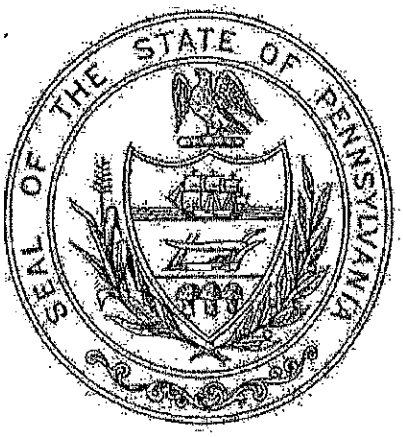

Report
of the
Governor's Judicial Reform Commission

Robert P. Casey
Governor

Phyllis W. Beck
Chairperson

January 1988

GOVERNOR'S JUDICIAL REFORM COMMISSION

PHYLLIS W. BECK
CHAIRPERSON

January 1988

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PREFACE

The Report of the Judicial Reform Commission is a blueprint for the future of Pennsylvania's judiciary. The Commission studied those issues that it identified as needing reform and that it viewed as ripe for reform. In order to arrive at the proposals presented in this Report the Commission gathered information from the people of Pennsylvania as well as from recognized authorities throughout the country. The proposals we present are solidly grounded on both enlightened public opinion and recognized valid research.

The staff of the Commission was outstanding. I especially thank Zygmont A. Pines, who, as legal counsel to the Commission, realized the critical importance of the work and brought to it enormous vision, energy, insight, talent and intelligence. Part-time counsel to each sub-committee: Mary S. Wyatte (Administration) Joyce C. McKeever, (Discipline), Michael C. Barrett (Finance), and Velma A. Boozer (Selection), worked diligently and conscientiously and I thank them. Vincent G. Guest, Executive Assistant, Department of State, helped to keep the machinery of the Commission going.

I am indebted to the Commissioners, all of whom were dedicated and hardworking and who were energized by the importance and excitement of this historic project. On behalf of the Commission I express my gratitude to the Governor for providing us with an opportunity to contribute meaningfully to judicial reform in Pennsylvania.

January 1988

Phyllis W. Beck

PHYLLIS W. BECK
Chairperson

The Commission

Chairperson

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Judge of the Superior Court of Pennsylvania

Vice-Chairperson

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Velma A. Boozer, Esq.
Joyce C. McKeever, Esq.
Mary S. Wyatte, Esq.

GENERAL INTRODUCTION

A. The Structure and Modus Operandi of the Commission

On July 16, 1987, Governor Robert P. Casey signed an executive order calling for an extensive re-examination of this Commonwealth's judicial system. Governor Casey proclaimed that "an impartial, independent, and honorable judiciary is indispensable to justice in a democratic society," and that there was "a growing consensus among the citizens of the Commonwealth that there is a need to consider reform of Pennsylvania's judicial system." To this end, Governor Casey created and appointed a Commission, called the Pennsylvania Judicial Reform Commission, which was entrusted with considering and recommending reforms.

The twenty-three Commission members, which included an impressive array of civic leaders, public servants, legal professionals and judges, were specifically directed to do the following: (1) review Pennsylvania laws and regulations pertaining to the judiciary; (2) consider proposed legislation, including constitutional amendment, which would reform and improve the judiciary; (3) examine reform efforts in other states relating to the judiciary; (4) actively seek out information and recommendations from the judiciary, the legal profession, and the public at large; and (5) make specific findings and recommendations for proposed reforms. The Commission's work was to be completed within six months.

administrators, judges, and civic leaders) who made valuable contributions in the specialized subject areas. These professionals, who came from many areas of the United States, as well as Canada, gave generously of their time and wisdom in order to assist the Commission in resolving a host of difficult issues.

The following summary of appearances reveals the breadth and quality of this Commission's intensive deliberations.

Administration and Utilization

Hon. Andrew Barilla, District Justice for Luzerne County and President of the Special Court Judges Association of Pennsylvania

Jeanne D. Bonney, Esq., Director of the Pennsylvania District Justice Project

Hon. Maxwell Davison, President of the Pennsylvania Conference of Trial Judges

Hon. D. Richard Eckman, President Judge of the Lancaster County Court of Common Pleas

Hon. Abraham Gafni, former Court Administrator of Pennsylvania and presently a judge for the Philadelphia County Court of Common Pleas

A. Leo Levin, Professor of Law at the University of Pennsylvania School of Law and former Director of the Federal Judicial Center

Robert Lipsher, Administrative Director of the Administrative Office of Courts (AOC) of New Jersey

JUDICIAL DISCIPLINE

Introduction

The Committee on Judicial Discipline was charged with the task of examining the Pennsylvania judicial discipline system and making recommendations for its improvement.

