

**STATEMENT SUBMITTED TO THE
NEW YORK STATE SENATE JUDICIARY COMMITTEE
ON BEHALF OF THE
COMMISSION ON JUDICIAL CONDUCT BY
HON. THOMAS A. KLONICK, CHAIR, AND
ROBERT H. TEMBECKJIAN, ADMINISTRATOR**



Stephen R. Coffey, Esq., Vice Chair	Marvin E. Jacob, Esq.
Joseph W. Belluck, Esq.	Hon. Jill Konviser
Richard D. Emery, Esq.	Nina M. Moore
Paul B. Harding, Esq.	Hon. Karen K. Peters
Elizabeth B Hubbard	Hon. Terry Jane Ruderman

Contact:
Robert H. Tembeckjian, Administrator
Commission on Judicial Conduct
61 Broadway, Suite 1200
New York, New York 10006
(646) 386-4800

June 8, 2009

TABLE OF CONTENTS

I. AGENCY OVERVIEW	3
A. The commission's Constitutional Authority and Independence	3
B. Mission and Recent History	3
C. Recent Fiscal History and Impact on Agency Mission	5
D. Summary of FY 2009-10 Plans	6
 II. PROGRAM GOALS AND DESCRIPTION	 6
A. Investigations	7
B. Formal Proceedings	7
C. Litigation Challenging the Commission	8
D. Personnel Functions and Structure	8
Commission	8
Administrator of the Commission	8
Legal and Investigative Staff	8
Administrative Staff	9
Support Staff	9
Clerk of the Commission	9
Referees	9
E. Geographic Organization	9
 III. WORKLOAD AND RESULTS	 10
 APPENDIX:	
Procedural Flow Chart	

I. AGENCY OVERVIEW

This Preliminary Overview summarizes the charter, functions, results, challenges and needs of the New York State Commission on Judicial Conduct. These are further documented in the following sections.

A. The Commission's Constitutional Authority and Independence

The Commission was created in 1978 in the Judiciary Article of the Constitution (Article 6, Section 22). Its enabling statute is the Judiciary Law (Article 2-A, Sections 40-48). The Commission's 11 members are appointed by six different officers of government, none of whom commands a majority: 4 by the Governor, 4 by the leaders of the Legislature and 3 by the Chief Judge of the State of New York. The Commission elects its own Chair and appoints its own chief executive officer (the Administrator, who in law is the agency head). It was purposely designed in such a fashion so as to work cooperatively with all three branches of government but not to be dominated or controlled by any one of them.

Although the Commission is not a gubernatorial agency, historically its budget request has been submitted to the Legislature by the Executive, as have the budget requests of other independent officers of state government: the Attorney General (Department of Law) and the Comptroller (Department of Audit and Control).

The Commission continues to enjoy excellent relations with all three branches of government and the other independent officers of government.

B. Mission and Recent History

The Commission is the sole state agency responsible for receiving, initiating, investigating and conducting evidentiary trials with respect to complaints of misconduct or disability against judges and justices of the New York State Unified Court System, which is comprised of approximately 3,500 judges and justices. Where appropriate, at the end of such proceedings, the Commission has authority to render disciplinary decisions of confidential caution, public admonition, public censure, removal or retirement from office.

The Commission was originally created legislatively in 1974, began operations in January 1975 and expanded its authority as a result of constitutional and statutory amendments that took effect in April 1978 and remain in effect to the present.

The agency has only one program, *i.e.* its core constitutional mission. With their varying responsibilities, all agency staff – lawyers, investigators, administrative – are deployed

and devoted to fulfilling the agency's sole and core mission: disposing of complaints that judges have engaged in misconduct.

