

# **Rules of the Prosecuting Attorneys Qualifications Commission**

Pursuant to Article VI, Section VIII, Paragraph II of the Georgia Constitution of 1983, any district attorney or solicitor-general may be disciplined, removed, or involuntarily retired as provided by general law. OCGA 15-18-32 creates a Prosecuting Attorneys Qualifications Commission, which has the power to discipline, remove, and cause involuntary retirement of appointed or elected district attorneys or solicitors-general. OCGA 15-18-32(g) requires the commission to promulgate rules for the commission's governance which comport with due process and enforce the provisions of OCGA 15-18-32 (h) & (i).

Pursuant to this authority, the following are the rules of the Prosecuting Attorneys Qualifications Commission as adopted by the Commission. These rules are effective March 26, 2024 Subsequent amendments of these rules having later effective dates are so indicated at the location of the amendments.

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## SECTION 1

### Rule 1.1. Preamble

In 1897, the Georgia Supreme Court observed that a district attorney or solicitor-general has only the State for a client. 102 Ga. 264, 271 (1897). He or she cannot be employed by a private person to prosecute a case, nor to give advice on a matter. Their duty is a public one - owed to the entire public. His or her duty is prescribed by statute and guided by the discretion with which the public at large entrusts him or her. Thus, the regulation of the conduct of prosecuting attorneys is critical to preserving the integrity of the criminal justice system and enhancing public confidence therein.

These Rules reflect a careful balance of a number of competing interests: the rights of prosecuting attorneys to fair treatment in the disposition of complaints against them; their interest in the confidentiality of complaints for which the Commission finds there is not reasonable cause to believe that misconduct occurred; the public's concern that complaints against prosecuting attorneys are given serious consideration and that prosecuting attorneys are held to high standards of behavior; and the interest of the prosecuting attorneys and the public in having disciplinary complaints resolved promptly and accurately.

These Rules were drafted based on the American Bar Association's Standards for the Prosecution Function, Fourth Edition, the Georgia Rules for Professional Conduct, the NDAA's national prosecution standards, Georgia constitutional and statutory law, and the history and practice of the Judicial Qualifications Commission of Georgia, which regulates judicial conduct. They reflect the views of the Prosecuting Attorneys Qualifications Commission on the often complex and difficult issues that arise in the regulation of the conduct of prosecuting attorneys.

### Rule 1.2. Definitions

As used in these Rules:

- (a) **Bad Faith** means breach of known duty through some motive of interest or ill will and is not simply bad judgment or negligence. It imports a dishonest purpose or some moral obliquity, and implies conscious doing of wrong. *See Inquiry Concerning Judge Coomer*, 315 Ga. 841, 859-860 (2023).

- (b) **Individual Case for which Probable Cause for Prosecution Exists** means any matter within the jurisdiction of the prosecuting attorney for which a judicial officer has made a formal finding of probable cause that an offender has committed a crime according to the laws of the State of Georgia. *See* OCGA 15-18-6(4).
- (c) **Censure** means a reprimand by the Hearing Panel in the form of a written decision, which shall be imposed by the Hearing Panel on the prosecuting attorney in person in an open meeting of the Hearing Panel, and publicly filed with the Supreme Court.
- (d) **Commission** means the Prosecuting Attorneys Qualifications Commission.
- (e) **Complaint** means an allegation that complies with Rule 3.2, which is received by the Investigative Panel that alleges or from which a reasonable inference can be drawn that a district attorney or solicitor-general committed misconduct or is incapacitated.
- (f) **Conduct Prejudicial to the Administration of Justice Which Brings the Office into Disrepute** means inappropriate actions, which are harmful to the public's esteem of the criminal justice system or the office of prosecuting attorney, taken in good faith by the prosecuting attorney acting in their capacity as a prosecutor or taken in bad faith by the prosecuting attorney acting outside their capacity as a prosecutor. *See Inquiry Concerning Judge Coomer*, 315 Ga. 841, 859-860 (2023).
- (g) **Conflict of Interest** means an interest or relationship that would compel disqualification in accordance with O.C.G.A. § 15-18-5 or 15-18-65, as well as applicable provisions of the Georgia Rules of Professional Conduct.
- (h) **Conviction** means a final judgment of conviction entered upon a verdict or finding of guilty of a crime or upon a plea of guilty, including a plea of nolo contendere, by a court of this state or any other state; by a court of the United States including its territories, possessions, and dominions; or by a court of any foreign nation. OCGA 16-1-3(4).
- (i) **Criminal Charge** means an arrest, an indictment, a docketed accusation in this state or a comparable legal instrument in any other state; in the United States including its territories, possessions, and dominions; or in any foreign nation.

- (j) **Deferred Discipline Agreement** means a confidential agreement between a prosecuting attorney and the Investigative Panel for the prosecuting attorney to undergo treatment, participate in education programs, or take other corrective action. It is only available as a response to misconduct that can be addressed through treatment, education, or a rehabilitation program.
- (k) **Director** means the lawyer working for the Investigative Panel who is in charge of screening and investigating complaints, prosecuting formal charges, drafting reports, handling administrative matters, and performing other duties assigned by the Commission. This also includes special counsel selected to fill the role of Director for specific cases in which the Director recuses himself or herself. *See* Rule 4.
- (l) **Discipline** means a deferred discipline agreement, private admonition, public reprimand, limitations on the performance of prosecutorial duties, suspension, involuntary retirement, or removal from office. For any disciplinary disposition, other than a private admonition or deferred discipline agreement, a report of such disposition shall be publicly filed in the Supreme Court. OCGA 15-18-32(j).
- (m) **Formal Charges** means the document that charges the prosecuting attorney with specific acts of misconduct or with a specific incapacity.
- (n) **Hearing** means the public proceeding at which the issues of law and fact raised by the formal charges and answer are tried. *See* Rule 4.8.
- (o) **Hearing Panel** means the panel of the Commission that adjudicates formal charges filed by the investigative panel, issues disciplinary and incapacity orders, issues formal advisory opinions on its own initiative or on the recommendation of the investigative panel regarding the grounds for discipline set forth under OCGA 15-18-32(h), and issues standards of conduct on its own initiative or on recommendation of the investigative panel. *See* Rules 2.3 and 4.8; O.C.G.A. § 15-18-32 (c) (3).
- (p) **Incapacity** means a mental or physical condition that adversely affects a prosecuting attorney's ability to perform their duties, as prescribed in OCGA 15-18-6 and OCGA 15-18-66. Incapacity is distinguished from a disability that does not adversely affect a prosecuting attorney's performance of prosecutorial duties.

- (q) **Incapacity Inactive Status** means non-disciplinary involuntary retirement, removal, or suspension of a prosecuting attorney from office because of mental or physical inability to perform official functions.
- (r) **Indictable Offense** means any criminal case where a grand jury could find probable cause to believe a defendant has committed a crime. *See* OCGA 15-18-6(5) (for use of the word “indictable”).
- (s) **Investigation** means an inquiry into allegations of misconduct, including a search for and examination of evidence concerning the allegations, divided into two stages: a preliminary investigation conducted by the Director after the receipt of a complaint, and a full investigation conducted after approval by the Investigative Panel. *See* Rule 4.1.
- (t) **Investigative Panel** means the panel of the Commission that is responsible for the investigative, prosecutorial, and administrative functions of the commission; investigation of alleged conduct constituting grounds for discipline under subsection (h) of Code section 15-8-32; the selection of an individual to serve as the director of the commission; and authorization of employment of such additional staff as the commission deems necessary to carry out the powers assigned to the commission. This panel determines whether full investigations will be conducted and whether formal charges will be filed. *See* Rule 2.3; O.C.G.A. § 15-18-31 (c) (2).
- (u) **Involuntary Retirement** means compelling a district attorney or solicitor-general who is vested in a state or county retirement plan to vacate office.
- (v) **Knowingly** means actual knowledge of the fact in question. A prosecuting attorney's knowledge may be inferred from the circumstances. *See* Georgia Rules of Professional Conduct 5.1 (c).
- (w) **Misconduct** means any conduct by a prosecuting attorney constituting grounds for discipline. *See* Rule 3.1.
- (x) **Moral Turpitude** means any crime punishable by death, by imprisonment for life, or by imprisonment for more than 12 months, or any crime involving dishonesty or the obstruction of justice, regardless of the punishment. *See* *Lewis v. State*, 243 Ga. 443 (1979); *In the Matter of Jones*, 293 Ga. 264, 265 (1) (2013); OCGA 16-1-3(5).