Initially, to inform itself regarding the operation of the Pennsylvania judicial discipline system, the Committee held two informational sessions. On September 1, 1987, in Philadelphia, the Committee heard testimony by the Honorable James R. Rowley, Judge of the Pennsylvania Superior Court and Chairman of the Judicial Inquiry and Review Board, the Honorable Bruce Kauffman, a Philadelphia lawyer and former Justice of the Pennsylvania Supreme Court, a member of the 1968 Constitutional Convention that created the Judicial Inquiry and Review Board and a current member of the Board, and the Honorable Alex Bonavitacola, Judge of the Philadelphia Court of Common Pleas and a member of the Judicial Inquiry and Review Board. On October 5, 1987, in Philadelphia, the committee heard testimony by Robert Keuch, Executive Director and General Counsel of the Judicial Inquiry and Review Board, Mark A. Aronchick, Esquire, a Philadelphia lawyer who has practiced before the Board, and Professor Steven Lubet, of Emory and Northwestern Law Schools, who has written extensively regarding standards of judicial conduct. The Committee was further provided with an extensive bibliography, which included the pertinent provisions of the Pennsylvania Constitution and statutes, articles on judicial discipline systems of other jurisdictions, including the federal system, and advisory opinions issued by the Judicial Inquiry and Review Board.

On October 14, 1987, in Harrisburg, the Committee conducted a public hearing to which, by appropriate notice, anyone interested was invited to testify. Testimony was presented by Ira B. Coldren, Jr., Esquire, and William A. Stickel, Esquire, respectively immediate past President of the Pennsylvania Bar Association and Chairman of the Bar Association's Judicial Inquiry and Review Board Committee; Marc J. Sonnenfeld, Esquire, Chairman of the Board of Governors of the Philadelphia Bar Association; the Honorable Alex Bonavitacola, for the Pennsylvania State Conference of Trial Judges; James Morgan, Esquire, for the Special Court Judges' Association; Lora Lavin, for Common Cause of Pennsylvania; Henry T. Reath, Esquire, a Philadelphia lawyer; and Daniel F. Glassmire, Esquire, a Potter County lawyer. In addition, the Committee received written comments from many interested individuals who could not appear to testify.

The Committee wishes to express its gratitude to everyone who took time to appear before the Committee or to write. The information and comments thus provided have been invaluable.

On October 21, 1987, the Committee met in executive session in Harrisburg. After considering the testimony and other communications it had received and the materials it had examined, the members of the Committee unanimously agreed upon the recommendations to the Commission. The Commission discussed the Committee's recommendations at the Commission's meeting in Harrisburg on November 17, 1987, and, with certain amendments, finally approved them at its meeting in Harrisburg on December 15, 1987. The following report states the recommendations thus

approved. Each section of the report contains one or more black-letter recommendations, followed by supporting comment.

I. The Necessity Of A Judicial Discipline System

Recommendation: There should be a system of judicial discipline, distinct from and in addition to impeachment, to remove from office or otherwise discipline judges who have been unfaithful to their trust; the system should also be empowered to deal appropriately with judges who have become physically or mentally unable to perform their duties.

Comment: A fundamental feature of our system of government is its division into three branches: the legislative, the executive and the judicial. If the legislative and executive branches are to maintain a proper relationship to each other, and if the rights of every individual are to be respected, the judicial branch must be not simply independent but composed of judges of integrity and professional competence who enjoy the confidence and respect of the public. The Constitutional provision for impeachment of a judge, Pa. Cons. art. 6, §6, is inadequate to achieve such a judicial branch, for impeachment is so cumbersome and rarely invoked a process as not to represent an effective sanction for judicial misconduct. It is therefore essential that there be a separate system of judicial discipline, and to ensure the effectiveness of this system, it should be Constitutionally provided. In any event, since the present Pennsylvania judicial discipline system is Constitutionally provided, any change in it must be by Constitutional amendment.