Based on the average over the last five years:

- **The agency handles over 1,600 complaints per year; last year, a record number: 1,923.**
- **The agency conducts over 380 preliminary inquiries a year; last year, 354**
- **The agency conducts over and 245 full-scale investigations combined per year; last year, 262, the second highest number in its history.**
- **The agency publicly disciplines approximately 22 judges per year; last year, 21.**
- **The agency private cautions approximately 37 judges per year; last year, 37**

The agency also handles its own appellate caseload. By law, disciplined judges have the right of review in the New York State Court of Appeals. In addition, the agency handles much of its own outside litigation, either in conjunction with the attorney General's Office or on its own, such as when judges or complainants commence lawsuits attempting to enjoin the Commission from investigating or prosecuting complaints.

The September 2008 Report by the Special Commission on the Future of the New York State Courts, established by Chief Judge Judith S. Kaye, highlights the unique and critical role played by the Judicial Conduct Commission in overseeing disciplinary rules enforcement among the far-flung statewide network of approximately 2,300 hundred justices in approximately 1250 town and village courts.

The Commission, which provides the only forum for complaints of misconduct against judges in the state unified court system, undertakes comprehensive and efficient investigations of such complaints; exonerates those judges who have been falsely accused; takes appropriate disciplinary action against those who have violated the high standards of conduct applicable to judges; and, by its presence and actions, makes the judiciary more sensitive to ethics standards and more apt to avoid misconduct.

This mission is of vital importance in protecting both the public and judges from potential abuse. Every judge wields considerable power and as such must follow high standards of ethical conduct. If a judge fails to follow these standards, it is in the public interest to swiftly provide the appropriate discipline; but if a judge is falsely accused, he or she should not be subject to prolonged procedures. Undue delay detracts from the Commission's mission and accomplishments.

C. Recent Fiscal History and Impact on Agency Mission

Over the years, as the Commission's workload had been steadily increasing, its resources were being steadily diminished to the point that its ability to fulfill its constitutional mandate was compromised. By 1996, its one-time staff of 63 had been reduced to 20.

In FY 2007-08, after hearings by this committee and its Assembly counterpart, the Legislature increased its appropriation to the Commission from the \$2.8 million recommended in the Executive Budget to nearly \$4.8 million. For FY 2008-09, the Legislature appropriated \$5.304 million to the Commission. This constituted the first significant increase in the Commission's resources in nearly 30 years.

As a result, the Commission embarked on and is now in the final stage of a major staff and physical plant expansion. Commitments have been made pursuant to an expansion plan painstakingly designed over the better part of a year and implemented over two fiscal years (07-08 and 08-09) in cooperation with the Division of Budget and the Office of General Services. This expansion has been affected by the economic downturn affecting the entire country, and as a result the Commission has instituted voluntary restraints in order to share in the sacrifice being borne by all state agencies. For example, although authorized for 55 FTEs, the Commission's Administrator agreed to defer the hiring of four staff, effectively reducing the number of FTEs to 51. Where vacancies occur, replacement hires are being phased in and, wherever possible, at salaries lower than that of departing staff. At present, the agency employs 48 FTEs.

While the Commission's caseload has continued to expand, the positive impact of the increase in resources can already be quantified. Though the number of complaints received and processed in 2008 constituted an all-time high of 1,923, the backlog of matters pending at year's end was reduced over two years by 24%, *i.e.* a total of 208.

The following chart is illustrative.

FISCAL YEAR	ANNUAL BUDGET	COMPLAINTS RECEIVED	PRELIM'Y INQUIRIES	NEW INVESTIG'S	PENDING YEAR END	ATTORNEYS/ INVESTIG'RS	TOTAL STAFF
1978-79	\$1,644,000	641	N.A.	170	324	21/18	63
1988-89	\$2,224,000	1109	N.A.	200	141	9/13	41
1992-93	\$1,666,700	1452	363	180	141	8/6½	26
1996-97	\$1,696,000	1490	492	192	172	8/2½	20
2005-06	\$2,609,000	1565	366	260	260	10/7	28½
2006-07	\$2,800,000	1500	375	267	275	10/7	28½
2007-08	\$4,795,000	1711	413	192	238	17/10	38
2008-09	\$5,304,000	1923	354	262	208	19/10	49
2009-10	\$5,200,000		N.A.			19/9	48

D. Summary of FY 2009-10 Plans

Recognizing the negative impact on state revenues due to the recent economic downturn, the Commission's Administrator requested a reduced budget of \$5,200,000, which the Governor endorsed and the Legislature approved. While a reduced budget requires certain economies, since rental and other contractual obligations continue to rise, the Commission is prepared to do its part and make such sacrifices, *e.g.* by further capping the number of staff at 49 (11% under its allotted total).