- (y) **Personal Knowledge** means knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said or written, and it denotes much more narrowly a fact or cluster of facts acquired by firsthand observation of or participation in events being inquired into, coupled with a credible degree of recollection. *Batres-Garay v. United States AG*, 748 Fed. Appx. 204, 209 (III)(A) (11<sup>th</sup> Cir. 2018).
- (z) **Private Admonition** means a non-public sanction imposed on a prosecuting attorney by the Investigative Panel with the consent of the prosecuting attorney. *See* Rule 3.1 (c)(1).
- (aa) **Proceedings** means all steps in the discipline and incapacity system set forth in these Rules.
- (bb) **Prosecute** means all actions taken by a prosecuting attorney related to resolving an individual case for which probable cause for prosecution exists, including but not limited to dismissal, deferment, diversion, referral to accountability courts, motions to enter nolle prosequi and dead docket, plea, trial, and post-conviction matters.
- (cc) **Prosecuting Attorney** means an appointed or elected commissioned district attorney or solicitor-general. OCGA 15-18-32(a).
- (dd) **Prosecutorial Decision** means any decision to prosecute, as defined in Rule 1.2(bb), any individual case.
- (ee) **Public Reprimand** means a reprimand by the Hearing Panel in the form of a written decision, which shall be publicly filed with the Supreme Court
- (ff) **Reasonable Cause** means a reasonable ground for belief in the existence of facts warranting the filing of formal charges for discipline or a petition for transfer to incapacity inactive status.
- (gg) **Record** means all documents filed in the case beginning with the formal charges. The record includes a transcript of the hearing on the formal charges only if a transcript is requested by the respondent, Director, or Hearing Panel.
- (hh) **Respondent** means a prosecuting attorney against whom formal charges have been filed.



- (ii) **To Review a Case** means to consider and examine the evidence and law relevant to an alleged criminal violation of the Official Code of Georgia.
- (jj) **Screening** means examination of a complaint or other information coming to the attention of the Director to determine whether the Commission has jurisdiction and whether the information would constitute misconduct or incapacity if true. *See* Rule 4.1.
- (kk) **Special Counsel** means any member(s) of the Georgia Bar designated by the Investigative Panel to assist in the investigation and prosecution of disciplinary or incapacity matters before the Investigative Panel, Hearing Panel.
- (ll) **Supreme Court** means the Supreme Court of Georgia.
- (mm) **A Decision Based on Undue Bias or Prejudice** means a decision that has an improper basis that is unfair rather than a basis in evidence specific and relevant to the decision. *See State v. Harris*, 316 Ga. 272, 279 (2) (2023) (defining “unfair prejudice”); *U.S. v. Hooks*, 147 Fed. Appx. 956, 957 (11<sup>th</sup> Cir. 2005).
- (nn) **Willful Misconduct in Office** means actions taken by a prosecuting attorney in bad faith while acting in their capacity as a prosecutor, not actions merely taken during the term of service as a prosecuting attorney. *See Inquiry Concerning Judge Coomer*, 315 Ga. 841, 859-860 (2023).

## Section 2. Organization and Structure

### Rule 2.1. Disciplinary Authority

The disciplinary authority of the Commission extends to every commissioned district attorney and solicitor-general, as defined by Chapter 18 of Title 15 of the Official Code of Georgia Annotated.

#### *Commentary*

The Commission's authority does not extend to municipal prosecutors, prosecutors employed by the Georgia Department of Law, prosecutors employed by the Prosecuting Attorneys' Council of Georgia, the director of this Commission (and his or her deputies), contract juvenile, probate, and magistrate court prosecutors, candidates for prosecutorial office, or any officer not explicitly defined by statute as an elected or appointed district attorney or solicitor-general.

### Rule 2.2. The Prosecuting Attorneys Qualifications Commission

- A. **Purpose.** The Prosecuting Attorneys Qualifications Commission shall administer the discipline and incapacity system for prosecuting attorneys.
- B. **Jurisdiction.** The Commission has jurisdiction over prosecuting attorneys regarding allegations that misconduct occurred during service as a prosecuting attorney and regarding allegations of incapacity during service as a prosecuting attorney.
- C. **Appointment of Members.** The Commission shall consist of an Investigative Panel and a Hearing Panel. The Investigative Panel shall be appointed in accordance with O.C.G.A. § 15-18-32 (d)(3). The Hearing panel shall be appointed in accordance with O.C.G.A. § 15-18-32 (d)(4). The Prosecuting Attorneys' Council of Georgia may recommend to the respective appointing authorities a list of individuals for consideration to serve as attorney members of the Commission. See O.C.G.A. § 15- 18-32 (d)(2).
- D. **Terms.** The terms of Commission members initially appointed for staggered terms beginning July 1, 2023, shall be as set forth in OCGA § 15-18-32 (d). Successors to such members shall serve for a term of four years beginning on July 1 following their appointment and shall be eligible for reappointment to a second full term. A member appointed to an initial term of less than four years or to fill a vacancy may serve an additional two full terms. See O.C.G.A. § 15-18-32 (d)(5).

- E. **Removal.** Removal of a panel member shall be in accordance with O.C.G.A. § 15- 18-32 (f)(2).
- F. **Vacancies.** A vacancy shall be created by operation of law when a commission member no longer has the designation for which he or she was appointed, pursuant to O.C.G.A. § 15-18-32. Vacancies shall be filled in accordance with the provisions of O.C.G.A. § 15-18-32.

*Commentary*

The composition of the Commission, including its membership, appointing authorities, terms of office, and provisions for removal or vacancy of members, is wholly determined by O.C.G.A. § 15-18-32. Rule 2.3. Organization and Authority of the Commission

**Rule 2.3. Organization and Authority of the Commission**

- A. **Panels and Meetings.** The Commission is divided into an Investigative Panel of five members and a Hearing Panel of three members. See Rule 2.2; O.C.G.A. § 15- 18-32 (c). The Investigative Panel shall meet periodically as determined by the panel. Meetings of the Investigative Panel other than periodic meetings may be called by the chairperson upon the written request of three members of that panel. Meetings of the Hearing Panel may be called by the presiding officer upon the presiding officer’s own motion and shall be called by the presiding officer upon the written request of the other two members of the panel. Meetings may be conducted in person, by conference call, or electronically, except that members of the Investigative Panel must be present in person for a meeting with a prosecuting attorney pursuant to Rule 4.1.C (4) and members of the Hearing Panel must be present in person for a hearing pursuant to Rule 4.8. Further, except in situations in which the chairperson declares an emergency in his or her sole discretion, members of the Investigative Panel must be present in person or remotely using video technology at a meeting in order to vote to authorize a full investigation under Rule 4.1.B (3) or to vote on any action under the provisions of Rule 4.1.C or 4.1.D.
- B. **Officers.** The Investigative Panel shall annually elect one of its members to serve as chairperson and another to serve as vice-chairperson. The vice-chairperson shall perform the duties of the chairperson whenever the chairperson is absent or unable to act. The elected prosecutor member of the Hearing Panel appointed by the Senate Committee on Assignments shall serve as its presiding officer. See O.C.G.A. § 15- 18-32 (d)(3)(B).