The literature is uniform regarding the necessity of a separate system of judicial discipline, and the purposes it should

serve. The ABA Standards Relating to Judicial Discipline and Disability Proceedings (hereinafter "ABA Standards") identify these purposes in the Commentary to §1.1: "It is essential to have a method for imposing judicial discipline for the following reasons: to protect the public; to preserve the integrity of the judicial process; to maintain public confidence in the judiciary; and to create a greater awareness of proper judicial behavior on the part of the judges themselves." These purposes accord with those identified in both Gillis and Feldman, Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach, 54 Chi.-Kent L.Rev. 117, 118 (1977), and Greenburg, The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting, 54 Chi.-Kent L.Rev. 69, 76 (1977). One commentator states that

> [a]lthough the ultimate purpose of the disciplinary commission is the promotion of public confidence in the judiciary, it serves three additional purposes. The Commission increases awareness of the judicial community of the consequences of violating the standards governing judicial conduct. By refining the definitions of acceptable judicial conduct through a case-by-case determination, the commission informs judges of what is expected of them in specific cases. As a result, the disciplinary commission is intended to deter future judicial misconduct.

Blynt, Judicial Discipline - Does It Exist in Pennsylvania?, 84 Dickinson L.Rev. 447, 448-49 (1980). In Judicial Disciplinary Proceedings in Minnesota, 7 Wm. Mitchell L.Rev. 459, 461-62 (1981), it is stated that "[t]o maintain the public's confidence in the courts, to insure the effective administration of justice,

and to maintain the integrity of the judicial system, judges are disciplined if they engage in inappropriate behavior."

The inadequacy of impeachment as the only procedure for removing a judge from office may be seen from the federal experience. Since the adoption of the federal Constitution, 200 years ago, there have been only 13 impeachment trials in the Senate, only 4 of which ended in conviction. The most recent impeachment was of Judge Harry Claiborne on July 22, 1986. It occurred because of public outrage that a federal judge should be drawing his judicial salary while serving time in prison. As a result of the experience of the Claiborne impeachment, on April 9, 1987, Senators Wheeling, Sanford, Shelby, and Stevens introduced S.J. Res. 113, a joint resolution proposing an amendment to the Constitution that would authorize the Congress to provide procedures for the removal from office of federal judges found to have committed treason, bribery, or other high crimes and misdemeanors. Senator Heflin, as one of the sponsors of the joint resolution and as Chairman of the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice, has indicated that in the hearings on the resolution the subcommittee will examine the various state judicial discipline systems as possible models for a federal system. Heflin, The Impeachment Process: Modernizing an Archaic System, 71 Judicature 123 (Aug./Sep. 1987).

II. Standards of Judicial Conduct

Recommendations:

First: The Pennsylvania Constitution's present separate but overlapping formulations of standards of judicial conduct in

Sections 17 and 18 of Article 5 should be amended and combined into a single formulation.

Second: The drafting of the formulation should be at once undertaken by a Special Committee the members of which would be appointed, in equal numbers, by the Pennsylvania Supreme Court, the Governor, and the General Assembly.

Third: The formulation should include, among other provisions, provision that a justice, judge, or district justice may be removed from office, suspended, censured, or otherwise disciplined for: misconduct in office; neglect of or failure to perform the duties of office; conduct that is prejudicial to the administration of justice or brings the judicial office into disrepute whether or not done in a judicial capacity or prohibited by law; and conduct in violation of canon or rule prescribed by the Pennsylvania Supreme Court. The definition of "duties of office" should include a duty to make financial disclosure as may from time to time be prescribed by law, canon or rule.

Comment: At present, the standards of judicial conduct are stated in the Pennsylvania Constitution, Article 5, Sections 17 and 18(d), and in the American Bar Association Code of Judicial Conduct, which, with some amendment, see infra, has been adopted by the Pennsylvania Supreme Court. These provisions overlap, thus creating some ambiguity, and are incomplete. While Senate Bill No. 1, 1987 Session, Printer's No. 1171, as reported from the Committee on the Judiciary of the House of Representatives, as amended, June 22, 1987 (hereinafter "Senate Bill No. 1") would amend, and strengthen, Sections 17 and 18(d), the amendment still would not, in the Committee's judgement, result in as clear a statement of the standards of judicial conduct as is desirable.