II. PROGRAM GOALS AND DESCRIPTION

The Commission is mandated to provide a forum for complaints against judges, to investigate such complaints, to exonerate judges falsely accused, to take appropriate action against those who have violated judicial standards of conduct, and thereby to help sensitize judges to ethics standards and deter misconduct. The public interest in a strong Commission was demonstrated by the overwhelming majorities by which both houses of this Legislature twice passed and the electorate ratified the constitutional amendment that created the Commission in its present form in the 1977 election. The Commission assumed the judicial disciplinary authority of five separate courts: the Court on the Judiciary, which was abolished, and the four Appellate Divisions, whose mandates in this field were transferred to the Commission.

The Commission's caseload priorities arise out of the number and nature of credible complaints and news media reports of judicial misconduct. The Commission is authorized to determine whether or not there was misconduct and to impose appropriate sanctions, but not to change or reverse a judge's decisions in a particular case.

Once the Commission authorizes an investigation, the goal is to conduct a fair, comprehensive inquiry within a reasonable period of time, and, if charges are filed, to complete the matter within a reasonable period. The following sections A and B describe Commission procedures in handling complaints, as illustrated in the attached flowchart. Depending upon how far each complaint goes through this set of procedures, the elapsed time to resolution may be anywhere from 8 weeks in the case of dismissal, to 3 years or more in the case of a full investigation, hearing and appeal. During the late 1980s, it took an average of 20 months to complete a complicated case that included a full hearing. Today, it takes an average of two years or more, but that time is already being reduced as a result of the increased resources made available to the Commission by the Legislature in 2007. Meanwhile, the time taken to dispose of less complex matters has been reduced dramatically: from complaint to disposition in approximately nine months, down from 15-18 months prior to the Legislature's commitment of resources to the Commission.

A. Investigations

Every incoming complaint is recorded, summarized, analyzed and presented to the Commission. About 25% are clarified in an initial review and inquiry, with transcript reviews and interviews of the participating lawyers and complainant. Based on this information, the Commission votes either to dismiss the case at this stage, or to authorize a full investigation. If investigation is authorized, staff responsibilities may include interviews with and/or sworn testimony from witnesses, court personnel, attorneys and others; legal and documentary research; review of court transcripts and other court records; monitoring the judge's court; corresponding with and/or taking sworn testimony from the judge; and detailing the investigation in memoranda to the Commission. After this exhaustive process, the Commission must decide whether to dismiss the matter or to proceed with a formal, adjudicatory disciplinary proceeding. Investigations vary in scope, detail and comprehensiveness, depending on the complexity of the complaint and the issues.

B. Formal Proceedings

If a disciplinary proceeding is required, the staff prepares and serves on the judge a Formal Written Complaint that commences the adjudicatory phase. The rules of evidence, specific provisions of the Judiciary Law and relevant Commission rules take effect. The judge must answer the Formal Written Complaint, for example. An impartial referee must be designated to preside at the hearing. Witnesses are prepared for trial; pre-hearing motions and discovery take place; conferences are held between the parties and referee; documentary evidence is prepared; stipulations may be negotiated; etc.

The hearing itself proceeds in the fashion of a non-jury trial, with introduction of documentary evidence, testimony, cross-examination and motions before the referee. After the hearing, a transcript is prepared and post-hearing memoranda are submitted to the referee, who then files a written report of his or her findings and conclusions to the Commission. Briefs and oral argument are then presented to the Commission with respect to confirming or disaffirming the referee's report and disciplining the judge. The Commission thereafter renders its decision, which is called a "determination".

