



PENNSYLVANIANS
FOR MODERN COURTS

Testimony of Pennsylvanians for Modern Courts

Interbranch Commission on Juvenile Justice

**Presented by the Honorable Phyllis W. Beck, PMC Board Member,
Lynn A. Marks, Executive Director &
Shira J. Goodman, Deputy Director**

**Harrisburg
February 2, 2010**

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Submitted by the Honorable Phyllis W. Beck, Lynn A. Marks and Shira Goodman
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I. Introduction

Pennsylvanians for Modern Courts (PMC)¹ thanks the Interbranch Commission on Juvenile Justice (Commission) for holding this public hearing and for the opportunity to submit this written testimony.

We understand that a large focus of the Commission is the juvenile justice system in Pennsylvania. But the legislation authorizing the Commission's work also grants the Commission the authority "To review procedures used in responding to judicial and attorney conduct and to make recommendations as necessary with respect to both disciplinary systems." Accordingly, our testimony will focus on the judicial discipline system.

We are experiencing a crisis of confidence in our courts and judges. When judges face criminal charges, as they do in Luzerne County, or are disciplined because of unethical or improper behavior on the bench or the campaign trail, it weakens public trust and confidence in the entire system. The last few years have brought too many stories of Pennsylvania judges violating the Judicial Code and even criminal laws.

But what helps maintain public confidence in the face of such problems is the knowledge that there is a strong, independent judicial discipline system that will act to investigate allegations of judicial misconduct, prosecute credible, substantiated allegations and impose meaningful sanctions on judges found by the Court of Judicial Discipline to have engaged in misconduct.

A strong, independent judicial discipline system that is working properly should have two functions: protect the public by ensuring that unethical and illegal conduct by judges is halted and punished, and protect judges from unfounded allegations by disappointed litigants. At the moment, the public's faith in the system has been shaken.

The two-tiered judicial discipline system that Pennsylvania uses – separating the investigative and prosecutorial functions from the dispositional function – is the system best-designed to accomplish this. We believe that the system should be preserved.

However, we also believe that two things must happen for public confidence in the judicial discipline system to be restored. First, there must be an accounting of the actions or inactions of the Judicial Conduct Board with respect to the allegations about misconduct in Luzerne County.

¹ **Pennsylvanians for Modern Courts** is a statewide nonprofit, nonpartisan organization founded to improve and strengthen the justice system in Pennsylvania by reforming the judicial selection process; improving the jury system, court administration and court financing; increasing fairness in the courts; ensuring a strong judicial discipline system; and assisting citizens in navigating the courts and the justice system, whether as litigants, jurors, or witnesses.

Second, we believe that moving forward, there should be some fundamental changes made to the constitutional structure and internal operating procedures of the Judicial Conduct Board and the Court of Judicial Discipline. We believe that these changes may have the beneficial impact of improving the efficacy and potency of the judicial discipline system. This in turn will help renew public confidence in the system.

Outlined below are PMC's suggestions for achieving these recommendations. In addition, we propose some general changes to the operation of the judicial system to help increase public confidence in the courts and judiciary.

II. Investigating the Judicial Discipline System's Handling of the Allegations of Corruption in Luzerne County

PMC believes that Pennsylvania will be unable to move forward and restore public confidence in our courts and judicial discipline system until there is a full and fair investigation into the judicial discipline system's handling of allegations of corruption in Luzerne County. The public wants to know what the Judicial Conduct Board knew, when it knew it and why it acted as it did.

We understand that under the constitutional provisions governing the Judicial Conduct Board, some of this information might be considered to be confidential. However, we believe that the Supreme Court, as the body with authority over the Unified Judicial System, can and should find a way to have this information come to light.

Given the Commission's statutory charge, it would seem that the Commission is the proper body to investigate and assess the judicial discipline's handling of the allegations about Luzerne County. We are aware of the litigation about the provision of information by the Judicial Conduct Board to the Commission and the Supreme Court's decision last week requiring the provision of some of the requested information but ruling that some need not be produced. Given this ruling, the potential for further litigation and the limited duration of the Commission's charge, we recognize that the Commission may determine that it cannot conduct a full investigation. Should this occur, PMC urges the Commission to recommend in its final report to the General Assembly, Supreme Court and the Governor that a new investigation be authorized into the judicial discipline system.