Article 5, Section 17 of the Pennsylvania Constitution provides:

> (a) Justices and judges shall devote full time to their judicial duties, and shall not engage in the practice of law, hold office in a political party or political organization, or hold an office or position of profit in the

> government of the United States, the Commonwealth or any other municipal corporation or political subdivision thereof, except in the armed service of the United States or the Commonwealth.
>
> (b) Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court. Justices of the peace shall be governed by rules or canons which shall be prescribed by the Supreme Court.
>
> (c) No justice, judge or justice of the peace shall be paid or accept for the performance of any judicial duty or for any service connected with his office, any fee, emolument or perquisite other than the salary and expenses provided by law.
>
> (d) No duties shall be imposed by law upon the Supreme Court or any of the justices thereof or the Superior Court or any of the judges thereof, except such as are judicial, nor shall any of them exercise any power of appointment except as provided in this Constitution.

It is not apparent why §17(d) is not made applicable to all judges and district justices; the Committee believes it should be so expanded.

Senate Bill No. 1 would amend §17 by adding paragraphs (e), (f), and (g), requiring financial disclosure and disclosure of an interest in a pending matter, as follows [present paragraphs (a) through (d) would not change]:

> (e) The Supreme Court shall promulgate financial disclosure requirements for all justices, judges, justices of the peace and other officers or employees of the unified judicial system which shall provide for no less disclosure than provided by law for members of the General Assembly. Such requirements shall prohibit any justice, judge, justice of the peace or other officer or employee of the system from taking the oath of office or entering or continuing upon his

> duties or receiving compensation from public funds unless he has complied with such financial disclosure requirements. In addition such disclosure shall include that information deemed necessary for the fair and impartial administration of justice.
>
> (f) All justices, judges, justices of the peace and other officers and employees of the unified judicial system who have personal or private interests in any action, proceeding or appeal pending before their respective court shall disclose that fact to the court of which that person is a member, officer or employee and shall not act thereon.
>
> (g) The Supreme Court shall promulgate financial disclosure requirements for full-time attorneys employed by the Commonwealth which shall provide for no less disclosure than provided by law for members of the General Assembly. This subsection shall not apply to attorneys employed by political subdivisions.

The Committee believes that standards of judicial conduct should indeed require financial disclosure, but it is not apparent why such standards should be "no less" strict than standards applicable to members of the General Assembly; it may well be that the judicial standards should be more strict. The Committee further believes that standards of judicial conduct should require disclosure of an interest in a pending matter, but it may be that such a requirement is better imposed by a Code of Judicial Conduct than by a constitutional provision. As a general rule, a Constitutional provision should not be too specifically expressed, lest undesirable rigidity result.

Article 5, Section 18(d) of the Pennsylvania Constitution provides:

§18. Suspension, removal, discipline and compulsory retirement

....

(d) Under the procedure prescribed herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section 17 of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties.

Senate Bill No. 1 would amend §18(d) as follows:

(d) Under the procedure prescribed herein, any justice [or] judge or justice of the peace may be suspended, removed from office or otherwise disciplined or censured for violation of section 17 of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties.

Senate Bill No. 1 would amend §18(d) as follows:

(d) Under the procedure prescribed herein, any justice [or] judge or justice of the peace may be suspended, removed from office or otherwise disciplined or censured for violation of section 17 of this article, misconduct in office, neglect of duty, failure to perform [his duties] the duties of that office, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, whether or not such conduct occurred while acting in a judicial capacity or is prohibited by law, and may be retired for disability seriously interfering with the performance of his duties.

This amendment would appropriately strengthen present §18(d); in particular the Committee supports the inclusion of district justices and the rejection of the rule of Matter of Dallessandro, 483 Pa. 431, 397 A.2d 743 (1979), by inclusion of conduct occurring while not acting in a judicial capacity.

The question remains, however, whether there should be such separate, overlapping Constitutional statements of standards of judicial conduct. It is the Committee's judgment that it would be better to have a single statement, thereby avoiding any argument that to the extent the present separate statements differ, differing standards are imposed.

Finally, the Committee notes an ambiguity arising from a comparison of the ABA Code of Judicial Conduct with the financial disclosure requirements of the Public Officials' Ethics Act, 65 P.S. §401 et seq. (Purdon's Supp. 1987). The Ethics Act requires a judge to file a financial statement which includes

> the name and address of any person from whom a gift or gifts valued in the aggregate at $200 or more were received, and the value and the circumstances of each gift.

Section 401(b)(6). This requirement may in some circumstances be difficult to reconcile with the requirement of Canon 2 of the ABA Code of Judicial Conduct that a judge must "avoid impropriety and the appearance of impropriety." Furthermore, the Pennsylvania Supreme Court in adopting the ABA Code deleted §C(4)(c) of Canon 5, which would have required disclosure of any gift, bequest, favor or loan whose value exceeded $100 rather than the $200 requirement under the Ethics Act. In any event, any statute or

rule imposing a duty of financial disclosure should be drafted with reference to the provisions of the Code of Judicial Conduct and the Ethics Act.

