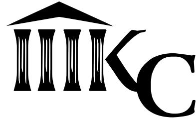

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May 2, 2022

The Honorable Matthew J. Fader
Chief Judge
The Honorable Shirley M. Watts
The Honorable Michele D. Hotten
The Honorable Brynja M. Booth
The Honorable Jonathan Biran
The Honorable Steven B. Gould
The Honorable Angela M. Eaves,
Judges
The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

RE: **210th Report of the Standing Committee on Rules of Practice and Procedure**
Revisions to Maryland Rules 19-726 and 2-412

Your Honors:

I write in response to the 210th Report of the Rules Committee. In reviewing the Committee's draft, I must emphasize that I do not do so as a committee member, but as an attorney concerned with the fairness of the attorney grievance process in the State of Maryland. I must also express concern over a committee process that blindly deferred to Bar Counsel, failed to scrutinize the language she proposed, and continues to favor one side.

Background

Contrary to the revisionist history contained in its Report, the Committee never "decided, *in place of* the full panoply of interrogatories, depositions, and other discovery techniques, to require Bar Counsel" to produce her investigative file. 210th Report at 1 (emphasis added). Failing to scrutinize the language drafted by Bar Counsel, the Committee touted last year's

revision of Rule 19-726 as an *expansion* of respondents' discovery to ensure that "the playing field is more level." *See* Appendix A at A-502 (January 8, 2021 Meeting Minutes).[1]

Recommending that this Court adopt her proposal on June 14, 2021, Judge Wilner never expressed any intent to replace "the full panoply of interrogatories, depositions, and other discovery techniques," or to reserve such discovery for Bar Counsel alone. *See id*. at A-1 (Excerpt of June 14, 2021 Open Meeting). Nor were such extraordinary changes reflected in the Committee's meeting minutes or in its earlier report to this Court. *See id*. at A-502 (January 31, 2021 Minutes), A-12 (207th Report).

When reporting to this Court, Judge Wilner made no mention of such drastic restrictions and only raised "the issue of Attorney Grievance Commission organizational depositions." *Id*. at A-1. Except for that, Judge Booth and other members of this Court had the impression "that we were establishing a floor as opposed to a ceiling" with respect to the Commission's "open book policy." *See* Exhibit 1 (Excerpt of March 30, 2022 Open Meeting).

Unbeknownst to Judge Wilner, to the Rules Committee or to the members of this Court, Bar Counsel had other reasons for proposing last year's revision. Revealing her hidden agenda in the case of *Attorney Grievance Comm'n v. Pierre*, Case No. COA-AG-0042-2021, Bar Counsel took the position that "***Rule 19-726, as amended, does not permit respondent attorneys to propound written discovery***." Appendix B at B-6 (emphasis added). Relying on language that she managed to slip past this Court and its committee, Bar Counsel persuaded the hearing judge to excuse her from answering the same types of discovery that she propounded upon the respondent. Bar Counsel also convinced the lower court that the Commission's exemption from depositions shielded her as well.

Never intending to tilt the playing field in Bar Counsel's favor, this Court stayed the circuit court proceedings and convened an expedited meeting to restore the fundamental fairness of a system that its top ethics official sought to subvert. Taking unprecedented action to address an unprecedented perversion of its rule making process, this Court recognized the urgent need to reverse the "inequity" of Bar Counsel's one-sided and draconian approach to the rights of her adversary. *See* Exhibit 1 at 3.

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[1] Except for two numbered exhibits appended to this letter, the supporting documents have previously been filed with this Court in *Attorney Grievance Comm'n v. Pierre*, Case No. COA-AG-0042-2021. Citations to Appendices A and B and to lettered exhibits refer to those included with Respondent Marylin Pierre's Emergency Exception, Reply to Bar Counsel's Opposition to Emergency Exception, and Reply to Bar Counsel's Supplement to Response to Emergency Exception to Orders Denying Respondent Discovery. All of these memoranda and accompanying exhibits are expressly incorporated herein.

Troublesome Provisions

Rather than level the playing field, the Committee's latest draft gives preferential treatment to Bar Counsel and to the Attorney Grievance Commission while adding gratuitous committee notes to block the discovery efforts of their adversary. The Committee's proposed language would:

- ➢ Encourage the hearing judge to curtail an accused lawyer's discovery efforts;
- ➢ Set a double standard to give accused judges more discovery than accused lawyers;
- ➢ Shield the Attorney Grievance Commission from the same discovery applicable to the Judicial Disabilities Commission and to all other state agencies; and
- ➢ Extend the Commission's special treatment to Bar Counsel herself.

1. CURTAILING RESPONDENT'S DISCOVERY EFFORTS

Judge Gould correctly recognized a trial court's power to restrict discovery under Rule 2-402(b)(1). But there is no need to cite it in a revised rule that already provides for discovery "governed by the relevant Rules in Title 2, Chapter 400."

That chapter already allows for orders "tailoring discovery to the facts and circumstances of the particular action." Repeating this language may not affect anyone's substantive rights. But adding it along with a committee note that reminds judges of their power "to limit or modify certain aspects of the discovery Rules" would encourage courts to curtail the discovery of accused lawyers.

Considering the legislative history of a rule that previously decimated a respondent's discovery, seemingly neutral language inviting judges to curtail it themselves will likely hit the defense much harder than the prosecution. This is particularly true in a system which often defers to Bar Counsel.