- C. **Quorum.** A quorum of the Investigative Panel shall require at least three members to be present. A quorum of the Hearing Panel shall require all members to be present. A decision by a panel shall be by majority vote of the members present except for minor procedural or administrative matters assigned to the Director, chairperson, or presiding officer, as applicable, for a decision as provided by these Rules. See O.C.G.A. § 15-18-32 (f)(3).
- D. **Expenses.** Members of the Commission shall serve without compensation but shall receive the same daily expense allowance as members of the General Assembly receive, as set forth in O.C.G.A. § 28-1-8, for each day such member is in physical attendance at a panel meeting or hearing, plus either reimbursement for actual transportation costs while traveling by public transportation or the same mileage allowance for use of a personal motor vehicle in connection with such attendance as members of the General Assembly receive. Notwithstanding the preceding sentence, no Commission member shall receive such expense allowance or travel reimbursement if he or she is entitled to receive an expense allowance, travel reimbursement, or salary for performance of duties as a state employee. Expense allowances and travel reimbursement shall be paid from moneys appropriated or otherwise available to the Commission. See O.C.G.A. § 15-18-32 (f)(4).
- E. **Powers and Duties.**
- (1). The Investigative Panel shall have the duty and authority to:
    - (a) Promulgate rules for the Commission's governance that comport with due process and are not otherwise provided by O.C.G.A. 15-18-32; provided;
    - (b) propose amendments to the Georgia Code of Conduct for Prosecuting Attorneys and these Rules;
    - (c) recommend formal advisory opinions to the Hearing Panel;
    - (d) select the Director of the Commission; and
    - (e) authorize the employment of such additional staff as the Commission deems necessary to carry out the powers assigned to the Commission.
  - (2). In addition to the duties assigned to the Director in Rule 2.4, the Investigative Panel may delegate to the Director the duty and authority to:
    - (a) maintain the Commission's records;
    - (b) maintain statistics concerning the operation of the Commission and make them available to the Commission, the Supreme Court, the General

Assembly, and the public;

- (c) prepare the Commission's budget for its approval and administer the funds;
  - (d) notify the appropriate appointing authority of vacancies on the Commission; prepare an annual report of the Commission's activities for presentation to the Commission, the Supreme Court, the General Assembly, and the public; and
  - (e) inform prosecuting attorneys and the public of the existence and operation of the prosecuting attorneys discipline system, including the Investigative Panel's address and telephone number and the disposition of each matter in which public discipline is imposed.
- (3). The Investigative Panel shall have the duty and authority to:
- (a) review the recommendations of the Director after preliminary investigation and either authorize a full investigation or dismiss the complaint;
  - (b) decide how to proceed as provided in Rule 4.1.D; and
  - (c) oversee the prosecution by the Director of formal charges, before the Hearing Panel and the appropriate reviewing court as defined in O.C.G.A. § 15-18-32 (m).
- (4). The Hearing Panel shall have the duty and authority to:
- (a) adjudicate formal charges filed by the Investigative Panel;
  - (b) issue disciplinary and incapacity orders;
  - (c) issue formal advisory opinions on its own initiative or on the recommendation of the investigative panel regarding the grounds for discipline set forth under subsection (h) of Code section 15-18-32; and
  - (d) Issuing standards on its own initiative or on the recommendation of the investigative panel. Any such standards shall elaborate, define, or provide context for the grounds for discipline as set forth in subsection (h) of Code section 15-18-32.

#### **F. Recusal**

- (1) Each member of the commission shall be entitled to vote on any matter coming before his or her respective panel unless otherwise provided by rules adopted by the commission concerning recusal. The chairperson of the investigative panel and the presiding officer of the hearing panel shall retain a vote on all matters except those in which such chairperson or presiding

officer has been recused. No commission member present at a panel meeting shall abstain from voting unless he or she is recused. See O.C.G.A. § 15-18-32 (f) (1).

- (2) A member of the Investigative Panel shall recuse himself or herself from any matter in which recusal would be required of a prosecutor under Georgia law and the Georgia Rules of Professional Conduct for lawyers, treating the Commission as the member's client. A member of the Hearing Panel shall recuse himself or herself from any matter in which recusal would be required of a judicial officer under Georgia law and the Georgia Code of Judicial Conduct.
- (3) A member of either panel shall recuse himself or herself from any matter involving the panel member and may recuse himself or herself from any matter involving a district attorney or solicitor-general of a court in the same judicial circuit as the panel member.
- (4) A party to the proceeding may file a motion to recuse a Commission member from the matter within a reasonable time after the party discovers or should have discovered the grounds for recusal. The motion and all evidence thereon shall be presented by accompanying affidavit(s) that shall clearly state the facts and reasons for the belief that bias or prejudice exists, being definite and specific as to time, place, persons, and circumstances of the status, conduct, or statements that demonstrate either bias in favor of any adverse party, prejudice toward the moving party, or that the member's impartiality otherwise might be reasonably questioned. Allegations consisting of bare conclusions and opinions shall not be legally sufficient to support the motion.
- (5) Whether raised by motion to recuse or otherwise, the Commission member whose impartiality is questioned shall determine individually whether or not to recuse, although the member may consult with other members of his or her panel.
  - (a) If a Commission member recuses himself or herself from a matter, he or she shall immediately advise the Director of that decision and shall not participate further in the matter. The recused member shall be replaced as a member for that particular matter if he or she serves on the Hearing Panel or if he or she serves on the Investigative Panel and recusal(s) on the matter will result in the Investigative Panel lacking a quorum or being unable to reach a decision on the matter due to an equal division of the votes on the matter.
  - (b) A member shall be promptly replaced by an alternate who satisfies the qualifications and requirements of the member replaced as outlined in

O.C.G.A. § 15-18-32 (d). Said alternate shall be chosen by the remaining Commission members.

- (c) To identify qualified alternates to be selected by the commission, the commission may seek the assistance of the Prosecuting Attorneys' Council of Georgia, the Judicial Council of Georgia, and the State Bar of Georgia.

### ***Commentary***

[1] A panel member's decision to self-recuse shall not be questioned.

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

[3] Commission members and commission staff shall comply with Rule 3.6 of the Georgia State Bar Rules of Professional Conduct regarding any matter before the commission. The independence of the Commission will be enhanced if the Investigative Panel chooses its own leadership.

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

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

[6] Educating the public, bar, and prosecuting attorneys should be an integral part of the enforcement function. Distribution of a detailed annual report is essential to this purpose. To fulfill its educational function, the annual report should contain: a description of the Commission's purpose and function, basic statistics, descriptions of proper and improper prosecutorial conduct, a discussion of the cases decided during the year including private sanctions (without identifying the prosecuting attorneys), an explanation of any recommendations for changes in procedure or in

the Georgia Code of Conduct for Prosecuting Attorneys, and an explanation of how to bring a matter before the Commission. The annual report should be widely distributed and available on the Commission's website.

## **Rule 2.4. Director**

- A. **Selection.** The Investigative Panel shall select a Director, who shall be an active status member of the State Bar of Georgia and shall not engage in the practice of law, other than to represent the Commission, and shall not serve in a judicial capacity. See O.C.G.A. § 15-18-32 (c)(2)(C).
- B. **Removal.** The Director shall not be removed from office except by majority vote of the Investigative Panel. In the event of a vacancy, the Investigative Panel may delegate the Director's powers and duties to another of its staff or to one or more of its members until a new Director is selected.
- C. **Recusal.** In the event the Director recuses from a specific matter, an individual shall be selected by the Investigative Panel to serve as special counsel to fill the role of Director for that specific matter. An individual selected to serve as special counsel in the event of the Director's recusal shall be an active status member of the State Bar of Georgia and shall not simultaneously serve in a judicial capacity or as a prosecuting attorney but shall be allowed to engage in the practice of law outside of representing the Commission.
- D. **Powers and Duties.** The Director shall have the duty and authority to:
- (1) receive and screen complaints, refer complaints to other agencies when appropriate, conduct preliminary investigations, recommend to the Investigative Panel and upon authorization conduct full investigations, notify complainants about the status and disposition of their complaints, make recommendations to the Investigative Panel on the disposition of complaints, file formal charges when directed to do so by the Investigative Panel, prosecute formal charges, file notices of exceptions to the findings, conclusions, recommendations for sanctions, or orders of dismissal of the Hearing Panel, and brief and argue matters on review by a Superior Court, the Georgia Court of Appeals, or the Supreme Court;
  - (2) maintain records of the operations of the Commission, including minutes of Investigative Panel meetings and receipt of complaints, screening, investigation, and filing of formal charges in judicial discipline and incapacity matters, subject to the requirements of Rule 4.3;
  - (3) compile statistics to aid in the administration of the system, including but



not limited to a log of all complaints received, investigative files, and statistical summaries of docket processing and case dispositions;

- (4) prepare the Commission's budget for submission to the Investigative Panel and administer the funds;
- (5) employ, with the Investigative Panel's approval, and supervise other members of the Investigative Panel's staff;
- (6) employ, with the Investigative Panel's approval, and supervise investigators or experts as necessary to investigate and process matters before the Investigative Panel, the Hearing Panel, a Superior Court, the Georgia Court of Appeals, and the Supreme Court; and
- (7) perform other duties at the direction of the Investigative Panel insofar as they are consistent with the duties enumerated above.