The foregoing considerations persuade the Committee that the present constitutional formulation of standards of judicial conduct should be re-examined and a single formulation prepared to replace the two partly distinct, partly overlapping formulations now contained in Sections 17 and 18 of Article 5. At the end of this comment the Committee proposes a possible single formulation. However, the Committee regards this formulation as suggestive only. Because of the importance of the subject, and to achieve a broad range of comment, the Committee recommends that a committee be specially appointed and assigned the task of recommending a final formulation for inclusion in the Constitution.

Without offering a comprehensive review of the authorities, the Committee notes that there is ample precedent for the standards of judicial conduct it recommends. The ABA Standards, §3.3(b), support disciplinary action against a judge for "wilful misconduct in office." This generally refers to instances where a judge while serving in a judicial capacity acts in bad faith. Overton, Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions, 54 Chi.-Kent L.Rev. 59, 62 (1977). Some judges have challenged the term "wilful misconduct" as being so vague that inadequate notice is provided judges, but the courts have generally rejected such challenges. See S. Rush Nicholson v. Judicial Retirement and Removal Comm'n., 562 S.W. 2d 306 (Ky. 1978); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Furthermore, states imposing disciplinary action for "cause" have prevailed in the courts against claims of vagueness. See Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972), cert. denied 409 U.S. 1037 (1972), rehearing denied 410 U.S. 947 (1973); Halleck v. Berliner, 427 F. Supp. 1225 (D.C. D.C. 1977); Sarisohn v. App. Div., 265 F.Supp. 455 (E.D.N.Y. 1967); In re Haggerty, 257 La. 1, 240 So.2d 469 (1970); Sharpe v. State, 448 P.2d 301 (Okla. Jud. 1968). Wilful misconduct is more serious than "conduct prejudicial to the administration of justice," see Geiler v. Comm'n on Judicial Qualifications, 10 Cal. 3d 270, 110 Cal. Rptr. 201, 515 P.2d 1 (1973), which ordinarily refers to violations outside the scope of judicial duties. Thus this charge has been levied against a judge for driving while intoxicated, In re Law, No. 73-cc-6 (Ill. Cts. Comm'n., Feb. 1974); for committing lewd and lascivious acts in public in violation of a city ordinance, In re Lee, 336 So. 2d 1175 (Fla. 1976); for operating an abstract company and practicing law while sitting on the bench, In re Durr, No. 72-CC-1 (Ill. Cts. Comm'n Aug. 1973); and for showing pornographic movies and providing live performances of lewd acts and engaging in illegal gambling activities, In re Haggerty, 257 La. 1, 241 So.2d 469 (1979). The ABA Code of Judicial Conduct provides that it is appropriate to hold a judge to a higher standard of conduct both on and off the bench. See Comment to Canon 2. Also see Stern, Is Judicial Discipline in New York State a Threat to Judicial Independence?, 7 Pace L. Rev. 291, 377-386 (Winter, 1987), for discussion of appropriateness of holding a judge to an appearance of impropriety standard.

The Committee suggests the following possible formulation of standards of judicial conduct for further consideration by a special committee:

Standards of Judicial Conduct

(a) Justices and judges shall devote full time to their judicial duties, and shall not engage in the practice of law, hold office in a political party or political organization, or hold an office or position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof, except in the armed service of the United States or the Commonwealth.

(b) Justices, judges and district justices shall not engage in any activity prohibited by law and shall not violate any rule or canon of legal or judicial ethics prescribed by the Supreme Court.

(c) No justice, judge or district justice shall be paid or accept for the performance of any judicial duty or for any service connected with his office, any fee, emolument or perquisite other than the salary and expenses provided by law.

(d) No duties shall be imposed by law upon any court or any justice, judge or district justice except such as are judicial, nor shall any of them exercise any power of appointment except as provided in this Constitution.

(e) All justices, judges, and district justices shall provide financial disclosure consistent with the requirements of

law, and no justice, judge or district justice may take the oath of office or enter or continue upon his duties or receive compensation from public funds unless he has complied with such financial disclosure requirements.