In a corresponding rule for discovery in judicial discipline cases, this Court saw no need to highlight specific parts of Title 2, Chapter 400 or to remind presiding judges of their power to restrict it. *See* Rule 18-433(a)(1). It should not treat attorney grievance cases any differently.

2. SPECIAL TREATMENT FOR THE ATTORNEY GRIEVANCE COMMISSION

Out of hundreds of state agencies, each of whom perform vital government functions, the only agency exempt from the same transparency is the AGC. Excusing this one agency from answering the same questions that may be posed to others, the Committee would amend Rule 2-412(d) to provide that "[t]his section does not apply to a deposition sought of the Attorney Grievance Commission in an action under the Rules in Title 19, Chapter 700."

Despite Bar Counsel's claim in *Pierre* that the AGC is no "ordinary party," she has failed to justify any special treatment of the agency that she works for. Should a litigant seek unnecessary depositions, the discovery rules already provide for protective orders to address the specific facts at issue. But without any evidence that litigants have abused the privilege, there is no cause for precluding these depositions where a need may arise.[2]

This Court has never shielded any other agency from depositions. By favoring this one agency, this Court has given accused judges greater discovery rights than accused lawyers. Indeed, if accused judges may depose the Judicial Disabilities Commission, there is no basis for shielding the Attorney Grievance Commission from the same type of examination. As this Court seeks to level the playing field in attorney grievance cases, a double standard which gives special treatment to the AGC hardly meets this objective.

3. SPECIAL TREATMENT FOR BAR COUNSEL

Seeking the same special treatment that this Court gave the Commission, Bar Counsel used its exemption to block her own deposition. Arguing that "**deposing Bar Counsel is effectively an organizational deposition of the Attorney Grievance Commission, which is barred by Md. Rule 19-726(e)(2)**," Appendix B at B-49 (bold in original), her private counsel claimed that "Respondent's attempt to depose Ms. Lawless appears to be an attempt to improperly circumvent the prohibition on organizational designee depositions of the Attorney Grievance Commission by posing these questions to Ms. Lawless." *Id*. at B-49-50.

Contrary to her lawyer's claim that this prohibition was "clear," this dubious proposition was far from clear to members of this Court. According to Judge Watts, "there may be confusion over the provision which prohibits the deposition of a corporate designee of the Attorney Grievance Commission and the breadth of that provision as to whether or not it prohibits the

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[2] Such depositions are rare. In the Commission's entire history, I know of only two or three instances in which its deposition has even been requested. While I have yet to see the need for such a deposition in the cases that I have handled, I cannot predict my need for discovery in cases I have yet to see. Hence, I would "never say never" and neither should this Court.

deposition of Bar Counsel, members of Bar Counsel's office, as well as fact witnesses." Exhibit 1 at 3. Recognizing Bar Counsel's attempt to twist its rules, the Court referred this issue to its Rules Committee to ensure that "the Rule prohibiting the deposition of the corporate designee of the Attorney Grievance Commission be clarified to make clear that Bar Counsel, members of Bar Counsel's office and members of the Attorney Grievance Commission may be deposed as fact witnesses in disciplinary proceedings in accordance with the Rules that govern depositions." *Id*.

To do so, the Attorneys & Judges Subcommittee added the following Committee note to Rule 19-726(f):

> Section (f) of this Rule does not preclude the deposition of other persons, including individual members of the Commission or of the Office of Bar Counsel, in accordance with Rules in Title 2, Chapter 400.

Exhibit 2 at 7 (Subcommittee Draft of Revised Rule 19-726).[3]

Rather than adopt the simple clarifying language called for by this Court, a divided committee revised this note to discourage any court from ever permitting such depositions. Going beyond Title 2, Chapter 400, the Committee's new note misstates "the substantive law applicable to taking a deposition of the person" by codifying a heightened standard which would add "the burden of proving that (1) no other means exist to obtain the information sought, (2) the information sought is relevant and not privileged, and (3) the information sought is crucial to the preparation of the case." 210th Report at 7.

This Court has never adopted the three-pronged test proposed in this note. Lacking Maryland case law, the Committee simply adopted Bar Counsel's preference among differing approaches throughout the nation. *See* Bar Counsel's Opposition to *Pierre* Emergency Exception at 31, *quoting Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). Rejecting the categorical test proposed by the Committee, other jurisdictions have taken what one Maryland judge described as a "more nuanced approach" that leaves these factual inquiries to the trial

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[3] This simple clarification echoes prior assurances that the AGC's special exemption would have no bearing on efforts to depose Bar Counsel or anyone else. Asked to confirm that "there would be no limit ... on seeking the deposition of a fact witness ... *regardless of the identity of that individual*," Lydia E. Lawless assured Chief Judge Barbera that her understanding was "correct." Exhibit L at H-84-85 (March 22, 2018 Open Meeting) (emphasis added). Judge Wilner said the same when asked whether "*any employee of the Bar Counsel* such as the investigator could not be deposed." Dismissing such concerns, Judge Wilner replied, "Oh, no, no, no. I think *Ms. Lawless made very clear that they can be deposed*. *They can be deposed individually* but not as a designee of AGC because they're not part of AGC." *Id*. at H-74 (emphasis added); *see also* Appendix A at A-12 (207th Report) ("Bar Counsel who has conducted the investigation ... may have relevant disclosable information"); *id*. at A-502 (January 31, 2021 Committee Minutes clarify that the entity's exemption "does not preclude the deposition of individuals").

court's "exercise of informed discretion." *Wills Family Trust v. Alloy*, 2009 Md. Cir. Ct. LEXIS 1, 10 (2009), *citing In re Friedman*, 350 F.3d 65, 72 (2d Cir. 2003) and *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp.2d 207, 210-11 (S.D.N.Y. 2000). "[I]n the absence of binding appellate precedent," Montgomery County Circuit Judge Ronald B. Rubin found that "the analysis employed by those decisions is more consonant with the liberal discovery philosophy of Rule 2-402(a)." *Id*. at 11.