### ***Commentary***

[1] Except as provided in Rule 5.2(B), the Director and the Investigative Panel's other staff must not participate in the Hearing Panel's deliberations, draft decisions, orders, or other documents, or otherwise serve as legal counsel to the Hearing Panel. To the extent the Hearing Panel requires legal or support staff assistance not available from its members, it should contract for the necessary support personnel.

[2] Investigations and prosecutions of Prosecuting Attorneys should be conducted by the Director under the authority of the Investigative Panel. The Director should not employ active law enforcement officials or staff to investigate complaints or present cases. However, the Director may consult with active law enforcement officials and staff about matters within the jurisdiction of the commission and may use investigations by active law enforcement officials and staff. The Director shall comply with Rule 3.6 of the Georgia State Bar Rules of Professional Conduct regarding any matter before the commission.

## Section 3. General Provisions

### Rule 3.1. Grounds for Discipline; Sanctions; Felony Indictment or Conviction

- A. **Grounds for Discipline.** The grounds for discipline are:
- (1) Mental or physical incapacity interfering with the performance of his or her duties which is, or is likely to become, permanent;
  - (2) Willful misconduct in office;
  - (3) With respect to district attorneys, willful and persistent failure to carry out duties pursuant to O.C.G.A. § 15-18-6;
  - (4) With respect to solicitors-general, willful and persistent failure to carry out duties pursuant to O.C.G.A. § 15-18-66;
  - (5) Conviction of a crime involving moral turpitude;
  - (6) Conduct prejudicial to the administration of justice which brings the office into disrepute; or
  - (7) Knowingly authorizing or permitting an assistant district attorney or assistant solicitor-general to commit any act constituting grounds for removal under paragraphs (1) through (6) of this subsection.
- B. **Limitations for Discipline.** The commission may not entertain a complaint on the basis of a charging decision, plea offer, opposition to or grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond unless the affidavits and any documents attached to the complaint show it is plausible that the district attorney or solicitor-general made or knowingly authorized the decision based on:
- (1) Undue bias or prejudice against the accused or in favor of persons with interests adverse to the accused;
  - (2) An undisclosed financial interest in the outcome of the prosecution;
  - (3) An undisclosed conflict of interest;
  - (4) Factors that are completely unrelated to the duties of prosecution; or
  - (5) A stated policy, written or otherwise, which demonstrates that the district attorney or solicitor-general categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute.

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

- (1) Private admonition by the Investigative Panel with the consent of the Prosecuting Attorney, provided that a private admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of the sanction to be imposed, pursuant to Rule 4.1 D (1).
- (2) Deferred discipline agreement;
- (3) Public reprimand by the Hearing Panel;
- (4) Censure by the Hearing Panel;
- (5) Imposition by the Hearing Panel of limitations on the performance of prosecutorial duties;
- (6) Suspension by the Hearing Panel, with such conditions and restrictions as deemed appropriate;
- (7) Removal or involuntary retirement from office by the Hearing Panel, which shall include a disqualification from being appointed or elected to the office of district attorney of any judicial circuit or to the office of solicitor-general of any county of this state for a period of ten years from the date of such removal or involuntary retirement;
- (8) Other appropriate disciplinary action.

D. **Criminal Charges.**

- (1) “Upon indictment of a district attorney or solicitor-general of a matter before either panel, the commission shall suspend its investigation or hearing pending the outcome of the procedure provided for in OCGA 45-5-6.” OCGA 15-18-32(i)(3).
- (2) When a district attorney or solicitor-general has been arrested, indicted, or accused of a criminal charge, which is not subject to the provisions of OCGA 45-5-6 (in other words, not an “indictment for a felony by a grand jury of this state or by the United States, which felony indictment relates to the performance or activities of the office of any public official”), regarding a matter before either panel, the Commission may proceed with its investigation or hearing.

### ***Commentary***

[1] Removal and suspension are the most serious sanctions that can be imposed by the prosecutorial discipline system. They can be imposed only by the Hearing

Panel, and their use is appropriate when the respondent's misconduct demonstrates that the respondent is unfit to serve as a prosecuting attorney. In many instances, however, prosecutorial misconduct is of a lesser nature that does not require the prosecuting attorney's removal or suspension, either to protect the public or to preserve the integrity of the criminal justice system. The facts may indicate that the prosecuting attorney can continue to serve effectively with certain conditions (e.g., participation in a therapy, counseling, or recovery program). In these cases, the Hearing Panel should impose appropriate conditions.

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

[3] A deferred discipline agreement is a confidential agreement between the prosecuting attorney and the Investigative Panel for the prosecuting attorney to undergo treatment, participate in education programs, or take other corrective action. It is only available as a response to misconduct that can be addressed through treatment, education, or a rehabilitation program. A deferred discipline agreement can only be entered into prior to the filing and service of formal charges.

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

### **Rule 3.2. Form of Complaint**

- A. Any person who has personal knowledge that a district attorney or solicitor-general is subject to discipline pursuant to O.C.G.A. § 15-18-32, may file a complaint with the Investigative Panel.
- B. Such complaint shall be in such form as the Investigative Panel shall prescribe, but at least shall include the following:
  - (1) The complainant's name, address, and contact information (i.e. telephone number and/or email address);

- (2) A sworn affidavit detailing the personal knowledge of the facts supporting the allegation that a district attorney or solicitor-general has violated the Georgia Prosecutors Standards of Conduct and detailing any interest the complainant may have in the outcome of the complaint;
  - (a) Interests in the outcome of the complaint required to be disclosed by the complainant include but are not limited to:
    - i. The complainant's status as a party to, or relationship to another person who is a party to, any criminal or civil case, whether pending or closed, which is under the jurisdiction of the prosecuting attorney who is the subject of the complaint;
    - ii. The existence of any legal action brought by the person making the complaint on behalf of himself or herself or another person against the prosecuting attorney who is the subject of the complaint;
    - iii. The existence of any prior relationship (social, familial, romantic, business, etc.) between the complainant, or an associate of the complainant, and the prosecuting attorney who is the subject of the complaint;
    - iv. The existence of any political activity by the complainant in opposition to the prosecuting attorney who is the subject of the complaint;
  - (b) The affidavit shall be made under oath or affirmation that the facts stated in the pleading are true to the best of the complainant's knowledge and belief, and shall be sworn to before any notary public, magistrate, judge of any court, or any other officer of the state or county where the oath is made who is authorized by the laws thereof to administer oaths.
- C. The person submitting a complaint pursuant to this rule may attach to the complaint documents, which support the facts alleged in the complaint.
- D. A complaint brought by the commission on its own motion shall be documented in the minutes of the commission meeting and shall include the facts supporting the complaint and any interest a member of the commission, who is not recused, may have in the outcome of the case.
- E. Conduct occurring before the adoption of these Rules and the Code of Conduct shall not be subject to discipline by the Commission.

### **Rule 3.3. Standard and Burden of Proof**

Charges of misconduct and grounds for transfer to and from incapacity status shall be established by the standard of clear and convincing evidence. The burden of proof

in proceedings seeking transfer from incapacity status is on the prosecuting attorney. In all other proceedings, the burden of proof is on the Director.

