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COMMISSION ON JUDICIAL CONDUCT

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MARGARET DEVER
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NCJRS

SEP 2 1982

ACQUISITIONS

To the Honorable Chief Justice, and Justices of the
Supreme Judicial Court, and the Honorable Senators
and Representatives of the General Court

In accordance with the requirements of Massachusetts
General Law chapter 211C, section 4, the members of
the Commission on Judicial Conduct respectfully submit
for your consideration the Commission's annual report.

The time period covered by this report extends from
January 1, 1981, through December 31, 1981.

Respectfully submitted,

Honorable Elbert Tuttle, Chairman
Margaret Dever, Vice Chairman
Honorable Mary C. Fitzpatrick
Colin Gillis, Esq.
Honorable Andrew Linscott
Samuel A. Marsella, Esq.
James F. Queenan, Jr., Esq.
Elinore C. Sheils
Sandra Snyder, R. N.

March 1, 1982
Boston, Massachusetts

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INTRODUCTION

All fifty states and the District of Columbia have established judicial conduct commissions to help enforce the codes of conduct which govern the behavior of judges both on and off the bench. As a forum for citizens with complaints against judges, the judicial conduct commission protects the integrity of the judicial process and promotes public confidence in the courts. Judicial conduct commissions deal with complaints about the unethical conduct and the mental or physical disability of judges. Such commissions do not act as appellate courts, nor do they make judgements as to the correctness of judicial decisions.

The Massachusetts Commission on Judicial Conduct (Commission) was created by the court reorganization act of 1978. It replaced the Committee on Judicial Responsibility, which had been established by the Supreme Judicial Court in February 1977. The Commission is authorized to accept complaints concerning only judges of the Commonwealth.

This document is the Commission's third annual report.

THE COMMISSION'S ROLE

The Commission is authorized to investigate complaints of judicial misconduct and incapacity, and where warranted, to make recommendations for appropriate dispositions to the Supreme Judicial Court. Upon the complaint of any person, including a Commission member, the Commission must investigate the action of any judge whose wilful misconduct in office, wilful or persistent failure to perform his duties, habitual intemperance or other conduct detrimental to the administration of justice, either brings the judicial office into disrepute or violates the Code of Judicial Conduct (Supreme Judicial Court Rule 3:09).

The Commission may not initiate an investigation without a written, signed complaint. Even with a complaint, the Commission may not deal with matters which are more than one year old unless the Commission finds good cause to do so, or unless there is an alleged pattern of misconduct.

THE COMPLAINT PROCESS

Complaints alleging judicial misconduct must be in writing, be signed under the pains and penalties of perjury, and must contain specific charges to which a judge can reasonably make a response. The Commission staff is available to assist complainants in reducing grievances to writing.

The Commission staff screens the complaints as they are received in the Commission office. The usual practice is to send a copy of each complaint to the judge in question within twenty-one days of its receipt by the Commission. If, however, a complaint appears to be frivolous, unfounded, or outside the authority of the Commission, a copy is sent to each Commission member with a recommendation for immediate dismissal. If no Commission member disagrees with the recommendation, the judge is not notified of the complaint until after it has been formally dismissed at the next meeting of the Commission.

The judge has thirty days during which he may respond in writing to a complaint sent to him by the Commission. Upon receipt of the judge's response, or after the expiration of the thirty-day period, the Commission reviews the allegations contained in the complaint and the judge's response, if any. The Commission may then vote to order an investigation. The investigation may be conducted by the Commission staff or by special counsel appointed by the Supreme Judicial Court at the Commission's request. After the investigation, the Commission may vote to file formal charges against a judge. The judge has twenty days to respond to such charges. A hearing may then be conducted before a panel of Commission members or before a hearing officer appointed by the Supreme Judicial Court. The Commission may designate the Executive Secretary or special counsel to present the case in support of the charges.

At any appropriate time during the process the Commission may vote to dismiss a complaint, informally resolve a complaint, or take such other steps as it deems appropriate. Most complaints are disposed of before the hearing stage.