Rather than adopt the advisory opinion of a split committee whose only "research" lies in Bar Counsel's brief, this Court should conduct its own analysis in an actual case or controversy. Before reaching this Court, lower courts must develop a proper record on appropriate discovery motions. Unless and until this Court has the opportunity to weigh competing approaches in other jurisdictions and apply them to concrete facts, it should not follow the quick vote of a committee that spent about 20 minutes on the topic.

Ironically, this same committee saw no need to impose similar burdens on accused judges seeking to depose Investigative Counsel. Rather than recite a three-pronged test in Rule 18-433, the Committee and this Court found it sufficient to provide for discovery as "governed by the relevant Rules in Title 2, Chapter 400." If accused judges may depose Investigative Counsel under these rules, the same should suffice for Bar Counsel.

Whittling away at an accused lawyer's access to information, the proposed revision would shield Bar Counsel and the Commission from scrutiny in two ways: First, by prohibiting respondents from deposing the agency on the ground that only Bar Counsel "conducted the investigation" and has "relevant disclosable information." Appendix A at A-12. Second, by inserting language to help excuse Bar Counsel from providing it. In the span of a single rule, this Court would create a double standard that lets the petitioner have it both ways.

Subversion of this Court's Rule Making Process

As a member of the Rules Committee, I am embarrassed that I failed to read Bar Counsel's draft more carefully. Like this Court and my colleagues on the Committee, I perceived her proposal as one designed to *expand* a respondent's access to information – not as one to rob the defense of "the full panoply of interrogatories, depositions, and other discovery techniques."

After propounding such discovery on behalf of Marilyn Pierre, I was astonished to receive Ms. Lawless' immediate demand that I retract it. Taking the position that, "effective October 1, 2021, Maryland Rule 19-726 was revised" so that "Respondent attorneys are no longer permitted to propound interrogatories and requests for production on the Commission," Ms. Lawless demanded that I "withdraw the interrogatories and request for production directed to the Commission." Appendix B at B-28. I respectfully declined.

Accused of harboring "a strong personal animus" which "interfere[d] with [my] ability to read the Rules objectively," *id*., I begged Bar Counsel to relinquish her effort to undermine the fundamental fairness of this process:

> Given your interpretation of this rule, I believe that it would have been incumbent upon you to reveal your objectives to the Attorneys & Judges Subcommittee, to the Rules Committee, and to the Court. What conceivable rationale would there be for the Court to preserve your ability to propound interrogatories, requests for production of documents, electronically stored information and property, requests for admission of facts and genuineness of documents while depriving the defense of these same rights?
>
> You drafted the revision to Rule 19-726 and presented it as an expansion of respondent's discovery. If you intended your proposal to reduce respondents' rights while preserving them for yourself alone, I believe that you should have revealed an agenda that remained hidden until now. In reviewing my notes of the Rules Committee and subcommittee meetings, I cannot find any discussion indicating that your proposed revision would lead to the interpretation you now espouse. There was, to my memory, no discussion and you certainly never stated any intention to provide yourself with discovery tools that would be taken away from your opponents. Had you expressed such an intent, you and I both know that neither the Committee nor the Court would have approved a change which gives the prosecution tools that are denied to the defense.
>
> If you succeed in depriving respondents of an equal right to discovery, you will have succeeded in slipping it past the Committee and the Court. Given the gross inequity in your approach, I do not anticipate that your "victory" will last very long.
>
> *Is this really a position that you wish to take in these cases?*

Id. (emphasis added).

Apparently, it was.

Refusing to relent, Bar Counsel's attempt to monopolize discovery forced this Court and its Rules Committee to hold emergency meetings to reverse inequities that she designed. For those who strive to maintain the ideals of professionalism in the practice of law, it is hard to accept the fact that this Court's top ethics official would go to these extremes to gain an edge in litigation against those she accuses of professional misconduct. Often charging others with conduct prejudicial to the administration of justice, Bar Counsel has lost sight of the need to administer it in a fair and evenhanded manner.

To restore the fairness of a system that must be held above reproach, this Court must hold those entrusted with its administration to the highest of standards. As this Court is poised to rectify the conduct of its own Bar Counsel, it must recognize that rules are only as good as the people who must honor them. Ultimately, this Court's efforts to preserve the integrity of this process will take more than a change in language.

Very truly yours,

Irwin R. Kramer

Attachments (2):

Exhibit 1: Excerpt of this Court's March 30, 2022 Open Meeting
Exhibit 2: Subcommittee Draft of Revised Rule 19-726

cc: The Honorable Alan M. Wilner
Suzanne C. Johnson, Clerk
Sandra F. Haines, Esquire
Reporter, Rules Committee

UNOFFICIAL TRANSCRIPT OF
COURT OF APPEALS' MARCH 30, 2022 OPEN MEETING
DISCUSSION OF MARYLAND RULE 19-726

CHIEF JUDGE GETTY: The second item involves Rule 19-726 which the Court adopted not too long ago that governs discovery and attorney grievance matters. And this issue arises in the context of a pending attorney grievance case, Judge Wilner.