***Commentary***

Disciplinary cases are neither civil nor criminal in nature but are sui generis. “Clear and convincing evidence” is a standard of proof higher than the civil law standard of “preponderance of the evidence” and lower than the criminal law standard of “beyond a reasonable doubt.” The standard of proof required to sanction a respondent’s conduct is thus commensurate with the importance of protecting the criminal justice system’s ability to function – more than required to prove a private wrong, but less than required to prove a criminal offense. The same standard is applied in lawyer disciplinary proceedings. When incapacity is raised as a defense, the same burden of proof applies. See Rule 5.1.D (1).

**Rule 3.4. Civil Rules Generally Applicable**

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

***Commentary***

Rules promulgated by the Commission pursuant to its authority under O.C.G.A. § 15-18-32(g) take precedence over the civil rules of evidence and procedure. See, e.g., Rule 3.9 on service, and Rule 4.6 on discovery.

**Rule 3.5. Right to Counsel**

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

**Rule 3.6. Ex Parte Contacts by the Hearing Panel**

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

***Commentary***

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

[2] Because of their investigative and prosecutorial roles, the Director and members and other staff of the Investigative Panel are prohibited from ex parte

communications only with regard to communications about specific disciplinary matters with members and staff of the Hearing Panel.

### **Rule 3.7. Confidentiality**

- A. **Before Formal Charges.** All information regarding a disciplinary or incapacity matter of a prosecuting attorney shall be kept confidential by the Investigative Panel and Commission staff before formal charges are filed and served; provided, however, that if prior to filing formal charges the prosecuting attorney and the Investigative Panel agree to a satisfactory disposition of a disciplinary matter other than by a private admonition or deferred discipline agreement, a report of such disposition shall be publicly filed in the Supreme Court. See O.C.G.A. § 15-18-32 (j)(1).
- B. **After Filing and Service of Formal Charges.**
- (1) With respect to an incapacity matter of a prosecuting attorney, all pleadings, information, hearings, and proceedings shall remain confidential; and
  - (2) With respect to a disciplinary matter of a prosecuting attorney, once formal charges are filed and served, all pleadings and information shall be subject to disclosure to the public, and all hearings and proceedings shall be open and available to the public, except to the extent that such pleadings and information or hearings and proceedings could be properly sealed or closed by a court as provided by law. See OCGA § 15-18-32 (j)(2).
- C. **Administrative and Other Matters.** With respect to administrative and other matters, all records and information shall be subject to disclosure to the public and all meetings, or portions thereof, shall be open and available to the public, except to the extent such records, information, and meetings would:
- (1) disclose disciplinary matters of a prosecuting attorney protected in O.C.G.A. § 15- 1-32 (j)(1) ;
  - (2) disclose incapacity matters of a prosecuting attorney protected in O.C.G.A. § 15- 18-32 (j)(1) or (j)(2)(A);
  - (3) be considered a matter subject to executive session, if the Commission were considered to be an agency under Chapter 14 of Title 50 of the Georgia Code; or
  - (4) not be required under O.C.G.A. § 50-18-72, if the Commission were considered to be an agency. See O.C.G.A. § 15-18-32 (j).
- D. **Work Product and Deliberations.** The work product of the Commission and

its staff and the deliberations of the Commission shall remain confidential. See O.C.G.A. § 15-18-32 (j)(4).

- E. **Exceptions.** Notwithstanding the other provisions of this Rule, information regarding a disciplinary or incapacity matter of a prosecuting attorney may be disclosed to the general public or to specific persons or agencies when:
- (1) the privilege of confidentiality has been waived by the prosecuting attorney who was the subject of the Commission's investigation; or
  - (2) the Investigative Panel or the Hearing Panel determines that disclosure is necessary:
    - (a) In the interest of justice and to protect the public;
    - (b) If an emergency situation exists;
    - (c) If the prosecuting attorney is under consideration for another state or federal position. See O.C.G.A. § 15-18-32 (k); or
    - (d) In response to a valid court order or subpoena.

### *Commentary*

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

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

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

[4] Disclosures that the Investigative Panel or the Hearing Panel may determine to be necessary under Rule 3.7 (E) (2) (a) or (b) include disclosures to law enforcement authorities and potential victims of substantial evidence that a prosecuting attorney has committed, is committing, or is intending to commit a serious crime, and similar disclosures to attorney disciplinary authorities regarding



serious violations of the Georgia Rules of Professional Conduct by prosecuting attorneys. The timing and extent of such disclosures is at the discretion of the Investigative Panel or the Hearing Panel, depending on the procedural status of the case.

[5] When the alleged misconduct or incapacity of a prosecuting attorney who is the subject of a complaint has been publicized and the public would expect the Commission to be investigating such conduct, the Investigative Panel may authorize the chairperson or the Director to publicly confirm the existence of such an investigation pursuant to Rule 3.7 E (2) (a).

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

### **Rule 3.8. Immunity from Civil Suits**

Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission or one of its panels, shall be absolutely privileged, and no civil action predicated upon such information or testimony shall be instituted against any complainant, witness, or his or her counsel. See OCGA § 15-18-32 (l).

#### ***Commentary***

[1] This Rule does not cover immunity from criminal prosecution. Immunity from criminal prosecution for witnesses in prosecutorial disciplinary proceedings is covered by Rule 4.1.E. It is crucial that persons with information about misconduct feel free to bring matters to the Commission. Complainants and witnesses will not come forward without some protection.

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

[3] Immunity from civil action attaches only to communications made to the Commission or its staff and to testimony given in the proceeding. If the complainant or witness publicly discloses the information, immunity does not apply to the public disclosure. The complainant, witness, or attorney remains liable in a civil action if he or she publicly makes a false allegation about a prosecuting attorney.

[4] Commission members and staff must be free from harassment. They have

immunities from civil suits pursuant to the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., the official immunity provision of Article I, Section II, Paragraph IX of the Georgia Constitution of 1983, and the common law of quasi-judicial immunity. These immunities assure the independence of the Commission and eliminate a major deterrent to service on it.

### **Rule 3.9. Service**

- A. **Notice of Complaint.** Service of notice that a complaint has been received shall be made by regular mail and email to the prosecuting attorney's address of record on file with the State Bar of Georgia, or at such other address provided in writing to the Director.
- B. **Formal Charges.** Service of formal charges in any disciplinary or incapacity proceeding shall be made by personal service upon the prosecuting attorney or prosecuting attorney's counsel by any person authorized by the Director, by registered or certified mail, or by statutory overnight delivery. Delivery of all other papers or notices shall be made in accordance with the Civil Practice Act.

### **Rule 3.10. Oaths; Subpoena Power**

- A. **Oaths.** Oaths and affirmations may be administered by any member of the Commission or the Director in matters under full investigation or any other person authorized by law.
- B. **Subpoenas for Investigation.** After a full investigation is authorized pursuant to Rule 4.1, the Director or the chairperson may compel by subpoena the attendance of the prosecuting attorney or witnesses and the production of pertinent books, papers, and documents for purposes of investigation. The Investigative Panel may issue subpoenas for specific witnesses or documents at the request of a prosecuting attorney under investigation.
- C. **Subpoenas for Deposition or Hearing.** After formal charges are filed, the Director and the respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents at a deposition or hearing held under these Rules.
- D. **Enforcement of Subpoenas.** Upon proper application, the Superior Court in the county in which the attendance or production is required may enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.
- E. **Quashing Subpoena.** Any attack on the validity of a subpoena shall be heard and determined by the Investigative Panel or the Hearing Panel before which

the matter is then pending or by the court wherein enforcement of the subpoena is being sought. Any resulting order is not appealable prior to entry of a final order in the proceeding, except appeal of a court order pursuant to the interlocutory appeal procedures set forth in OCGA § 5-6-34 (b).

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

### **Rule 3.11. Notification to Complainant**

The Director shall provide written acknowledgment of every complaint entertainable under OCGA 15-18-32, and notify the complainant in writing of the final disposition of a proceeding under these Rules. Notification in writing shall be mailed within 10 days of the final disposition of the proceeding.