(f) In accordance with the procedures prescribed in this Constitution, any justice, judge or district justice may be removed from office, suspended, censured, or otherwise disciplined for violation of subsections (a) through (e) of this section, or for other misconduct in office, neglect of or failure to perform the duties of that office, or for conduct that prejudices the administration of justice or brings the judicial office into disrepute whether or not such conduct was engaged in in a judicial capacity or was prohibited by law.

(g) In accordance with the procedures prescribed in this Constitution, any justice, judge, or district justice may be removed from office, suspended, or otherwise limited in activity for disability seriously interfering with the performance of his judicial duties.

III. The Structure of the Judicial Discipline System

Recommendation: The judicial discipline system should be divided into two parts: an investigative division, within the executive branch, and an adjudicative division, within the judicial branch.

Comment: The present judicial discipline system is a unitary system, that is the Judicial Inquiry and Review Board both investigates a complaint of misconduct by a judge and decides whether the complaint has merit. The United States Supreme Court

has held that a single disciplinary board may investigate and adjudicate a complaint without necessarily violating the respondent's right to due process. Withrow v. Larkin, 421 U.S. 35 (1974). Moreover, the procedures of the Judicial Inquiry and Review Board have been held consistent with due process. Keiser v. Bell, 332 F.Supp. 608, 617-20 (E.D.Pa. 1971). This conclusion depends, in part, on the fact that the Judicial Inquiry and Review Board's decision that a sanction should be imposed is recommendatory only; on appeal, the Supreme Court "shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence."

Senate Bill No. 1 would amend the present provisions of the Constitution by deleting the provision that the Judicial Inquiry and Review Board "shall recommend" a sanction to the Supreme Court, substituting the provision that "[i]f, after hearing, the board finds good cause therefor, it shall render an order that a justice, judge or justice of the peace be suspended [or otherwise disciplined]." This increase in the Board's powers may make Senate Bill No. 1 vulnerable to a due process challenge, although whether that is so is not entirely clear, for under the bill, the Supreme Court would still review the record "on the law and facts" and could "permit the introduction of additional evidence."

A unitary judicial discipline system is recommended by the ABA standards on the grounds that it "avoids multiple investigations, makes possible more prompt determinations, and gives final disposition to the court in every case." §1.5. The ABA responds to the due process issue by stating that

> [n]o commission member who conducts the investigation of the matter should serve on the hearing panel or with the commission in considering this matter....

Section 5.9, Commentary.

The alternative to a unitary judicial discipline system is a system in which the investigative and adjudicative functions are structurally divided. At present, forty-one states have a unitary system and nine states have a divided system. See Tesitor and Sinks, Judicial Conduct Organizations. States have only recently turned to the use of a divided system. See Heflin, supra. The Committee has concluded that a divided system is preferable, for the following reasons.

In testimony to the Committee, members of the Judicial Inquiry and Review Board expressed great discomfort in serving in both an investigative and adjudicative capacity, and specifically urged the Committee to recommend a divided system. Observing that in their adjudicative capacity they acted as judges, they noted the impropriety of a judge knowing facts learned in the investigation of a case as distinguished from facts learned only as the result of testimony in court. They further noted that even though they resolutely sought to base their decisions only on the evidence presented at the adjudicative proceeding, they felt keenly that the respondent judge must regard the proceeding as to some extent unfair because of knowing that they knew of the investigation and despite disclaimer, might be affected by it in arriving at their decision. In other words, the Committee was told, combining the investigative and adjudicative functions in a

single board inevitably creates at least the appearance of unfairness, if not actual unfairness.

This testimony was confirmed by a lawyer who had practiced before the Judicial Inquiry and Review Board. He acknowledged the cases holding that his client had not been denied due process because the investigative and adjudicative functions were combined, but said that nevertheless his client regarded the hearing as unfair because, given the Board's combined functions, the basis of its decision was subject to question. Moreover, he said, this appearance was in no way undone by the fact that the Board's decision was only recommendatory. In fact the Supreme Court's review can not be de novo, for the Court does not itself see the witnesses whose testimony it reads, and its deliberations are inevitably shaped to some extent, and quite possibly a decisive extent, by the Board's "recommendation."

The suggestion of the ABA Standards that a judicial discipline system will be enabled, if it is unitary, to make prompt determinations is refuted by experience. An investigation must in any event be conducted and there is no reason to suppose that a unitary system can conduct it with any greater expedition than the investigative division of a divided system. In addition one result of requiring the Supreme Court to review the record de novo, and to take additional testimony if necessary, is that the Court's decisions will necessarily be much more slowly reached than if the Court reviewed the record as on other appeals, accepting as fact findings supported by sufficient evidence and reversing only for errors of law or manifest abuse of discretion.