If the Commission determines to discipline the judge, the judge may request review of the action by the Court of Appeals, which is granted automatically upon the judge's request. This generates a new phase of appellate practice that did not exist as of right before the Commission superseded the Court on the Judiciary. Briefs and oral argument must be presented to the Court of Appeals, which may accept or reject the Commission's decision.

The time and resources allocated to particular hearings vary widely from case to case. Where the hearing involves multiple charges of misconduct and numerous witnesses, the process is more demanding than where there is a single issue and few witnesses.

C. Litigation Challenging the Commission

Since its creation, the Commission has been challenged on more than a hundred occasions – in federal as well as state courts – by judges and complainants attacking the constitutionality, authority, procedures and decisions of the Commission. In no instance has a Commission procedure or rule been overturned. In 88 appeals of Commission disciplinary determinations heard by the Court of Appeals, only once did the Court dismiss the case. In sum, the courts over the years have underscored the Legislature's enactment of the public will that there be a strong Commission to enforce ethics standards on the judges of the New York State.

In 2008, there were three reviews of Commission determinations heard by the Court of Appeals, all of which resulted in findings of misconduct and removal of the judge involved. The Commission staff provided all the litigation services in these proceedings.

D. Personnel Functions and Structure

The Commission itself is composed of 11 uncompensated members, four of whom are appointed by the Governor, four of whom are appointed by the leaders of the Legislature, and three of whom are appointed by the Chief Judge of the Court of Appeals. The Commission members meet once every six to eight weeks for one or two full days and are on call for consultation. At least one member or a referee must be present each time a judge is examined under oath during an investigation; a quorum must be present for the scheduled meetings at which the Commission reviews and/or decides pending matters.

The Commission elects its own Chair from among its members for a renewable two-year term and hires an Administrator to run the agency. The Commission also designates a confidential Clerk to assist it in disciplinary cases, since it would be a conflict for the Administrator (who serves as prosecutor) to do so.

The Administrator of the Commission is an attorney, employed full-time, responsible for hiring and directing staff and for overseeing the day-to-day operations of the agency and both its legal/investigative and administrative activities.

The staff, which is full time, falls into four general categories:

1. **The legal and investigative staff** in each of the Commission's three offices reports to a Deputy Administrator in that office. With the exception of the Clerk of the Commission, all attorneys on the Commission staff handle investigations and hearings, with assistance from investigators.
2. **The administrative staff** is divided into two groups. One is responsible for the Commission's records-keeping, files, preparation of materials for Commission meetings,

and annual report preparation and distribution, as well as various case-related responsibilities such as processing and summarizing the 1700 or so incoming complaints per year and providing assistance and information to complainants and others. The other group is responsible for functions including preparation of the annual budget request and cash disbursement plan; payroll processing; classification and compensation research; accounts payable accounting; employee travel reimbursement; employee benefits processing; cash advance accounting; internal accounting and personnel controls; maintenance of accounting and personnel records; selection and implementation of payroll and accounting computer systems; management of vehicle fleet; purchasing; reconciliation of accounts; etc.

3. **The support staff**, i.e. secretaries, clerks and IT specialists, provides essential IT technology, typing, filing, reception and miscellaneous support functions. Occasionally, the full-time staff has been assisted by volunteer student interns.

4. **The Clerk of the Commission** reports independently to the 11 Commission members on those matters in which by rule or law the Commission may not be assisted by the Administrator or his staff, such as deciding motions, drafting opinions, rendering determinations, etc. Although an attorney, she is not involved in investigating or preparing cases for prosecution.

Referees: In addition to the regular staff, the Commission calls upon a panel of 68 referees (retired judges or prominent attorneys), independent of staff as required by law, who preside over those matters that, after investigation, proceed to formal hearings. Referees work on a per diem basis, as needed, at \$250 a day, which is less than the compensation received by referees in other agencies.