#### ***Commentary***

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

## SECTION 4. Disciplinary Proceedings

### Rule 4.1. Screening and Investigation

- A. **Screening.** The Director shall evaluate all information coming to the Director's attention by complaint or from other sources that alleges misconduct or incapacity. When a Commission member receives information relating to the alleged misconduct or incapacity of a prosecuting attorney, the member shall provide such information to the Director. See OCGA § 15-18-32 (g). If the information would not constitute misconduct or incapacity if true, the Director shall dismiss the complaint, subject to reconsideration by the Investigative Panel. If the information raises allegations that would constitute misconduct or incapacity if true, the Director shall conduct a preliminary investigation.
- B. **Preliminary Investigation.**
- (1) The Director may conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints, provided that no subpoena shall issue to obtain testimony or evidence until the Investigative Panel authorizes a full investigation pursuant to Rule 4.1.
  - (2) When the Director believes there is evidence supporting the allegations against a prosecuting attorney, he or she shall recommend to the Investigative Panel that the panel authorize a full investigation. The Director may recommend a full investigation when there are grounds to believe that evidence supporting the allegations could be obtained by subpoena or further investigation. In all other cases, the Director shall recommend that the matter be dismissed.
  - (3) The Investigative Panel shall review the Director's recommendations and either dismiss the complaint or authorize a full investigation. Said investigation shall only commence upon a majority vote of the Investigative Panel. See O.C.G.A. § 15-18-32 (g).
- C. **Full Investigation.**
- (1) Within 10 days after the Investigative Panel authorizes a full investigation, the Director shall give the following notice to the prosecuting attorney:
    - (a) a specific statement of the alleged violations being investigated and the canons or rules allegedly violated, with the provision that the investigation can be expanded if appropriate;
    - (b) the prosecuting attorney's duty to respond if requested pursuant to Rule 4.1.C (3);
    - (c) the prosecuting attorney's opportunity to meet with the Director or the

Investigative Panel pursuant to Rule 4.1.C (4); and

- (d) the name of the complainant unless the Investigative Panel determines that there is good cause to withhold that information.
- (2) The Investigative Panel may defer the giving of notice but, when notice is deferred, the Director must give notice to the prosecuting attorney before the Investigative Panel considers a disposition.
- (3) The Director may request that the prosecuting attorney file a written response within 30 days after service of the notice under Rule 4.1.C (1).
- (4) Before the Investigative Panel determines its disposition of the complaint under Rule 4.1.D, the prosecuting attorney, the Director, or the Investigative Panel may request a meeting by the prosecuting attorney with the Director or the Investigative Panel. The appearance may be on the record, with advance notice, at the request of the prosecuting attorney, the Director, or the Investigative Panel. The prosecuting attorney may appear with or without counsel, who may present additional information by proffer.
- (5) Members of the Investigative Panel shall be present in person to participate in a panel meeting with a prosecuting attorney. See Rule 2.3.A.

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

- (1) The Investigative Panel may consider any of the following dispositions:
  - (a) dismissal;
  - (b) private admonition or deferred discipline agreement;
  - (c) the filing of formal charges;
  - (d) the filing of a petition for transfer to incapacity inactive status;
  - (e) referral to an appropriate agency;
  - (f) other sanctions as provided by Rule 3.1.C; and
  - (g) resolution of the matter by the prosecuting attorney's agreement to resign or retire, with or without the prosecuting attorney's agreement not to seek or hold office as an elected or appointed district attorney or solicitor-general in the future.
- (2) If the Investigative Panel finds a violation pursuant to Rule 3.1 for which the imposition of discipline is not warranted, it may dismiss.

- (3) If the Investigative Panel finds that there is probable cause to believe the prosecuting attorney committed misconduct:
  - (a) the Investigative Panel may propose to the prosecuting attorney a private admonition, a deferred discipline agreement, or an agreement by the prosecuting attorney to resign or retire, and if the prosecuting attorney consents, it shall admonish the prosecuting attorney or implement the deferred discipline agreement or the agreement to resign or retire; or
  - (b) if the prosecuting attorney does not consent to the private admonition, or the deferred discipline or an agreement by the prosecuting attorney to resign or retire, the Investigative Panel may instruct the Director either to file formal charges or dismiss the complaint; or
  - (c) the Investigative Panel may direct the Director to file formal charges.

**E. Immunity from Criminal Prosecution.**

Whenever a witness, other than the respondent, invokes his or her privilege against self-incrimination as a basis for refusing to answer a question or to produce other evidence that may be relevant to a discipline or incapacity proceeding, the Director, after authorization by the Investigative Panel, may ask the appropriate prosecuting attorney, as determined by the jurisdiction in which the witness may face criminal prosecution, to apply for immunity from criminal prosecution. If the appropriate prosecuting attorney is the subject of the discipline or incapacity hearing or disqualifies his or her office from the case, the Director may request the Prosecuting Attorneys' Council of Georgia or any appropriate entity to appoint a prosecuting attorney pro tempore to consider application to the appropriate court for immunity from criminal prosecution. See O.C.G.A. § 24-5-507.

***Commentary***

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

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

[3] During a preliminary investigation, the Director and any staff or investigators assisting the Director should be cognizant in seeking evidence and conducting interviews of the objective of maintaining the confidentiality of the proceeding, particularly before the Investigative Panel has authorized a full investigation.

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

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

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

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

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

[9] The ultimate sanction for prosecutorial misconduct or incapacity is the removal or involuntary retirement of the prosecuting attorney, which includes a prohibition on the prosecuting attorney serving as an elected district attorney or solicitor-general for a period of ten years. A prosecuting attorney may always voluntarily resign or retire, and doing so precludes the Commission from proceeding.



[10] Such an agreement to resign or retire must be in writing; in the agreement, the prosecuting attorney may admit to all or certain of the allegations against him or her, or agree that such allegations could be properly proved in a hearing, or neither confirm nor deny the allegations, but the agreement must indicate that the prosecuting attorney is resigning or retiring in light of an investigation by the Commission. Pursuant to O.C.G.A. § 15-18-32, the Director must file a report of such an agreement reached in a disciplinary matter publicly in the Supreme Court, so that the public is notified that the prosecuting attorney resigned or retired due to a Commission investigation and to avoid such speculation about prosecuting attorneys who resign or retire under other circumstances. A copy of such report shall also be provided to the Hearing Panel for informational purposes. The Director shall also file a report of such an agreement reached in an incapacity matter confidentially with the Hearing Panel and the Supreme Court for informational purposes.

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

[12] Such agreements are not permitted for intermediate public sanctions that allow a prosecuting attorney to continue in office, such as suspension, limitations on the performance of prosecutorial duties, censure, and public reprimand, or for temporary incapacity, as decisions to leave in office a prosecuting attorney who allegedly has committed significant misconduct or suffers from a significant physical or mental incapacity should be made by the Hearing Panel. Likewise, an agreement to resign or retire is not authorized after formal charges are filed; after that point, discipline by consent is governed by Rule 4.7.

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

## **Rule 4.2. Use of Allegations from Dismissed Cases**

If a complaint has been dismissed due to insufficient evidence, the allegations made in that complaint shall not be used for any purpose in any other disciplinary proceeding against the prosecuting attorney. If, however, additional information becomes known to the Director regarding a complaint that has been dismissed due to insufficient evidence before the filing of formal charges, the allegations may be reconsidered with the permission of the Investigative Panel.

### *Commentary*

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

[2] These Rules do not adopt any statute of limitations as to incumbent prosecuting attorneys. The conduct of a prosecuting attorney while in office is always relevant to the question of fitness for office. The time between the commission of alleged misconduct and the initiation of a complaint based on the conduct is relevant to whether and to what extent discipline should be imposed, but is not relevant to limit the Commission's power to investigate. This only applies to actively serving prosecuting attorneys.

## **Rule 4.3. Formal Charges**

The formal charges shall give fair and adequate notice of the nature of the alleged misconduct or incapacity. The Director shall file the formal charges and proof of service with the Hearing Panel. The Director shall cause a copy of the formal charges to be served upon the respondent or respondent's counsel pursuant to Rule 3.9.