This investigation could take any number of forms, including the appointment of a Special Master or the authorization of a special Inspector General, among others. But regardless of the form, the investigation must be independent in fact and in appearance. In addition, the investigative authority should have the power to compel answers to questions and production of documents.

As we will discuss in more detail below, the constitutional confidentiality provisions governing the Judicial Conduct Board exist to protect complainants from reprisal and to protect judges from unfair allegations by disappointed litigants. These provisions do not exist as a privilege for the Board to exercise on its own behalf. Accordingly, concerns about confidentiality should not thwart a full investigation of the judicial discipline system.

The public needs this investigation, and the system needs to consent to an examination of its operations. Without such an accounting, we cannot be confident that Pennsylvania has in place a strong, independent judicial discipline system that will prevent and redress judicial misconduct in the future and protect the public from corrupt judges.

III. Suggested Changes to the Structure and Operation of the Judicial Discipline System

A. Constitutional Provisions

The Judicial Conduct Board and Court of Judicial Discipline are constitutionally created bodies. As such, the main authority governing their work is Article V of the Constitution. PMC suggests that the Commission consider proposing amendments to some of the constitutional provisions governing the judicial discipline system.

One item that should be examined is whether to impose restrictions on an individual's ability to serve on the Judicial Conduct Board and then, following that service, on the Court of Judicial Discipline (or vice versa). For the independence of both bodies and the public confidence in the system, it seems that at the very least there should be some period of time during which a former member of the Judicial Conduct Board should not be permitted to be appointed to the Court of Judicial Discipline and vice versa. This will also minimize the necessity for a member of the Court of Judicial Discipline to recuse from cases in which he or she may have made decisions as a member of the Judicial Conduct Board.

There are currently no limits on how many terms an individual may serve on either the Judicial Conduct Board or the Court of Judicial Discipline. The only restriction is that a member of either body must wait a year following the conclusion of his or her term before being reappointed to that body. We recommend that longer periods off the Board of Judicial Conduct and/or Court of Judicial Discipline be considered, and that a maximum number of years of service also be considered.

We appreciate that institutional memory and a fuller understanding of the work of either body may well be informed by continued service and by having members who have served on each body. However, without some time limits and restrictions the frequent rotation of the members of the Judicial Conduct Board and Court of Judicial Discipline weakens – at least in appearance – the independence of the bodies and the purpose of having a two-tiered system.

B. Judicial Conduct Board's Internal Operating Procedures

PMC was pleased to see the Judicial Conduct Board's public release of its newly compiled Internal Operating Procedures (IOPs). It is important that these IOPs are in written form and available to the public. PMC believes, however, that further amendments to the Board's procedures are necessary. We raise below specific concerns about the IOPs governing recusal, confidentiality and deferral of Board investigations into judicial misconduct in office because of a pending criminal investigation.

1. Recusal IOP 2.15

New IOP 2.15 addresses recusal or disqualification of members of the Judicial Conduct Board. The IOP opens by citing Judicial Conduct Board Member's Conduct Rule 8:

Members of the Board must police themselves against actual and potential conflicts in discharge of their proscribed duties. In circumstances involving an actual conflict of interest, the member must immediately discontinue any involvement in the matter including discussions of it with other members or staff.

IOP 2.15 goes on to prohibit a Board member who has recused from participating in any way in the ongoing case.

Member's Conduct Rule and IOP 2.15 seem to us to be underinclusive. There is no direction given on how a member should identify or define actual or potential conflicts of interest. There is no direction on the process of making a recusal determination, nor is there any discussion of whether the member makes that decision alone or whether the member should consult with the other members of the Judicial Conduct Board. There is also no discussion of how a member should proceed in the event a potential conflict arises; instead, only actual conflicts (also not defined) trigger immediate disqualification or recusal.

PMC urges the Commission to recommend that the Judicial Conduct Board consider revising IOP 2.15 and Board Member's Conduct Rule 8 to provide more guidance to Board members in the event that conflicts – apparent or actual – arise. Clear procedures for making recusal decisions, and having those decisions reviewed by the Board should be considered and adopted.

