promptly file a copy of a request for appointment of a Review Tribunal with the clerk of the Supreme Court, and shall immediately send the judge notice of such filing.

**RULE 12. REVIEW OF FORMAL PROCEEDINGS**

(a) A recommendation of the Commission for the removal or retirement, of a judge shall be determined by a Review Tribunal of seven Justices selected from the Courts of Appeals. Members of the Review Tribunal shall be selected by lot by the Chief Justice of the Supreme Court from all Appeals Justices sitting at the time of selection. Each Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made, except that no Justice who is a member of the Commission shall serve on the Review Tribunal. The

Justice whose name is drawn first shall be ~~chairman~~ chairperson of the Review Tribunal. The clerk of the Supreme Court will serve as the Review Tribunal's staff, and will notify the Commission when selection of the Review Tribunal is complete.

(b) After receipt of notice that the Review Tribunal has been constituted, the Commission shall promptly file a copy of its recommendation certified by the ~~Chairman~~ Chairperson or Secretary of the Commission, together with the transcript and the findings and conclusions, with the clerk of the Supreme Court. The Commission shall immediately send the judge notice of such filing and a copy of the recommendation, findings and conclusions.

(c) A petition to reject the recommendation of the Commission for removal or retirement of a judge or justice may be filed with the clerk of the Supreme Court within thirty days after the filing with the clerk of the Supreme Court of a certified copy of the Commission's recommendation. The petition shall be verified, shall be based on the record, shall specify the grounds relied on and shall be accompanied by seven copies of petitioner's brief and proof of service of one copy of the petition and of the brief on the ~~Chairman~~ Chairperson of the Commission. Within twenty days after the filing of the petition and supporting brief, the Commission shall file seven copies of the Commission's brief, and shall serve a copy thereof on the judge.

(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.

(e) Rules 4 and 74, Texas Rules of Appellate Procedure, shall govern the form and contents of briefs except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

(f) The Review Tribunal, may, in its discretion and for good cause shown, permit the introduction of additional evidence, and may direct that the same be introduced before the special master or the Commission and be filed as a part of the record in the Court.

(g) Oral argument on a petition of a judge to reject a recommendation of the Commission shall, upon receipt of the petition, be set on a date not less than thirty days nor more than forty days from the date of receipt thereof. The order and length of time of argument shall, if not otherwise ordered or permitted by the Review Tribunal, be governed by Rule 172, Texas Rules of Appellate Procedure.

(h) Within 90 days after the date on which the record is filed with the Review Tribunal, it shall order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation. The Review Tribunal, in an order for involuntary retirement for disability or an order for removal, may also prohibit such person from holding judicial office in the future.

(i) The opinion by the Review Tribunal shall be published if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of ethics or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal or ethical issue of continuing public interest; (3) criticizes existing legal or ethical principles; or (4) resolves an apparent conflict of authority. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the above indicated criteria, but in such event the majority opinion shall be published as well.

### **RULE 13. APPEAL TO SUPREME COURT**

A judge may appeal a decision of the Review Tribunal to the Supreme Court under the substantial evidence rule.

### **RULE 14. MOTION FOR REHEARING**

A motion for rehearing may not be filed as a matter of right. In entering its judgment the Supreme Court or Review Tribunal may direct that no motion for rehearing will be entertained, in which event the judgment will be final on the day and date of its entry. If the Supreme Court or Review Tribunal does not so direct and the judge wishes to file a motion for rehearing, he shall present the motion together with a motion for leave to file the same to the clerk of the Supreme Court or Review Tribunal within fifteen days of the date of the judgment, and the clerk of the Supreme Court shall transmit it to the Supreme Court or Review Tribunal for such action as the appropriate body deems proper.

### **RULE 15. SUSPENSION OF A JUDGE**

(a) Any judge may be suspended from office with or without pay by the Commission immediately upon being indicted by a state or federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. However, the suspended judge has the right to a post-suspension hearing to demonstrate that continued service would not jeopardize the interests of parties involved in court proceedings over which the judge would preside nor impair public confidence in the judiciary. A written request for a post-suspension hearing must be filed with the Commission within 30 days from receipt of the Order of Suspension. Within 30 days from the receipt of a request, a hearing will be scheduled before one or more members or the executive director of the Commission as designated by the ~~Chairman~~ Chairperson of the Commission. The person or persons designated will report findings and make recommendations, and within 60 days from the close of the hearing, the Commission shall notify the judge whether the suspension will be continued, terminated, or modified.

(b) Upon the filing with the Commission of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission (under Rule 6), may recommend to the Supreme Court the suspension of such person from office.

(c) When the Commission or the Supreme Court orders the suspension of a judge or justice, with or without pay, the appropriate city, county, and/or state officials shall be notified of such suspension by certified copy of such order.

### **RULE 16. RECORD OF COMMISSION PROCEEDINGS**

The Commission shall keep a record of all informal appearances and formal proceedings concerning a judge. In all proceedings resulting in a recommendation to the Review Tribunal for removal or retirement, the Commission shall prepare a transcript of the evidence and of all

proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding.

**RULE 17. CONFIDENTIALITY AND PRIVILEGE OF PROCEEDINGS**

All papers filed with and proceedings before the Commission shall be confidential, and the filing of papers with, and the giving of testimony before the Commission shall be privileged; provided that:

(a) The formal hearing, and all papers, records, documents, and other evidence introduced during the formal hearing shall be public.

(b) If the Commission issues a public sanction, all papers, documents, evidence, and records considered by the Commission or forwarded to the Commission by its staff and related to the sanction shall be public.

(c) The judge may elect to open the informal appearance hearing pursuant to Rule 6(b).

(d) Any hearings of the Special Court of Review shall be public and held at the location determined by the Special Court of Review. Any evidence introduced during a hearing, including papers, records, documents, and pleadings filed in the proceedings, is public.

**RULE 18. EX PARTE CONTACTS BY MEMBERS OF THE COMMISSION**

A Commissioner, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* contacts with any judge who is the subject of an investigation being conducted by the Commission or involved in a proceeding before the Commission