For complaints where formal proceedings have been instituted and a hearing held, the Commission has the authority, when appropriate, to make recommendations to

the Supreme Judicial Court for disciplinary sanctions such as a fine, a suspension, a reprimand, censure, disbarment, retirement, removal from office, or any other appropriate action.

In dealing with complaints the Commission has the power to subpoena witnesses and documents, order depositions to be taken, administer oaths, and compel testimony. It has such additional powers as are necessary and proper to obtain information and to conduct hearings. The participants in a Commission proceeding may depose witnesses, and obtain appropriate information in the possession of other participants.

All Commission proceedings are confidential. While the Commission may issue public statements to explain its responsibilities and the way it conducts business, it may not identify anyone involved in a Commission proceeding. The exceptions are after the final disposition of a complaint, or in certain circumstances where the judge in question expressly or impliedly waives confidentiality. Otherwise, the Commission's policy is to refrain from commenting on complaints even as to whether or not the Commission has received or is investigating a complaint against a particular judge.

SOURCES OF COMPLAINTS

Forty-nine complaints were filed in 1981, one of which was filed by the Commission.

The majority of complaints came from dissatisfied litigants or their relatives. In many instances, the complainants proceeded in court without the benefit of counsel. Most matters presented to the Commission by such litigants or their relatives raised issues of findings of fact, rulings of law, or discretionary acts not properly reviewable by the Commission in the absence of a showing of improper motivation or a pattern of illegal conduct.

The Board of Bar Overseers (Board) routinely refers to the Commission complaints arising out of the practice

of law by judges prior to their acceptance of full-time judicial appointments. Unless such matters raise serious questions as to the present integrity and competency of judges, the Commission defers to the Board in such matters. To date, all matters referred to the Commission by the Board have been referred back to the Board for disposition.

Relatively few matters have been brought to the Commission's attention by individual lawyers or the organized bar.

NATURE OF COMMISSION MATTERS

Many of the matters considered by the Commission arose out of small claims, domestic disputes, criminal misdemeanor prosecutions, and civil litigation such as landlord-tenant disputes. Such matters were important to the complainants, and often involved personal and emotional issues.

In this context, many of the matters presented to the Commission involved dissatisfaction or disagreement with a judge's rulings of law, findings of fact, or exercise of discretion - matters not properly reviewable by the Commission in the absence of an underlying allegation of misconduct or incapacity.

Accordingly, 97.9 per cent of the matters disposed of during this reporting period were dismissed by the Commission.

STATUS OF THE COMMISSION'S DOCKET

Chart I indicates the activity of the Commission from January 1, 1981, to December 31, 1981.

CHART I

Matters pending on January 1, 1981	4
Matters filed	49
Dismissed	47
Informally adjusted	1
Matters pending on December 31, 1981	5

Chart II indicates the status of the five complaints pending on December 31, 1981.

CHART II

Awaiting initial screening	1
Awaiting judge's response	2
Awaiting Commission consideration after screening	1
Under investigation	1

The Commission notes that the staff devoted considerable time to responding to inquiries which did not result in the filing of complaints. Such inquiries included instances where information, explanations, and complaint forms were provided, but callers elected not to file complaints; instances where inquirers were referred to other agencies for information or action; and instances where callers or visitors were informed that their complaints did not fall within the authority of the Commission.

NATIONAL SURVEY

A table summarizing the results of a survey conducted by the Center for Judicial Conduct Organizations of the American Judicature Society appeared in the Fall 1981 issue of the Judicial Conduct Reporter. Forty-five commissions participated in this survey regarding the disposition of complaints received in 1980.

An article ("Center Surveys Commission Dispositions," by Robert Roth and Irene Tesitor) published with the table makes some interesting observations. Of the complaints filed in 1980, 83% were dismissed initially or after a brief investigation, compared to 77% for the same commissions in 1979. Ten commissions dismissed over 90% of the complaints received in 1980. While there was no national trend toward an increase or decrease in the number of complaints received, eighteen commissions reported a 5% or greater decrease in 1980 as compared to 1979.