2. Confidentiality IOP 5.01

Based on our reading of the provisions of the Pennsylvania Constitution regarding confidentiality of complaints and proceedings before the Board, we believe that IOP 5.01 is an inappropriate expansion of the constitutional confidentiality provisions. The constitutional confidentiality provisions exist to protect complainants from reprisal and to protect judges from spurious allegations by disgruntled litigants. These are very important elements of a well-functioning judicial discipline system. The confidentiality provisions ensure that complainants are not afraid to file complaints against judges who have engaged in misconduct and to protect judges when erroneous or malicious complaints are filed.

These provisions do not exist as a privilege for the Board to exercise on its own behalf. IOP 5.01, however, creates such a privilege for the Board. Expanding the confidentiality provisions to create a special privilege held by the Board and its members ignores the purpose of the confidentiality rules and instead shifts the protection to the Board and its members. However, the Constitution already provides that members of the Judicial

Conduct Board enjoy immunity for actions taken in their role as Board members. There is no need to expand the protection afforded Board members.

We urge the Commission to recommend that the Judicial Conduct Board amend IOP 5.01 to ensure that it comports with the constitutional provisions and does not expand them to create a special confidentiality privilege for the Board.

3. Deferring Investigations Because of Pending Criminal Investigations IOP 4.07

PMC is concerned that the deferral procedures outlined in the new IOPs do not adequately serve the Board's duty to protect the public from judges who engage in serious misconduct. We are specifically concerned about allegations of judicial misconduct in office, that is, allegations relating to the judge's courtroom decision-making, disposition of litigation matters and treatment of litigants.

The allegations against the former Luzerne County judges related to the judges' conduct on the bench. The result of the Board's deferring its investigation may very well have been to permit former Judges Conahan and Ciavarella to continue for many more months or even years activities that caused horrendous injury to innocent children.

In some cases, it may be appropriate for the Judicial Conduct Board to defer investigation into certain cases because external criminal investigations are pending. We submit, however, that the Judicial Conduct Board should never defer an investigation into allegations of judicial misconduct in office – allegations related to the judicial role or function itself – to wait for a criminal prosecution. In such cases, when there are allegations relating to subversion of the judicial role, the obligation of the Judicial Conduct Board to protect our system of justice from rogue judges should wait for no other process.

New IOP 4.07 provides that the Board may in some cases pursue an investigation into judicial misconduct even while a criminal investigation is ongoing. But the Board is not required to do so. Discretion should be maintained by the Board in deciding whether or not to refer matters to law enforcement agencies, but the Board should never defer investigations into allegations of judicial misconduct in office simply because of a concurrent criminal investigation.

Further, IOP 4.07 permits the Board to investigate allegations in a complaint that are severable from alleged criminal conduct. However, IOP 4.07 does not identify what considerations should guide the Board's decision about whether to sever and how it should proceed if it decides to sever – and pursue investigations into some -- allegations in a complaint. Moreover, PMC submits that severance is not the answer to the problem: if the alleged criminal conduct is related to the judicial function, it should be concurrently investigated by the Board. Simply put, if another case were to arise alleging serious misconduct on the bench or in the courtroom – including corruption, case fixing or some other subversion of the judicial function – it is uncertain how IOP 4.07 would be applied.

PMC understands that the Judicial Conduct Board – like the entire Unified Judicial System – is grossly underfunded. We understand that there are limited resources dedicated to the Judicial Conduct Board’s important work. But this should not result in a deferral of the duty to protect the public from judges engaging in what may be the very worst cases of misconduct.

We are pleased that the new IOPs make clear that the Judicial Conduct Board has the power to initiate special proceedings when immediate action is necessary to protect the public. For example, IOP 4.13 refers to the “emergency removal when administration of justice is significantly impaired.” PMC recommends that the Commission question representatives of the Judicial Conduct Board and Court of Judicial Discipline to determine how this procedure works. We also recommend that the IOPs make clear in the deferral/referral provisions that this option for immediate action remains available to the Judicial Conduct Board even when an outside criminal investigation is pending.