And therefore the Court looked at the Rule in that context and we want to make sure that the Rules Committee is aware of some concerns that we have with potential interpretations of that rule. I believe Judge Booth has been in communication with the Rules Committee and I'll let her provide the background on this particular issue.

JUDGE BOOTH: Thank you, Chief Judge Getty. So as the Chief mentioned this has come up in the context of a pending case and the discussion that at least I intend to have is not related to that case at all.

But it certainly brought up this interpretation of Rule 19-726 and several members of the Court expressed concern and I had a conversation with both Judge Wilner and and Ms. Haines about the Rule in which I explained some of my concerns which were that I was under the impression when we were considering the recent amendments to 19-726 that we were really dealing with two issues one was corporate designee depositions of the Attorney Grievance Commission and I could certainly understand why we want to limit their use in these proceedings or prohibit their use in these proceedings.

And reading the revisions it was my reading at least that we were establishing a floor as opposed to a ceiling with respect to the discovery the Attorney Grievance Commission's open book policy if you will of discovery kind of akin to what is done in a criminal case. Of course, we're not dealing here with a criminal prosecution. They're civil cases and I had a concern that there is an interpretation of this rule whereby it could be construed that the discovery rules the civil discovery rules no longer apply to the Attorney Grievance Commission.

And it caused me to consider a case that the Court just unanimously decided where interrogatories, production of documents and particularly requests for admission and, in that case, even the deposition of the former Bar Counsel, the Court found to be appropriate and were very effective. Discovery tools that in part resulted in the dismissal of that case.

So with these concerns in mind, I had a conversation with Judge Wilner and Ms. Haines and, as a result of those discussions, they prepared a draft of what some amendments might look like. These have not been – we've not discussed them as a court. Nor have they been referred to the

Rules Committee. But because we had this meeting on our agenda, I thought it would be good for the Court to discuss the issue and, if there's an interest in proposed amendments, give some direction to Judge Wilner who, in turn, could formally propose an amendment that could be considered by the Rules Committee and brought back to the Court for consideration.
So that's kind of the background as I see it.

CHIEF JUDGE GETTY: So this would be a referral from the Court. Any other member of the Court wish to make a comment on this topic?

JUDGE HOTTEN: Chief Judge Getty, yes, I do. I had a couple of potential questions. Let me see if I can try to provide some clarity on my thoughts.

Have there been any complaints from Judicial Disabilities regarding the obligation to respond to discovery requests addressed to them? Because if equal discovery requests appear to work for Judicial Disabilities, then wouldn't it be incumbent upon the petitioner, in this case the Attorney Grievance Commission, to show or demonstrate to us why the Attorney Grievance Commission should not be accorded the same discovery treatment or received different discovery treatment since it appears that what has been presented through Judge Wilner and Sandy seem to align with Bar Counsel's discovery rules relative to Judicial Disability discovery rules?

CHIEF JUDGE GETTY: So I'll clarify just in terms of this meeting. We have had discussions with the Rules Committee with regard to the wording of this rule, as it came up in the context of one attorney grievance matter. The Rules Committee responded – not with a formal revision – but with some background material that indicated that this rule could be rewritten along the same lines as the Judicial Disability discovery rules.

So Judge Hotten is discussing the attorney grievance rule that is before us in the context of what has been provided to us informally by the Rules Committee. It's not before the Court at this time. It hasn't been discussed by the Rules Committee or referred to us. But we did post it for public awareness prior to this meeting with a disclaimer that this is not a formal proposal from the Rules Committee.

The Court wants to refer something to Rules for additional consideration. And so Judge Wilner, I think Judge Hotten's comments are just to clarify exactly where we are in the comparison between Judicial Disabilities and Attorney Grievance Commission matters.

JUDGE WATTS: If I may, Chief.

CHIEF JUDGE GETTY: Certainly.

JUDGE WATTS: My observation is that, as a result of the recent amendments to Rule 19-726, respondents in disciplinary proceedings no longer have access to the use of civil discovery provisions under a possible reading of the revisions to Rule 19-726.

And if the Rule is read to that conclusion, there could be the result of an inequity in terms of Bar Counsel having use of the civil discovery proceedings and the respondents not having access to those procedures.

In addition it appears that there may be confusion over the provision which prohibits the deposition of a corporate designee of the Attorney Grievance Commission and the breadth of that provision as to whether or not it prohibits the deposition of Bar Counsel, members of Bar Counsel's office, as well as fact witnesses.

Those are my understanding of the potential concerns that have arisen as a result of our recent amendment.

And I have a motion geared toward those concerns. I would move that Rule 19-726 be referred to the Rules Committee to propose revisions to clarify that, one, respondents in disciplinary proceedings may use, are permitted to use civil discovery provisions under Title 2, Chapter 400 of the Rules; and, secondly, that the current rule, the current section of the Rule prohibiting the deposition of the corporate designee of the Attorney Grievance Commission be clarified to make clear that Bar Counsel, members of Bar Counsel's office and members of the Attorney Grievance Commission may be deposed as fact witnesses in disciplinary proceedings in accordance with the Rules that govern depositions.