The article cautions that the summary "may raise more questions than it answers." For instance, the summary does not deal with what effect differing complaint filing requirements have on the number and kinds of complaints, or with whether educational efforts by commissions would reduce the filing of inappropriate complaints. Finally, the summary does not take into account the number of judges in each state.

The table is appended to this report with the permission of the American Judicature Society.

MEMBERSHIP

The Commission is comprised of nine members serving three-year staggered terms. Massachusetts General Law chapter 211C, section 1 provides that three members be lay persons, three be lawyers, and three be judges. The three lay members are appointed by the Governor, the three lawyer members are appointed by the Chief Administrative Justice of the Trial Court, and the three judicial members are appointed by the Justices of the Supreme Judicial Court. The Commission annually elects one of its members to serve as Chairman, and one to serve as Vice Chairman.

The membership of the Commission during the time period covered by this report follows:

Margaret Dever

Archie C. Epps III
Served until November 10, 1981

Honorable Mary C. Fitzpatrick
Began serving November 17, 1981

John M. Harrington, Jr., Esq., Vice Chairman
Served until December 8, 1981

Honorable Sanford Keedy
Served until November 17, 1981

Honorable Andrew Linscott

Samuel A. Marsella, Esq.
Began serving January 14, 1981

James F. Queenan, Jr., Esq.
Began serving December 8, 1981

Allan G. Rodgers, Esq.
Served until January 14, 1981

Florence R. Rubin, Chairman

Elinore C. Sheils
Began serving November 10, 1981

Honorable Elbert Tuttle

BUDGET

The Commission is an independent agency funded through a line item in the budget of the Supreme Judicial Court. The Commission received a fiscal year 1982 appropriation of \$80,000.

EDUCATIONAL CONFERENCES WITH THE JUDICIARY

In March and April, 1981, the Commission sponsored a series of five regionally located educational conferences with members of the Massachusetts judiciary. A total of fifty-eight judges, nominated by the Chief Justices of the Massachusetts court system, attended in small groups at the various locations.

The conferences were designed to solicit comments on the proposed revision of the Rules of the Commission on Judicial Conduct, and promote discussion regarding the Commission's present practices and procedures. The comments and suggestions offered at the conferences were discussed at subsequent Commission meetings, and many of them were helpful in formulating the final version of the Commission's rules.

RULES OF THE COMMISSION ON JUDICIAL CONDUCT

From January 16, 1979 through July 31, 1981, the Commission used interim rules approved by the Supreme Judicial Court, and modeled after those of its predecessor, the Committee on Judicial Responsibility. The interim rules underwent a continuous process of review and analysis by the Commission and its staff. A proposed rules revision was published in the January 19, 1981, issue of the Massachusetts Lawyers Weekly with a request for comments. Copies of the revision were sent to the Chief Justices of the Massachusetts court system for their comments. Finally, input was solicited from the fifty-eight judges who attended a series of five educational meetings sponsored by the Commission in March and April of 1981. The new rules were approved by the Supreme Judicial Court on July 16, 1981, and they became effective on August 1, 1981.

The most notable changes occur in Rule 3 where the Commission has provided for certain exceptions to the confidentiality requirement, in Rule 9(b) where an initial inquiry is allowed as part of the screening process, in Rule 12 where the Commission's investigatory powers are set out in more detail, and in Rule 15 where a liberal discovery policy is applied to the formal proceeding stage and set out in more detail.

STAFF

Anthony C. Sicuso, Esq. is the Commission's Executive Secretary, having been appointed in June, 1980. Ingrid S. McLean joined the Commission staff in April, 1979, and is the Commission's Executive Assistant.

MEETINGS

The Commission, usually meeting once a month, met eleven times during 1981. It is at these meetings that the Commission reviews new complaints and responses, votes to dismiss or investigate complaints, and deals with any other matters that have come to its attention.

RECOMMENDATIONS

The extensive review of the Commission's interim rules demonstrated a need to amend chapter 211C of the Massachusetts General Laws. Consequently, the Commission approved the drafting of legislation for that purpose (An Act Revising Procedures for the Commission on Judicial Conduct). The legislation was filed in the form of two identical bills (House No. 5591 and Senate No. 1925) for consideration in the 1981 legislative session. It failed to pass. The legislation was resubmitted for consideration in the 1982 legislative session (House No. 2697 and Senate No. 1659).