The people of Pennsylvania need and deserve certainty – certainty that the Board will investigate judicial misconduct in office, regardless of pending criminal investigations. New IOP 4.07 does not provide this certainty. New IOP 4.07 would not prevent the Board from tabling or deferring a Luzerne County-type investigation in the future. PMC urges the Commission to recommend that the Judicial Conduct Board adopt and implement a policy that will ensure that the Judicial Conduct Board will never again cede its jurisdiction and abandon or delay exercising its duty to protect the people of Pennsylvania.

IV. Proposed Changes to the Operation of the Judicial System

PMC has focused the majority of its testimony on the judicial discipline system. Because the Commission has broad jurisdiction and will be reporting to the Supreme Court, the Governor and the General Assembly, we also include below some proposals for other changes within the judicial system that we believe would improve the system and increase public confidence in our courts and judges.

A. Judicial Education

Unlike lawyers, most judges are not required to attend mandatory ongoing education. Although many courts and judges’ associations do offer periodic educational programs, most judges are not required to attend. We suggest that the Commission recommend that the Supreme Court of Pennsylvania enact a new requirement for ongoing annual judicial ethics training. This would afford judges at all levels the opportunity to discuss with their colleagues the pressures and challenges of being on the bench and the ethical quandaries which arise. Discussion and peer education in a no-pressure setting is vastly preferable to judges making their own calls on the tough ethical issues that might cause them to abuse their power on the bench.

B. A Reexamination of the Rules of Judicial Conduct

Other states, the American Bar Association and the Conference of Chief Justices are reexamining the Rules of Judicial Conduct to ensure they provide strong, reasonable guidance to judges. Pennsylvania should undertake a similar evaluation, especially with an eye toward recusal issues – that is, when must a judge remove him or herself from a case because of actual or perceived conflicts of interest.

C. Centralized and Uniform Administration and Funding of the Court System

Part of the problem in Luzerne was that the courthouse was run under the tight control of a president judge. President judges occupy important administrative posts and are entrusted to lead the judges of the courthouse. They have not been given a blank check of power to operate the justice system as a personal kingdom, as Conahan and Ciavarella appear to have done during their terms as president judges.

There should be centralized control of the 60 judicial districts under the auspices of the Supreme Court and the Administrative Office of Pennsylvania Courts to ensure that clear procedures and policies govern the operation of the courthouses and the duties and powers of the President and Administrative judges. Each county courthouse should be run like the others in the Commonwealth despite their vast disparities. An out-of-county lawyer litigating a case should not feel like a stranger. There is a place for local rules, but there should be more centralized, uniform procedure and policy development.

In addition, there should be clear oversight of the 60 judicial districts by the Supreme Court and the AOPC. The Judicial Discipline system provides a forum for some types of problems, but procedures must also be available for court users, lawyers, and courthouse personnel to report concerns that do not rise to the level of a judicial misconduct complaint. For example, the Unified Judicial System of Pennsylvania's policy on non-discrimination and equal opportunity guarantees that "all individuals having business with the UJS are treated in a dignified, civil, respectful, and nondiscriminatory manner," and there is a specific complaint procedure available to handle complaints about bias and violations of this policy. There should be similar uniform policies that govern complaints about judicial conduct generally, and these policies and procedures should be advertised to court employees, judges and court users.

Funding is also part of the equation. Despite a long-standing order of the Pennsylvania Supreme Court, the state still does not fully (or even mostly) fund the Unified Judicial System. The state budget covers certain judicial and administrative salaries, but the bulk of the costs of running the county courthouses fall upon the individual counties. This creates serious budget pressures on the counties and also on the judges and courthouse staff as well.

Litigation is currently pending before the Pennsylvania Supreme Court to resolve this issue of the funding obligations. Whether this is resolved through litigation, negotiation, or some more innovative cooperation among the three branches of government, the people of Pennsylvania deserve to know how our courthouse doors will be kept open.

V. Conclusion

Thank you for the opportunity to present this testimony. We believe the Commission's hard work and dedication will be instrumental in restoring public confidence in our court system and in ensuring that we have structures and procedures in place to prevent any future Luzerne County-type scandal.