CHIEF JUDGE GETTY: So that's a motion before the Court.
Is there a second for that motion?

JUDGE HOTTEN: I'll second, but I'd like to have some discussion or clarification of Judge Watts's motion.

CHIEF JUDGE GETTY: So there's a motion and a second. The motion is properly before the Court for discussion.

JUDGE HOTTEN: Judge Watts, just a point of clarification, because as I review Rule 1-303 an oath may be made either by a person swearing to their personal knowledge of the truth of the contents of the document or by swearing, "I solemnly affirm under the penalties of perjury that the contents of this document are true to the best of my knowledge, information and belief."

I only raise that because personal knowledge, as I read 1-304, is not required relative to an oath. Would your suggestion relative to a motion incorporate in some form those thoughts relative to the Rules?

JUDGE WATTS: The second aspect of my motion clarifying that Bar Counsel members of Bar Counsel's office and members of the Attorney Grievance Commission may be called as fact witnesses in accordance with the Rules governing deposition, would presuppose as fact witnesses that they would have personal knowledge, be competent fact witnesses.

JUDGE HOTTEN: So there would be no consideration of Rule 1-303 in that regard?

JUDGE WATTS: I am not following, Judge Hotten, the import of your question and how it's at variance at all with the motion.

JUDGE HOTTEN: It is an attempt to clarify that it is not – that 1-304 is not limited to personal knowledge relative to an oath. So that was part of my clarification or concern.

JUDGE WATTS: If you wish to make a friendly amendment that certainly is a possibility.

JUDGE HOTTEN: Okay, I so make it.

JUDGE GOULD: For further clarification, if I may Chief.

CHIEF JUDGE GETTY: Certainly.

JUDGE GOULD: The Rule to which Judge Hotten refers, I think, would certainly apply to the response to interrogatories. And so that's a – to the extent that the discovery rules would be applicable to the Attorney Grievance Commission to Bar Counsel in these proceedings, I would think some consideration would be given to this to the type of oath that Bar Counsel would be required to execute, and – in line with other civil parties – that's typically "on information and belief." So I do – so that's with respect to Rule 1-304.

There's one other observation I had as the Rules Committee considers this issue. Under Rule 2-401 – I'm sorry, 2-402(b), that's entitled "Limitations and Modifications." And particularly subsection one. So I'm referring to Rule 2-402(b)(1). That's I think when I was in private practice for 25 years, I don't think I ever saw that limitation ever put into effect. I don't think I ever saw that rule be utilized. And I think given the truncated nature of attorney grievance cases in the circuit court, if the discovery rules are going to apply I think perhaps some consideration by the Rules Committee to direct the hearing judge's attention to the discretion it has under that subsection of the Rule to tailor the use and scope of discovery to the facts and circumstances of the particular case. So that by opening up the Rules of – the discovery procedures to the to the parties, we're not creating a situation where there could be protracted, difficult and expensive discovery disputes. So that's a very powerful tool that that trial Judges have. It's not – I've never seen it used in civil practice. But I think it's time that consideration ought to be given to making – to putting that rule to use. And I think this is a good opportunity for that.

CHIEF JUDGE GETTY: Judge Booth?

JUDGE BOOTH: So there's a motion pending now, and a proposed, I think, friendly amendment that hasn't received a second. I guess listening to what Judge Watts proposed, it was simple direction that the respondents can use the discovery rules which include interrogatories pursuant to which that oath is regularly interpreted, that Judge Hotten was concerned about, and

also the Rule that Judge Gould just referenced.

I personally feel that Judge Watts's motion giving direction to consider that respondents be permitted to use the discovery rules and clarifying the corporate designee embody the concerns that have been expressed. And I'm not really sure that I personally feel like an amendment is necessary. The Rules Committee will have the benefit of our comments here. But I think that the direction as stated in the motion with the broad parameters as expressed by Judge Watts is sufficient.

CHIEF JUDGE GETTY: So I feel like we're in a town council meeting. We've just received our advice from our town attorney.

JUDGE BOOTH: No longer.

CHIEF JUDGE GETTY: Judge Hotten and Judge Gould, you have both made comments with regard to the Rules that I think Judge Wilner and the Rules Committee will take into consideration. I think that, Judge Hotten, we don't need to amend the current motion for a referral in order for you to have satisfaction that those issues are taken up, if that's okay with you on your amendment.

JUDGE HOTTEN: Oh, no problem Chief. I'm absolutely comfortable that Judge Wilner will take all of this in consideration.

CHIEF JUDGE GETTY: So we have the original motion by Judge Watts. Is there any additional discussion with regard to this referral or any other matter that you would like Judge Wilner and the Rules Committee to be considerate of when they look at this referral?

JUDGE WILNER: Can I ask a question?

CHIEF JUDGE GETTY: We certainly want to make sure you are fully advised as to what the Court wants, Judge Wilner. So, yes, you may.

JUDGE WILNER: For clarification to this point. This thing, this rule was sort of a merger coming from two different directions. The first was from Linda Lamone that concerned the representative deposition – taking the deposition of a member of the Attorney Grievance Commission.

CHIEF JUDGE GETTY: To clarify, Judge Wilner, just for any members of the public watching, this was a consideration of Linda Lamone in her role as Chair of the Attorney Grievance Commission – not in her other role as State Administrator of Elections.