In the interest of national uniformity, the legislation would revise the language describing the types of judicial behavior within the Commission's authority to conform to that suggested by the American Bar Association's Standards Relating to Judicial Discipline and Disability Retirement.

The legislation would exempt Commission initiated complaints from the statutory requirement that all complaints be signed under the pains and penalties of perjury. The specificity and reliability requirements set forth in McKenney v. Commission on Judicial Conduct 377 Mass 790, 388 N.E. 2d 666 (1979) provide judges with sufficient protection against unwarranted complaints. To require Commission members, who are sworn to office, to sign complaints under the pains and penalties of perjury is a needless formality.

Under the present statute the Commission is prohibited from commencing an investigation until a judge has been given thirty days in which to respond to a complaint. No other judicial conduct organization in the nation has such a restriction on its investigatory powers. The legislation would eliminate this restriction. It is necessary that the Commission have the authority to commence an investigation promptly, particularly in matters involving alleged corruption or involving judicial conduct which threatens harm to the public.

The present statute requires that all Commission proceedings be confidential. The legislation would allow the Commission to make reasonable exceptions to confidentiality with the approval of the Supreme Judicial Court, and would provide for public proceedings once formal charges have been issued. In the spirit of applicable standards of the American Bar Association, such changes would help to protect both the judge's reputation and the integrity of the Commission's proceedings from the effects of rumor and speculation.

Finally, the proposed legislation would provide for the informal adjustment of complaints, an established practice which the Commission believes should be addressed in the statute as well as in the Commission's rules.

The Commission also recognized a need to amend chapter 211C, section 3 of the Massachusetts General Laws. Section 3 sets the salary for the Commission's Executive Secretary at \$25,000. Established with the enactment of the statute in 1978, the salary has never been upgraded. Accordingly, the Commission filed legislation (House No. 173) for consideration in the 1981 legislative session. The legislation failed to pass, but it has been resubmitted (House No. 121) for consideration in the 1982 legislative session. It would amend section 3 by allowing the Commission to determine the Executive Secretary's salary.

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APPENDIX

Judicial conduct reporter

Volume 3, Number 3

Fall 1981

Center surveys commission dispositions

The Center's annual summary of the disposition of complaints received by state judicial discipline commissions in 1980 may raise more questions than it answers. For example, how do the requirements for filing a complaint affect the number and kinds of complaints received? Would educational efforts by the commissions reduce the filing of inappropriate complaints?

The table on page 3 reports responses to a questionnaire sent to all state commissions in June. Due to differences in how commissions define a complaint,

comparisons between jurisdictions must be made cautiously. The Massachusetts commission, for example, only accepts and acts on written complaints signed under penalty of perjury. In contrast, the Oregon commission may accept a complaint "upon the basis of any information coming to it from 'any person,' including any information coming to it through any of its members or staff." *Matter of Sawyer*, 594 P.2d 805, 8 (1979). In 1980 the Oregon commission received about fourteen percent of its complaints by telephone.

Forty-five commissions responded to this year's questionnaire, reporting a total of 4,191 complaints. Twenty-two of these commissions received fewer than 50 complaints; twelve commissions received between 50 and 100 complaints; and eleven commissions received 100 or more complaints—ranging from 100 in Maryland to 692 in New York.

Looking at the 38 commissions that reported receiving more than ten complaints in both 1979 and 1980, the data show there is no *national* trend toward an increase or decrease in the number of complaints these commissions are receiving.

- Fifteen states reported a one-year increase greater than five percent. Maryland jumped from 32 complaints in 1979 to 100 in 1980; Wisconsin had a 71 percent increase.

- Eighteen states experienced a five percent or greater decrease in complaints. Texas, for example, went from 170 complaints in 1979 to 77 in 1980—a 54 percent drop.

- The number of complaints varied less than five percent in five states—Florida, Indiana, Minnesota, Oregon, and Vermont.