E. Geographic Organization

The Commission has offices in three cities: New York (principal office), Albany and Rochester. Having geographic coverage is critical to being able to serve all citizens of the state because many of the state's judges are in remote locations considerable distant from any major city. Investigations in these remote locations are already more difficult than those in major metropolitan areas, as travel is more time consuming and court may be held in places other than a courthouse, since not all municipalities provide court facilities to their local justices. Our three offices render the courts and complainants in each of the state's four judicial departments more accessible to the Commission and the Commission more accessible to the courts and complainants. All three offices were expanded in 2008 to accommodate the increase in staff made possible by the Legislature's increase in the Commission's budget. In New York City and Rochester, our existing offices have been expanded into contiguous space. In Albany, our office has been relocated from the Hampton Plaza on State Street to the Corning Tower.

III. WORKLOAD AND RESULTS

Commission workload is a function of the number of complaints we receive; the size and structure of the state's judiciary; and the size, seriousness and complexity of matters being investigated or heard (tried). In 2008, the Commission received 1,923 complaints against judges, conducted 354 preliminary inquiries and 262 full-scale investigations. Investigations and formal proceedings were also continued in 238 matters commenced but not completed prior to 2008. These numbers are expected to remain constant, if not increase.

Commission workload is also a function of the size and structure of the state's judiciary. Of the state's approximately 3,500 judges, approximately 1,200 preside in courts of record located in readily accessible cities and county seats. The remaining 2,400 – 67% – are part-time town and village court justices. Many are from remote parts of the state; some hold court in their local business places or homes because there is no available court facility. Such physical limitations make investigation of complaints against these judges more difficult and time-consuming.

There is no way to distinguish or prioritize the significance of complaints against full-time higher-court judges versus part-time town and village justices. Part-time town and village justices do not have to be lawyers. Indeed, approximately 1,800 of them – constituting 78% of the town and village justices and 52% of the entire state judiciary – are not lawyers. Yet these justices are part of the state unified court system, subject to the same statewide rules governing judicial conduct, as are full-time judges. They wield considerable power in both civil and criminal matters. Most citizens will have their only experience in a court before one of the state's part-time justices. Complaints against them must be treated individually on the merits, the same as complaints against full-time judges.

Another factor in workload is the nature of the complaints and resulting investigations. A complaint alleging a single instance of rudeness will generally require much less investigation than one alleging a series of financial improprieties. Review of a transcript and several interviews may wrap up the former. Detailed analysis and auditing of records, in addition to interviews, would be required in the latter. On occasion, investigation of a complaint concerning a single incident of misconduct may disclose a wider pattern of misbehavior, triggering a broader investigation.

In addition to conducting full-fledged investigations, the Commission staff conducts an “initial review and inquiry” on approximately 400 complaints a year, before the complaints are presented to the Commission for its decision on whether to authorize an investigation. The “initial review and inquiry” may entail witness interviews and analysis of trial transcripts or other court or public records.

While investigations and initial review and inquiries – entailing interviews, research and summaries of the inquiry to the Commission – can be time-consuming, hearings (full trials) produce considerable additional work and take months to complete. Hearings are authorized only if the results of an investigation so warrant, and involve trial preparation, the hearing itself, and preparation of a transcript, legal memoranda to the referee, legal memoranda to the Commission, etc., all of which may be reviewed by the Court of Appeals at the judge's request after the Commission makes its decision.

During 1997, a significant amount of our legal and investigative resources were focused upon one extremely large, complex matter, which reduced the resources available to prepare other hearings and pursue new complaints. Therefore, as anticipated, fewer hearings were held in subsequent years, but this trend was reversed as our staff and resources increased. From an average of five (5) hearings each year in the late 1990's and early 2000's, there were 12 hearings in 2007 and 10 in 2008. A large number of cases have been resolved by stipulation, in part because it would have been impossible for staff to have hearings in every matter without a significant decline in the use of resources for conducting investigations and completing those matters expeditiously.