JUDGE WILNER: Oh right. Right.

CHIEF JUDGE GETTY: I just wanted to put that on the record.

JUDGE WILNER: Yes. And there was a good bit of discussion about it and her feeling was that when that kind of deposition was requested, it was usually at a stage where the Commission, the Commissioners really had no – not a lot of personal knowledge about anything.
That this was more in the hands of Bar Counsel because this was the discovery tool, and that it was it was creating a problem and then that got merged in later with some of these other issues regarding what kind of discovery should be with respect to Bar Counsel and Bar Counsel's staff. And those two things never really have been separated. I think the Rules Committee was of the view – then – that they found merit in what Ms. Lamone was saying with respect to a representative of the whole commission when none of them had personal knowledge of a lot of what was being requested that were still in the hands of Bar Counsel. And I just – this is a question – is – are we gonna – Is the Court asking the Committee to do anything about that or is it just or more what kind of discovery and what forms of discovery should be allowed of Bar Counsel and Bar Counsel staff? I just want to make sure we understand what the scope of this is.

JUDGE WATTS: Certainly. Judge Wilner, what I had intended with the second aspect of my motion was to clarify that the "corporate designee"-type of subpoena that's authorized under I think it's Rule 2-412 would remain – that prohibition would remain in the form that you have described it as a corporate designee person who may or may not have any factual information, but just as identified as a representative of an organization and a broad discovery request, but that this section of the Rule would not prohibit a respondent's ability to the extent that a respondent contends that a member of Bar Counsel's office, Bar Counsel or even a commissioner has personal knowledge of factual information for which they should be deposed –

JUDGE WILNER: That's based on their knowledge?

JUDGE WATTS: Exactly. And so I would see it as a clarification under that section stating much as what we've been discussing.

JUDGE WILNER: Thank you. That's clarified.

CHIEF JUDGE GETTY: With that clarification, there's a motion before the Court to refer the matter of Rule 19-726 to the Standing Committee On Rules of Practice and Procedure for review.

Is there any additional discussion? Seeing none, all in favor say "aye." [Affirmative indications from members of the Court]

Is anyone opposed? [No opposition voiced]

Judge Wilner thank you very much. I'm sure that you will do good work with this referral. We want to make sure that our rules are structured as such that there's no misinterpretation of them.

The motion passed unanimously and unless any of the Judges have additional matters to discuss before the Rules Committee Chairman –

JUDGE WATTS: Chief Judge, there is one additional matter I'd like to bring up with the Court – a potential for the Court entering an order to shorten the comment period on the resulting supplement that may come or will come from the Rules Committee. The comment period is generally 30 days for a report or a supplement. And I'd like the Court to consider shortening the comment period to perhaps 7 or 14 days in light of the broad use of this rule in disciplinary proceedings.

JUDGE BOOTH: Is that a motion Judge Watts?

JUDGE WATTS: Yes. Yes, Judge Booth it would be my motion and I'd actually like to move for a seven day comment period.

JUDGE BOOTH: I will second the motion.

CHIEF JUDGE GETTY: So the motion pertains to this particular matter – the Rules Committee's review of the Rule. Lots of times when we receive a rule – a report from the Rules Committee we schedule it for public comment and we consider a period of time, if necessary for expediency, in considering the rule. While we've not yet received the report from the Rules Committee, what is before the Court is that once we receive the report the public comment time will be shortened to seven days because of the expediency of matters that are pending before the Attorney Grievance Commission.

CHIEF JUDGE GETTY: Motion's been made and seconded.

Is there any discussion on that motion? Seeing none, all in favor say "aye."
[Affirmative indications from members of the Court]

Anyone opposed? [No opposition voiced] That motion passes unanimously.

Any other matters that the Court would like to discuss at this time?

Seeing none, Judge Wilner, Ms. Haines, thank you very much for your consideration today and we look forward to a speedy report on this matter. That concludes our –

MS. HAINES: Judge Getty and Judge Watts, as we're proceeding forward, I noticed that our next scheduled meeting of the Rules Committee is April 22. Now obviously we could move that we can try to move it up a little bit to get this to go faster since the Court is shortening the seven day period. But – shortening the comment period to seven days. But I would like the Court's thoughts on how you would like us to proceed. We could do it by Zoom. We could do it by email, whatever. But it needs to be an open meeting and I would appreciate any thoughts you

would share, keeping in mind the published next meeting is April 22.

CHIEF JUDGE GETTY: That's the next meeting of the full Rules Committee?

MS. HAINES: Full Rules, correct.

CHIEF JUDGE GETTY: April 22. And any consideration given to this matter would occur at that meeting and would come to us after that. I don't have a problem with that. I don't know that this needs to be expedited any more quickly than that. Judge Watts?

JUDGE WATTS: I think if there were a way that a public Rules Committee meeting could be held sooner than April 22, the Court would certainly welcome that. But I don't think it's necessary, Chief Judge, that we issue any direction to that effect. And we appreciate you bringing it up, Ms. Haines, to let us know the timetable.

MS. HAINES: Thank you.

JUDGE WATTS: Thank you.