Cumulatively for all commissions reporting, 83 percent of the complaints received were dismissed initially or after a brief investigation, compared to 77 percent for the same states in 1979. Ten commissions dismissed

(continued on page 2)

New grant for Center from Pew Memorial Trust

The Pew Memorial Trust has granted \$255,700 to the American Judicature Society to develop educational programs and materials designed to strengthen the processes by which many state and federal judges are selected, and by which judicial conduct and disability matters in all fifty states are conducted.

In explaining the need for the two programs, AJS Executive Vice President George H. Williams said, "Judges are among our most powerful public officials. They shape the laws by which we live; and through that process, they define our rights and responsibilities, alter the distribution of vast amounts of public and private property, and restrain or compel the actions of officials in the other branches of government.

"Because they are so important in our democracy, we must have judges who are competent and ethical, and whose actions foster respect for their decisions and for the judiciary."

The grant will provide major support for the Society's Judicial Nominating Program and Judicial Conduct Commission Program over the two-year period 1981-1982. □

Center survey (continued from page 1) over 90 percent of the complaints filed with them. Complaints were most often dismissed because they were not within the commission's jurisdiction, provided insufficient information, were unfounded, or required no commission action.

Of the remaining 17 percent of 1980 complaints that the commissions accepted for review 344 are pending, leaving 400 on which some final action was taken. Of that number, 264 complaints were resolved informally with a warning, an admonition, or with the judge's assurance that the problem would be corrected.

The remaining complaints were disposed of as follows:

- Thirty-five judges resigned or retired while under investigation; nine judges resigned or retired after formal charges were filed; and two judges died before a disposition was made.
- Fifty-two judges were privately censured for misconduct.
- Twelve judges were publicly censured.
- Four judges were suspended without pay as a final disposition.
- Six judges were removed from office, and one was involuntarily retired.
- Fifteen dispositions fell outside the categories of the questionnaire. (See the footnotes to the table, below.)

The annual reports of individual commissions often provide detailed information on the source of complaints and the nature of the allegations. These reports integrate statistical data with descriptions of the commission's work, and often include recommendations for improving the disciplinary process. Excerpts from three 1980 reports provide an example of the kinds of information some states provide.

Minnesota. The 83 complaints filed with the Board on Judicial Standards in 1980 came from the following sources:

Litigants	58
Attorneys	9
Nonlitigating citizens	9
Lawyers Professional Responsibility Board	1
Board on Judicial Standards	2
Public officials	4

Eighty-seven complaints were disposed of by the Board during 1980. The complaints concerned the following matters:

Personal behavior	27
Decision dissatisfaction	16
Prejudice or bias	11
Slow in orders	9
Procedural or administrative irregularity	9
Courtroom demeanor	7
Attorney misconduct	3
Conflict of interest	2
Physical or mental disability	1
Failure to perform—neglect	1
Practice of law	1

Oregon. The Commission on Judicial Fitness received a total of 235 complaints in 1979 and 1980. Of these complaints 141 were broadly categorized under the heading "claims of erroneous judgment."

In the biennial report the executive secretary of the commission addressed a concern that is common to all commissions—the dissatisfied litigant. He reported "a growing discontent by citizens over the lack of a practical, available and appropriate forum to redress their grievances with the rulings of trial judges." The dissatisfied citizens then turn to the commission for redress. He specifies a need for inexpensive, speedy appeals from all cases. (Small claims cases are not appealable in Oregon, and appeals in other minor cases, e.g., traffic, are lengthy and expensive.)

New York. The 152-page 1980 annual report of the State Commission on Judicial Conduct provides a thorough and cumulative review of the work of the country's most active commission. The commission notes in the report that the following types of misconduct occur "periodically and sometimes frequently":

- Nepotism and favoritism in appointments.
- Favoritism in adjudicating cases.
- Improper financial management and record keeping.
- Misuse of office to settle civil cases or collect debts.

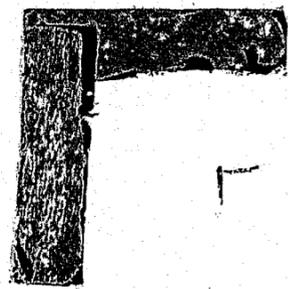
The commission urged the Office of Court Administration to increase and upgrade training in ethics and administrative requirements for all judges, but especially for nonlawyer and part-time judges.