The Committee has also examined the federal system of judicial discipline. That examination confirms that considerations of fairness to the respondent, prompt decision, and public confidence in the judicial discipline system all argue for a divided rather than unitary system.

The federal system of judicial discipline is established by the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. §§331 et. seq. (1982). The system's procedures are as follows:

Like all other judicial disciplinary systems, the federal procedure commences with the filing of a complaint. The complaint is filed with the clerk of the court of appeals for the circuit in which the judge sits. How the Federal Judicial Discipline Act Works, 71 Judicature 15 (June-July 1987). The clerk then transmits the complaint to the chief judge of the circuit. After reviewing the complaint, the chief judge may dismiss it if it either fails to conform with the requirements for a complaint, directly relates to the merits of a decision or procedural ruling, or is frivolous. 28 U.S.C. §372(c)(3)(A). In the alternative the chief judge may determine that "appropriate corrective action" has already been taken. 28 U.S.C. §372(c)(3)(B).

If, however, the complaint is not dismissed or corrective action has not been taken, the chief judge must appoint a special committee composed of the chief judge and equal numbers of district and circuit judges. This committee must conduct an investigation as extensive as it considers necessary. 28 U.S.C. §372(c)(4) and (5).

Upon receipt of the special committee's report, the judicial council may conduct any additional investigation it considers necessary. Then it "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 28 U.S.C. §372(a)(6)(B). It may, however, refer the complaint along with the records of the proceedings undertaken to that point and the council's recommendations to the Judicial Conference of the United States. 28 U.S.C. §372(c)(7)(A).

The Judicial Conference of the United States also may conduct an additional investigation. The Conference then may take any action it deems appropriate. Furthermore, the Conference, on its own or upon review of the judicial council's determination that consideration of impeachment is warranted, may transfer the complaint to the House of Representatives for whatever action it considers appropriate. 28 U.S.C. §372(e)(8).

Throughout each of the procedures, the investigating body has full subpoena power, including those bodies investigating after previous investigations have been completed. The federal system thus compounds the problem of multiple investigations.

The investigation of United States District Judge Alcee Hastings is an example of the delays that the federal system may entail. On March 17, 1983, a complaint was filed against Judge Hastings after he was acquitted of conspiracy to solicit and accept money in return for being influenced in the performance of official acts. Hastings v. Judicial Conference of the United States, 770 F.2d 1092, 1096-97 (D.C. Cir. 1985), cert. denied 106

S.Ct. 3272 (1986). The chief judge appointed a special committee. In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984), cert. denied 469 U.S. 884 (1984), rehearing denied 469 U.S. 1001 (1984). The case finally ended up in the Judicial Conference of the United States, which unanimously recommended that Congress consider removing Judge Hastings from the bench. The recommendation came four years to the day after the complaint was filed. Marcus, Congress Reluctantly Takes Up Hastings' Ouster, Legal Times, March 30, 1987, at 2, col. 1. The House Judiciary Committee now has the case and is investigating. Id.

Not only does the federal system multiply investigations and entail delay, it has also been criticized for its failure to inform the public. "[T]aking public accountability as a discrete congressional goal, the rulemaking under the act so far is cause for concern. Neither the processes used to develop the councils' rules nor the efforts to make those rules known to the public suggest that the Federal judiciary has embraced this goal." Burbank, The Federal Judicial Discipline Act: Is Decentralized Self-regulation Working? 67 Judicature 183, 187 (Oct. 1983). Reference was made above to the critique of the federal system by Senator Howell T. Heflin, who participated in the impeachment proceedings against Judge Harry Claiborne of Nevada. Senator Heflin has concluded that the federal system should be patterned after state judicial discipline systems, not vice versa. See Heflin, The Impeachment Process: Modernizing an Archaic System, 71 Judicature 123, 125 (Aug./Sept. 1987). While the Committee

expresses no opinion on the merits of Senator Heflin's proposal, it is persuaded that the federal judicial discipline system is not an appropriate model for Pennsylvania's system.

IV. The Investigative Division Of The Judicial Discipline System

A. Memberships and Powers

Recommendations:

First: The investigative division should have a name that would make its function clear to the lay public, as for example, Board of Complaints Regarding Judicial Conduct (hereinafter "The Board").