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MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION

DIVISION 3. PROCEEDINGS ON PETITION FOR

DISCIPLINARY OR REMEDIAL ACTION

AMEND Rule 19-726 by lettering the preamble before current section (a) as new section (a), by deleting certain language from new subsection (a)(1) and replacing it with a provision pertaining to the applicability of the Rules in Title 2, Chapter 400 to disciplinary and remedial actions; by adding a provision to new subsection (a)(1) pertaining to orders entered pursuant to Rule 2-402 (b)(1); by adding a Committee note following subsection (a)(1); by adding new subsection (a)(2), which identifies the parties for the purposes of this Rule; by adding new subsection (a)(3) pertaining to the obligation of the parties to respond to each other's discovery requests; by adding a Committee note following subsection (a)(3) pertaining to the oath or affirmation to be used by Bar Counsel when answering interrogatories; by adding new subsection (a)(4) pertaining to the continuing obligation of the parties to supplement information disclosed under this Rule; by adding new subsection (a)(5) pertaining to consequences for a party's failure to

disclose under this Rule; by re-lettering current section (a) as section (b) and revising the tagline; by replacing the word "inspection" in section (b) with the word "disclosure"; by re-lettering current section (b) as section (c); by changing the reference to section (a) in section (c) to section (b); by re-lettering current subsection (c)(1) as section (d) and revising the timing of disclosure of witnesses by Bar Counsel and the attorney; by deleting current subsection (c)(2); by deleting current subsection (d)(1); by re-lettering current subsection (d)(2) as subsection (e)(1); by adding new subsection (e)(2) pertaining to medical or psychological examinations; by deleting current subsection (e)(1); by re-lettering current subsection (e)(2) as section (f) and revising the tagline; by replacing the words "may not be" with "is not" in new subsection (f)(1); by adding a Committee note pertaining to depositions of individual members of the office of Bar Counsel, individual members of the Attorney Grievance Commission, and others; by adding a Committee note following new subsection (f)(2); by deleting current section (f); and by adding a provision to section (g) pertaining to the authority of the presiding circuit court judge appointed by Rule 19-722, as follows:

Rule 19-726. DISCOVERY

(a) Generally

(1) ~~After~~ Except as otherwise provided in this Rule, discovery after a Petition for Disciplinary or Remedial Action has been filed~~, discovery~~ is ~~permitted as follows~~ governed by the relevant Rules in Title 2, Chapter 400, subject to any scheduling order entered pursuant to Rule 19-722 and any order entered pursuant to Rule 2-402 (b)(1) tailoring discovery to the facts and circumstances of the particular action.

Committee note: The Rules in Title 2, Chapter 400 deal with discovery in civil cases. Rule 19-722 (a) requires a judge designated by the Court of Appeals to conduct hearings in an action for disciplinary or remedial action and, within 15 days after an answer to the petition is due and after consultation with Bar Counsel and the attorney, to enter a scheduling order setting dates for the completion of discovery and other events. Rule 2-402 (b)(1) permits the designated judge, after consultation with the parties, to limit or modify certain aspects of the discovery Rules.

~~(a) Discovery from Bar Counsel~~

(2) For purposes of this Rule, the parties are Bar Counsel and the attorney against whom charges have been filed.

(3) Bar Counsel and the attorney have the obligation to respond to the other's discovery requests addressed to them.

Committee note: Answers to interrogatories executed by Bar Counsel shall include an oath or affirmation on knowledge,

information, and belief, as generally set forth in Rule 1-304. The affiant's recitation also may include an explanation of the affiant's role in the preparation and signing of the answers to interrogatories and the extent of the affiant's personal knowledge of the information provided.

(4) Bar Counsel and the attorney have a continuing duty to supplement information required to be disclosed under this Rule.

(5) The judge appointed pursuant to Rule 19-722 shall preclude a party from calling a witness, other than a rebuttal witness, or otherwise presenting evidence upon a finding, after the opportunity for a hearing if one is requested, that (1) the witness or evidence was subject to disclosure under this Rule, (2) the party, without substantial justification, failed to disclose the witness or evidence in a timely manner, and (3) failure was prejudicial to the other party.

(b) Disclosure by Bar Counsel upon Written Request

After an Answer has been filed pursuant to Rule 19-724 and within 30 days after a written request from the attorney, Bar Counsel shall (1) provide the attorney with a copy of all material and information accumulated during the investigation and statements as defined in Rule 2-402 (f), (2) provide summaries or reports of all oral statements for which contemporaneously recorded substantially verbatim recitals do not exist, and (3) certify to the attorney in writing that,

except for material that constitutes attorney work product or that is subject to a lawful privilege or protective order issued by the circuit court, the material disclosed constitutes the complete record of Bar Counsel as of the date of ~~inspection~~ disclosure.

~~(b)~~ (c) Exculpatory Information

Whether as part of the disclosure pursuant to section ~~(a)~~ (b) of this Rule or otherwise, no later than 30 days following the filing of an Answer, Bar Counsel shall disclose to the attorney all statements and other evidence of which Bar Counsel is aware that (1) directly negate any allegation in the Petition, (2) would be admissible to impeach a witness intended to be called by Bar Counsel, or (3) would be admissible to mitigate any sanction.

~~(c)~~ (d) Witnesses

~~(1) Fact Witnesses~~

No later than ~~15 days after the filing of an Answer~~ 45 days prior to the scheduled hearing, Bar Counsel shall provide to the attorney the names and addresses of all persons, other than a rebuttal witness, Bar Counsel intends to call at the hearing. No later than ~~35 days after the filing of an Answer~~ 30 days prior to the scheduled hearing, the attorney shall provide

to Bar Counsel the names and addresses of all persons, other than a rebuttal witness, the attorney intends to call at the hearing.