—Robert Roth and Irene Tesitor

Footnotes to table: Complaint Disposition

- n/a Numbers not reported. Iowa, Ohio, and Virginia restricted by confidentiality requirements.
- * Dispositions may not equal complaints if more than one complaint submitted against a judge. Maryland, New Jersey, Michigan, and South Dakota reported complaints on fiscal year.
- ** Some commissions do not keep exact numbers for dispositions in this category.
- 1. Florida. Public censure and fine.
- 2. Illinois. Case dismissed by Courts Commission after hearing.
- 3. Kentucky. Voluntary temporary retirement.
- 4. Louisiana. Mandatory age retirement.
- 5. Michigan. Includes 31 pending complaints.
- 6. Michigan. Resigned and retired dispositions compiled together.
- 7. Minnesota. One retired judge not to be assigned cases; supreme court dismissed three cases as moot or *res judicata*.
- 8. Mississippi. Numbers cover first seven months of commission's operation.
- 9. Pennsylvania. One judge refused to resign to run for nonjudicial office and supreme court declared the office vacant. One judge reinstated after criminal charges were dismissed. One judge's term expired during investigation; the office was declared vacant and case dismissed as moot.
- 10. South Carolina. Two judges not reappointed by governor.
- 11. Texas. Two judges resigned after being indicted.
- 12. Washington. No commission in 1980.
- 13. West Virginia. Case dismissed as moot when judge failed to win reelection.

State	Complaints received 1980*		Dismissed (not within commission jurisdiction; insufficient information; unfounded; no action required)**	Informal action taken, case closed (warning, admonition, judge corrected problem, etc.)	Judge resigned before/after formal charges were filed	Judge retired before/after formal charges were filed	Judge died before disposition made	Judge privately censured	Judge publicly censured	Judge suspended without pay as final sanction	Judge involuntarily retired	Case pending	Other
	1979	1980											
Alabama	70	60		8					1	1			
Alaska	18	18											
Arizona	25	17		1	1							6	
Arkansas	5	4						1					
California	260	237		15			4					4	
Colorado	73	59				1						13	
Connecticut	32	27		2								3	
Delaware	3	2										1	
Dist. of Col.	29	24		2								3	
Florida	176	164		4				1 ¹		1		6	
Georgia	96	57		12	3			2	1			21	
Hawaii	8	7		1									
Idaho	12	10										2	
Illinois	161	157			[1]							2	1 ²
Indiana	108	94		8								6	
Iowa	n/a												
Kansas	97	88		3							1	5	
Kentucky	27	19		3							1	3	1 ³
Louisiana	19	9		4		[1 ⁴]						5	
Maine	13	6										7	
Maryland	100	94		3	1	1						1	
Massachusetts	54	53				[1]							
Michigan	349 ⁵	295		17	9 ⁶			25					3
Minnesota	87	38		39			5	1					4 ⁷
Mississippi	78 ⁸	41		5	2		1					29	
Missouri	77	68		6					2		1		
Montana	6	5										1	
Nebraska	20	14		4		1						2	
Nevada	n/a												
New Hampshire	21	18		2								1	
New Jersey	77	55		8								14	
New Mexico	38	24		4							1	9	
New York	692	600		3	2							87	
North Carolina	87	64									1	19	
North Dakota	40	34					4					2	
Ohio	n/a												
Oklahoma	32	21										11	
Oregon	124	119		5	1	1							
Pennsylvania	328	249		15	1		1					59	3 ⁹
Rhode Island	7	5		2									
South Carolina	77	46		16	4	1	1					4	2 ¹⁰
South Dakota	3	3											
Tennessee	240	233							2			5	
Texas	77	46						9	6			9	
Utah	23	19		3				1					
Vermont	13	9		1		[1]						1	
Virginia	n/a												
Washington	12												
West Virginia	37	35										1	1 ¹³
Wisconsin	273	200		68		1				1	1	2	
Wyoming	n/a												



END