### *Commentary*

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

[2] The Hearing Panel shall act as its own clerk.

#### **Rule 4.4. Answer**

- A. **Time.** The respondent shall file a written answer with the Hearing Panel and serve a copy on the Director within 30 days after service of the formal charges, unless the time is extended by the Hearing Panel.
- B. **Waiver of Privilege.** The raising of a mental or physical condition as a defense constitutes a waiver of medical privilege pursuant to Rule 5.1 D(2).
- C. **Effect of Denial.** The answer should contain denials of those factual allegations known or believed to be untrue. The answer should also specify those factual allegations as to which the respondent lacks knowledge or information sufficient to form a belief; this has the effect of a denial. All other factual allegations in the formal charges are deemed admitted. The answer may also contain affirmative and other defenses and may assert that the conduct alleged in the formal charges is not misconduct.
- D. **Failure to Answer.** Failure to answer the formal charges, or any amendments thereto, shall create a rebuttable presumption of admission of the factual allegations contained therein.

#### **Rule 4.5. Failure to Appear**

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

#### **Rule 4.6. Discovery**

- A. **Witnesses.** Within 30 days of the filing of an answer, the Director and the respondent shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. The Director or the respondent may withhold such information only with the permission of the presiding officer of the Hearing Panel, who may authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the prosecuting attorney. The presiding officer's review of the withholding request is to be in camera, but the party seeking withholding must advise the other party of the request without disclosing the subject of the request. The Hearing Panel shall set a date for the exchange of the names and addresses of all witnesses the

parties intend to call at the hearing. The Director and the respondent may take depositions only of witnesses to be called at the hearing and other witnesses who are unavailable to testify. Depositions of other persons may be taken only with permission of the presiding officer of the Hearing Panel and only for good cause shown.

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

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

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

- C. Exculpatory Evidence.** The Director shall provide the respondent with exculpatory evidence relevant to the formal charges.
- D. Duty of Supplementation.** Both parties have a continuing duty to supplement information required to be exchanged under this Rule.
- E. Completion of Discovery.** All discovery shall be completed within 90 days of the filing of the answer, unless extended for good cause by the presiding officer of the Hearing Panel, but not later than 10 days prior to any scheduled hearing.
- F. Failure to Disclose.** The Hearing Panel may preclude either party from calling a witness at the hearing if the party has not timely provided the opposing party with the witness's name and address or any statements taken from the witness.
- G. Resolution of Disputes.** Disputes concerning discovery shall be determined by the presiding officer of the Hearing Panel, who may in his or her discretion refer the dispute to the full Hearing Panel for decision. The decisions of the Hearing Panel may not be appealed before the entry of the final order.
- H. Civil Rules Not Applicable.** Proceedings under these Rules are not subject to the Civil Practice Act regarding discovery except those rules relating to depositions and subpoenas.

### *Commentary*

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

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

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

[3] Under this Rule, the number of persons who may be deposed is limited to avoid building delay into the process and to protect persons who will not testify at trial. Subpoena power is covered in Rule 3.10.

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

## **Rule 4.7 Discipline by Consent**

A. **Contents.** At any time after the filing of formal charges and before final disposition, the respondent may agree with the Director in writing that a stated sanction should be imposed in exchange for the prosecuting attorney's admission of some or all of the formal charges or the prosecuting attorney's admission that evidence exists with which the Director could properly prove some or all of the formal charges. If the prosecuting attorney admits to only some of the counts in the formal charges, or admits that evidence exists with which the Director could prove only some of the formal charges, the Director shall provide an explanation in the written agreement as to why the Director is not proceeding on the counts for which there is no admission. The written agreement shall include a signed affidavit from respondent stating that:

- (1) the respondent consents to the sanction;
- (2) the consent is freely and voluntarily rendered;
- (3) there is presently pending a proceeding involving allegations of misconduct;  
and
- (4) the facts set forth in the affidavit are true

B. **Submission to Hearing Panel.** The agreement and affidavit shall be submitted to the Hearing Panel, which shall either:

- (1) reject the agreement; or
- (2) approve the agreement and file the agreement with the Supreme Court.

C. **Rejection of Sanction.** If the recommended sanction is rejected by the Hearing Panel, the admission shall be withdrawn and cannot be used against the respondent in any proceedings.

- D. **Confidentiality.** The agreement and affidavit shall remain confidential until filed with the Supreme Court.
- E. **Order of Discipline.** The Hearing Panel shall either reject the agreement or enter an order disciplining the respondent as agreed upon in the written agreement. The final order of discipline shall be based upon the formal charges and the conditional admission.
- F. **Notice.** If the Hearing Panel's final order of discipline orders a censure, the Director shall issue and file with the Clerk of the Supreme Court an order setting the date, time, and place for the imposition of the censure and shall serve such order on the respondent and respondent's counsel at least 10 days prior to the date set. Such notice shall also be given in the event of any rescheduling of a censure.

### *Commentary*

[1] Disposition of certain matters before formal charges are filed is governed by Rule 4.1C.

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

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

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

[5] If rejecting a proposed discipline by consent, the Hearing Panel should consider providing a written explanation for its decision. An explanation of the rejection may provide valuable guidance both moving forward with the matter underlying the rejected discipline by consent and in crafting future discipline by consent agreements.

## **Rule 4.8. Hearing**

- A. **Scheduling.** Upon receipt of the respondent's answer or upon expiration of the time to answer, the presiding officer of the Hearing Panel shall confer with the Director and respondent about scheduling discovery, motions, and a public

hearing. The presiding officer shall issue and file an order setting the date, time, and place of the hearing and shall serve such order on the Director, the respondent or respondent's counsel, and other members of the Hearing Panel at least 20 days prior to the date set. The presiding officer may also conduct status and pre-hearing conferences and, in consultation with the other members of the Hearing Panel, may issue pre-hearing orders and other orders necessary for the just and efficient conduct of the hearing.

**B. Withdrawal or Dismissal of Formal Charges by the Director Prior to Hearing.**

- (1) **Withdrawal of Formal Charges.** At any point prior to beginning the public hearing, the Director, with authorization from the Investigative Panel, may file a notice withdrawing the formal charges from the Hearing Panel based upon newly discovered information or evidence.
- (2) **Dismissal of Formal Charges Without Prejudice.** At any point prior to beginning the public hearing, the Director, with authorization from the Investigative Panel and with the approval of the Hearing Panel, may file a notice dismissing the formal charges without prejudice for reasons of judicial economy or other good cause shown. A dismissal under this section shall be without prejudice, and the Director may reinstate a disciplinary matter by re-filing formal charges should the circumstances that warranted the dismissal of formal charges change.
- (3) **Confidentiality.** After formal charges have been withdrawn or dismissed as described above, any filings before the Hearing Panel prior to the withdrawal or dismissal of the formal charges shall remain subject to disclosure to the public. Any proceedings before the Investigative Panel after a withdrawal or dismissal of formal charges shall remain confidential, until or unless formal charges are again filed on the same matter, in which case Rule 3.7B will again apply.

**C. Conduct of Hearing.**

- (1) The hearing shall be conducted by the Hearing Panel, the members of which shall be present in person. See Rule 2.3.A.
- (2) The Director shall present evidence on the formal charges. All testimony shall be under oath.
- (3) The Director may call the respondent as a witness.
- (4) Both parties shall be permitted to present evidence and produce and cross-examine witnesses.
- (5) The hearing shall be recorded verbatim. Whenever a transcript is requested

by the respondent, the Director, or the Hearing Panel, a transcript of the hearing shall be produced promptly.