Workload has increased not just for attorneys and investigators, but for other staff as well. For example, since 1990, as part of a state initiative toward electronic transcription services, staff has largely taken on the task of preparing transcripts of hearings and investigative testimony, made from electronic recording equipment on site, doing work that was previously performed by court reporting services. That process has placed further burdens upon secretarial, clerical and administrative personnel.

Our business procedures have also become more complex over time, but the Commission's finance staff has kept pace with all internal controls and audit requirements, having consistently scored the highest grades available in performance measures evaluated by the State Comptroller's Office as to payroll, petty cash management, procurement procedures, etc.

The Commission will continue to pursue its goal of effectively discharging its constitutional mandate to investigate and discipline unethical judicial conduct and improving the quality and administration of justice in New York State. Among its priorities: (1) To continue reducing the number of pending matters; (2) Promptly processing and "staying ahead" of new incoming complaints; (3) Implementing a system of follow-up on discipline imposed by the Commission on judges, to insure compliance with ethical mandates by those shown to have violated them; (4) Contributing in a significant way to the education and training of judges and judicial candidates; (5) Better acquainting the public with the Commission's mandate and work, both as reassurance that judges are being held accountable for their behavior and to assist citizens in recognizing unethical conduct and reporting it so that appropriate remedial action may be undertaken.

The related strategic plan includes: (1) Maintaining staff at the level needed to handle the heavy caseload; (2) Increasing the number of Commission meeting-days to between 12 and 16, to process the increased number of cases made ready for disposition; (3) Implementing a technology plan developed with assistance from the Office of Court Administration, to facilitate more efficient handling of the substantial caseload and keep the backlog from reappearing; and (4) Continuing to make senior staff available for education, training and public awareness events, to improve the quality of judicial conduct and ultimately reduce the number of legitimate complaints that arise.

Procedures of the New York State Commission on Judicial Conduct (Page 1)

		Commission may dismiss complaint or refer it to another agency.	No further action.
Commission receives written complaint or may initiate its own complaint. (Commission-initiated complaints are signed by the Administrator.)	<i>Initial Review & Inquiry.</i> Staff analyzes complaint & may interview complainant & attorneys; review transcripts & other documents. Commission reviews all complaints.	Commission may authorize investigation.	Staff investigates and may subpoena documents & witnesses, take testimony, analyze records, request letter-response from judge, etc. Commission may authorize sworn testimony from judge: sworn Q&A by Commission Counsel.
		Commission may dismiss complaint or refer it to another agency.	Commission may authorize a Formal Written Complaint, i.e. accusatory instrument with specified charges of judicial misconduct.
		Commission may send judge a Letter of Dismissal and Caution and monitor judge's compliance.	No further action.

Procedures of the New York State Commission on Judicial Conduct (Page 2)

Judge files Verified Answer within 20 days of service of formal charges.	Commission Counsel or Judge may file for Summary Determination.	Commission may grant motion or refer case for hearing before Referee.	Commission entertains memoranda and oral argument as to sanction.	Commission may: ➤Dismiss charges or ➤Find misconduct established and ■Send Letter of Caution or ■Determine that Judge to be publicly admonished, censured, removed or (in disability cases) retired. Determinations are subject to review by Court on request of Judge. Court may accept or reject determination, impose different sanction, or dismiss proceeding.
	Commission Counsel & Judge may submit Agreed Statement of Facts, stipulating as to facts and, if agreed, to disciplinary sanction to be imposed.	Commission may accept or reject Agreed Statement in its entirety. (If rejected, case goes to Referee for hearing, where admissions in Agreed Statement may not be used.)	If Agreed Statement does not concede that the stipulated facts constitute misconduct or does not recommend a sanction, Commission entertains memoranda and oral argument as to misconduct and/or sanction.	
	Commission may direct evidentiary hearing before a Referee.	Hearing: Referee presides, entertains post-hearing memoranda from Commission Counsel & Judge, and reports written findings of fact & conclusions of law to Commission.	Commission entertains memoranda and oral argument on Referee Report, proposed findings & conclusions, and sanction.	