~~(2) Expert Witnesses~~

~~The designation of expert witnesses is governed by Title 5, Chapter 700.~~

~~(d) Other Discovery from the Attorney~~

~~(1) Bar Counsel may serve interrogatories, requests for production of documents, electronically stored information and property, requests for admission of facts and genuineness of documents, and request for mental or physical evaluations of the attorney pursuant to Title 2, Chapter 400.~~

~~(2)~~ (e) Waiver of Medical Privilege; Medical or Psychological Examination

(1) The assertion by an attorney of the existence of a mental or physical condition or an addiction, as a defense to or in mitigation of a charge of misconduct, or the non-existence of a mental or physical condition or an addiction, as a defense to a charge against the attorney constitutes a waiver of the attorney’s medical privilege and permits Bar Counsel to obtain, by subpoena or other legitimate means, medical and psychological

records of the attorney relevant to issues presented in the case.

(2) Medical or psychological examination of the attorney is governed by Rule 2-423.

~~(e) Depositions~~

~~(1) Except as provided in subsection (e)(2) of this Rule, depositions are governed by the Rules in Title 2, Chapter 400.~~

~~(2)~~ (f) Depositions of the Attorney Grievance Commission

The Attorney Grievance Commission ~~may not be~~ is not subject to an organizational designee deposition, pursuant to Rule 2-412 (d), in an attorney disciplinary matter.

Committee note: Section (f) of this Rule does not preclude the deposition of other persons, including individual members of the Commission or of the Office of Bar Counsel, in accordance with Rules in Title 2, Chapter 400.

~~(f) Continuing Duty to Disclose~~

~~Bar Counsel and the attorney have a continuing duty to supplement promptly the information required to be disclosed under this Rule.~~

(g) Motions

All discovery motions are governed by Title 2, Chapter 400 and shall be determined by the judge appointed pursuant to Rule 19-722.

Source: This Rule is new in part and is derived, in part from former Rule 16-756 (2016).

Reporter's Note

Rule 19-726 is amended to more closely parallel discovery procedures set forth in Title 18, Chapter 400, Judicial Disabilities and Discipline.

Subsection (a)(1) restores the 2020 version of Rule 19-726, with the addition of the following language from Rule 18-433 (a): "Except as otherwise provided in this Rule" and "the relevant Rules in." Additionally, a reference to Rule 2-402 (b)(1) is added to implement a suggestion made by a judge of the Court of Appeals at the Court's March 30, 2022 open meeting discussion of revisions to this Rule, and a Committee note is added after the subsection.

Subsection (a)(2) is derived from the second sentence of Rule 18-433 (a)(5).

Subsection (a)(3) is derived from Rule 18-433 (a)(3). In light of discussion at the March 30, 2022 open meeting, a Committee note after subsection (a)(3) clarifies the form of oath or affirmation to be used by Bar Counsel when answering interrogatories.

Subsection (a)(4) carries forward current Rule 19-726 (f), which is derived from Rule 18-433 (a)(4).

Subsection (a)(5) is derived from the first sentence of Rule 18-433 (a)(5).

Section (b) carries forward the provisions of current Rule 19-726 (a), with a revised tagline and substitution of the word "disclosure" for the word "inspection" at the end of the section. Section (b) is based upon Rule 18-433 (b), with stylistic changes and the inclusion of timing provisions appropriate to attorney disciplinary proceedings.

Section (c) carries forward the provisions of current Rule 19-726 (b). Section (c) is based upon Rule 18-433 (c), with stylistic changes and with the timing of the required disclosure of exculpatory information set at "30 days following the filing of an Answer," rather than "no later than 30 days prior to the scheduled hearing," which is the timing of the disclosure of exculpatory information in judicial disability and disciplinary proceedings.

Section (d) carries forward the provisions of current Rule 19-726 (c)(1); however the timing provisions are revised to provide that Bar Counsel must disclose witnesses "no later than 45 days prior to the scheduled hearing," and the attorney must disclose witnesses "no later than 30 days prior to the scheduled hearing." The current Rule requires that the disclosures be made "no later than 15 days after the filing of an Answer" and "no later than 35 days after the filing of an Answer," respectively. The Subcommittee believes the revised timing is more workable, and Bar Counsel advises that the change is not likely to cause delay in the proceedings. Section (d) is based upon Rule 18-433 (d), with revised timing provisions appropriate to attorney disciplinary proceedings.

Subsection (e)(1) carries forward the provisions of current Rule 16-726 (d)(2). Subsection (e)(2) is based upon the final clause in current Rule 16-726 (d)(1). Comparable provisions applicable in judicial disability and disciplinary proceedings are contained in Rule 18-441 (f)(1)(A) and (B).

Section (f) carries forward current Rule 19-726 (e)(2), with a stylistic change.

The Committee note following section (f) is new. It is added to clarify that depositions of individuals in the Office of Bar Counsel, individual members of the Attorney Grievance Commission, and other persons may be taken in accordance with the Rules in Title 2, Chapter 400.

Section (g) carries forward current Rule 19-726 (g), with the addition of clarifying language stating that discovery motions are determined by the judge appointed pursuant to Rule 19-722.

Subsections (c)(2), (d)(1), and (e)(1) of current Rule 19-726 are deleted as superfluous.