- (6) The Hearing Panel may request from the Director and the respondent proposed findings, conclusions, and orders of sanctions or dismissal.
- D. **Dismissal or Imposition of Sanction.** The Hearing Panel shall either dismiss the case or impose a sanction. The Hearing Panel shall decide a matter only upon the concurrence of at least two members of the panel. Panel members shall have the option of issuing a dissenting opinion that shall become part of the record.
- E. **Submission of the Report and Record.** Within 30 days after the hearing or after the filing of the transcript if one was requested, the Hearing Panel shall file with the Supreme Court the record of the proceeding and a report setting forth a written summary, findings of fact, conclusions of law, any minority opinions, and the order of dismissal or sanction. The Hearing Panel shall at the same time serve the report and a copy of the proposed record upon the respondent, respondent's counsel, and the Director. If the respondent or the Director has objections to the proposed record, he or she may have the record settled by the Hearing Panel's presiding officer.
- F. **Notice of Exceptions.** Within 20 days of receipt of the Hearing Panel's report, the respondent and the Director may file with the Supreme Court notice of exceptions to the findings, conclusions, sanction, or order of dismissal of the Hearing Panel. The failure to file notice of exceptions constitutes acceptance of the findings of fact, conclusions of law, and order of dismissal or sanction.

### *Commentary*

[1] Under these Rules, the Investigative Panel determines whether the Director has sufficient grounds to conduct a full investigation. After investigation, the Investigative Panel determines whether reasonable cause exists to believe misconduct was committed. After the Hearing Panel conducts the hearing, it determines whether to discipline the respondent or dismiss the case.

[2] If formal charges are not answered and are deemed admitted, or if the respondent fails to appear, the hearing shall be for the purpose of determining the appropriate sanction. See Rule 4.4 (D) and 4.5.

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

[4] The Director and the respondent are encouraged to stipulate to any issue of



fact or law so as to shorten the time for the hearing.

### **Rule 4.9. Review by the Superior Court**

- A. A respondent may appeal the decision of the Hearing Panel by submitting a petition to the superior court of the county where such respondent served as a district attorney or solicitor-general. A respondent who is subjected to public reprimand, censure, limitation on the performance of prosecutorial duties, suspension, retirement, or removal shall be entitled to a copy of the proposed record to be filed with the Supreme Court and, if the respondent has objections to it, to have the record settled by the Hearing Panel's presiding officer. The Hearing Panel's order in a disciplinary or incapacity matter may be appealed to the Superior Court of Fulton County pursuant to Chapter 3 of Title 5. OCGA 15-18-32.
  
- B. A final decision by the reviewing court may be appealed to the appropriate appellate court as prescribed by law. OCGA 5-3-18

## SECTION 5. Special Proceedings

### Rule 5.1. Cases Involving Allegations of Mental or Physical Incapacity

- A. **Initiation of Incapacity Proceeding.** An incapacity proceeding can be initiated by complaint, by a claim of inability to defend in a disciplinary proceeding, or by an order of involuntary commitment or adjudication of incompetency.
- B. **Proceedings to Determine Incapacity Generally.** All incapacity proceedings shall be conducted in accordance with the procedures for disciplinary proceedings, except:
- (1) the purpose of the incapacity proceedings shall be to determine whether the prosecuting attorney suffers from a physical or mental condition that adversely affects the prosecuting attorney's ability to perform prosecutorial functions;
  - (2) all of the proceedings shall be confidential, except as provided in Rule 3.7.E; and
  - (3) if the Hearing Panel concludes that the prosecuting attorney is incapacitated to hold his or her appointed or elected office, it may enter any order appropriate to the circumstances, the nature of the incapacity, and the probable length of the period of incapacity, including:
    - (a) retiring the prosecuting attorney, if the incapacity is a disability that constitutes a serious and likely permanent interference with the performance of the duties of office; and
    - (b) if a prosecuting attorney's incapacity is found to be temporary in nature following a hearing, the incapacity shall be resolved as provided for in O.C.G.A. § 15-18-15 (b) or 15-18-70 (b).
- C. **Involuntary Commitment or Adjudication of Incompetency.** If a prosecuting attorney has been judicially declared incompetent or is involuntarily committed on the grounds of incompetency or incapacity by a final judicial order after a judicial hearing, the Hearing Panel, upon receipt of a certified copy of the order, shall enter an order transferring the matter to the appropriate Superior Court for resolution in accordance with the provisions of O.C.G.A. § 15-18-15 (b) or 15-18-70 (b). A copy of the order shall be served, upon the prosecuting attorney, the prosecuting attorney's counsel, his or her guardian, or the director of the institution to which the prosecuting attorney has been committed.
- D. **Inability to Properly Defend in a Disciplinary Proceeding.**

- (1) If in the course of a disciplinary proceeding a prosecuting attorney alleges an inability to assist in the defense due to mental or physical incapacity, the Director shall notify the Hearing Panel. The Hearing Panel shall immediately transfer the case to the appropriate Superior Court in accordance with the provisions of O.C.G.A. § 15-18-15 (b) or 15-18-70 (b).
- (2) The raising of mental or physical condition as a defense to or in mitigation of formal charges constitutes a waiver of medical privilege for the purpose of the proceedings before the Commission, but shall remain confidential and not available for public inspection for any other purpose.

**E. Stipulated Disposition.**

- (1) The Director shall obtain any report issued under the provisions of O.C.G.A. §§ 15-18-15 (b) or 15-18-70 (b). After receipt of the examination report, the Director and the prosecuting attorney, their guardian, and/or their counsel may agree upon proposed findings of fact, conclusions, and order. The stipulated disposition shall be submitted to the Hearing Panel for approval or rejection.
- (2) If the Hearing Panel accepts the stipulated disposition, the Hearing Panel shall enter an order in accordance with its terms. If the stipulated disposition is rejected by the Hearing Panel, it shall be withdrawn and cannot be used against the prosecuting attorney in any proceedings. If the Hearing Panel rejects the stipulated disposition, it shall order that the hearing proceed.

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

Reinstatement from incapacity status shall be in accordance with the provisions of O.C.G.A. § 15-18-15 (b) or 15-18-70 (b). Upon satisfaction of those conditions, the Hearing Panel shall issue an order dismissing the complaint and returning the prosecuting attorney to service.

***Commentary***

[1] It is the intent of this rule that assertions of incapacity, whether raised by the prosecuting attorney, a civil commitment order, or involuntary commitment, be investigated and adjudicated in accordance with O.C.G.A. § 15-18-15 (b) and O.C.G.A. § 15-18-70 (b), which already provide for methods to ascertain and address any potential incapacity. A prosecuting attorney shall have the right to respond to all other outside assertions of incapacity.

**Rule 5.2. Advisory Opinions**

**A. Director's Opinions.** The Director and any other staff member designated by

the Director or the Investigative Panel shall be authorized to render a Director's opinion concerning his or her interpretation of the Georgia Code of Prosecuting Attorneys' Conduct as applied to a given state of facts. The Director's opinion should address prospective conduct and may be issued in oral or written form. A Director's opinion is the opinion of the Director or staff member and is neither a defense to any complaint nor binding on the Investigative Panel or the Hearing Panel, but action in accordance with and in reasonable reliance upon a written Director's opinion shall be considered in mitigation of discipline. If the person requesting a Director's opinion desires, the Director may transmit the opinion to the Hearing Panel for discretionary consideration of the drafting of a proposed formal advisory opinion.

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

(1) On its own initiative, on the recommendation of the Investigative Panel, or at the request of any person, the Hearing Panel shall be authorized to draft a formal advisory opinion regarding the Georgia Code of Prosecuting Attorneys' Conduct. The formal advisory opinion should only address prospective conduct and may respond to a request for review of a Director's opinion or a direct request for a formal advisory opinion.

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

(1) A formal advisory opinion is neither a defense to any complaint nor binding on the Investigative Panel, the Hearing Panel, or any reviewing court, but action in accordance with and in reasonable reliance upon a formal advisory opinion shall be considered in mitigation of discipline.

(2) When the Hearing Panel makes a preliminary determination that a formal advisory opinion should be drafted, it shall publish the formal advisory opinion on the website of the Commission, and shall solicit comments. After a reasonable time for receipt of comments, the Hearing Panel shall make a final determination either to issue the formal advisory opinion as drafted, as modified based on comments, or to reconsider its decision and decline to issue the formal advisory opinion.