Second: The Board should consist of twelve members, half of them law-trained and half of them lay members.

a. The law-trained members

i. The law-trained membership should include a district justice, who may but need not be law-trained; two judges, other than senior judges, one from the Courts of Common Pleas, the other from either the Superior Court or the Commonwealth Court; and three lawyers.

ii. The Governor should nominate the law-trained members to the Senate from a list of names provided by the Supreme Court. The list should contain three times the number of names as positions available. If the Senate fails to approve or reject a nomination within 90 days from the time of submission by the Governor, the nomination should be deemed approved. Senate approval should be by majority vote. If the Senate rejects a nomination, the Governor should be required to present another nomination from the names remaining on the list provided by the Supreme Court. If the Senate again rejects the nomination, the Governor should be entitled to appoint from the list without necessity of Senate approval.

b. The lay members

i. No more than three lay members should be registered in the same political party.

ii. The Governor should nominate the lay members to the Senate. If the Senate fails to approve or reject a nomination within 90 days from the time of submission by the Governor, the nomination should be deemed approved. Senate approval should be by majority vote.

c. The terms of the members of the Board should be for four years and should be staggered. The members of the first Board should be appointed as follows: Two law-trained and two lay members for four years, two law-trained and two lay members for three years, and two law-trained and two lay members for two years. In the case of a vacancy, the Governor should make an appointment for the unexpired term.

Third: The Board's powers should include the power to:

a. Receive complaints regarding judicial conduct, filed either by an individual or by the Board itself.

b. Authorize investigations regarding complaints and compel by subpoena the attendance and testimony of witnesses, including the respondent, and the production of documents, books, accounts, and other records relevant to the investigation.

c. Determine whether there is probable cause to file formal charges against a judge and present the case in support of the charges. A finding of probable cause should require the concurrence of a majority of the Board.

d. Appoint its own chief counsel by majority vote of the Board, hire staff, and otherwise prepare and administer its own budget and do what is needed to ensure its efficient operation.

e. Promulgate its own rules of procedure.

f. Through a special education division under the direction of the Board's chief counsel, issue advisory opinions, which should be published, without reference to any names. An advisory opinion would not be binding on the adjudicative division of the disciplinary system, though the adjudicative division might give weight to whether the respondent had acted in accordance with the opinion.

g. If on a complaint of mental or physical disability the Board finds probable cause, it should, before filing formal charges, present its findings to the judge and provide the judge with opportunity to resign or when appropriate to enter a rehabilitation program.

h. Prepare and disseminate an annual report of the Board's activities.

Comment: The probable cause investigation would determine that a complaint was not frivolous. A complaint based on the merits of a decision or procedural ruling would be deemed

frivolous, for it is not proper for a disciplinary board to evaluate the merits of a decision by a judge; such an evaluation belongs to the appellate process. See People ex rel. Harrod v. Illinois Courts Comm'n., 69 Ill. 2d 445, 372 N.E. 2d 53 (1977). If the majority of the Board found probable cause to file formal charges, it would be obliged to do so. Failure to file charges when probable cause exists ignores the purpose of maintaining confidence in the judiciary. The ABA Standards endorse the requirement that a majority find probable cause. See § 4.23, Commentary.

The majority of state judicial discipline systems allow the investigating body to initiate an investigation on its own. The ABA Standards recognize that latitude must be allowed for complaints. "Complaints submitted anonymously should not be disregarded. Lawyers, court personnel, or litigants may fear retaliation of a kind not insulated against.... Reports in the news media relating to the conduct of a judge may form the basis for inquiry by the Commission. Reports or records required by law or court rule to be filed or kept by the judge may form the basis for inquiry by the Commission." § 4.1, Commentary.

The power to promulgate rules, choose counsel, hire staff, and administer its own budget would enable the Board to be independent and is consistent with the powers given other administrative agencies.

Allowing the Board to issue advisory opinions would provide judges with an important source for conforming their behavior to judicial standards. Generally speaking, it is much better, by

such educational efforts, to prevent or avoid undesirable conduct than to punish such conduct after it occurs. Lawyers have long been able to seek advisory opinions from bar association ethics committees; judges should have the same resource. See Gardiner, Preventing Judicial Misconduct: Defining the Role of Conduct Organizations, 70 Judicature 113 (Aug./Sept. 1986); and Judicial Commission Monitors Judicial Conduct, 59 Wis. B. Bull. 22 (1986).

Implicit in the powers that would be granted the Board would be the obligation to dispose of all complaints with the utmost dispatch consistent with fairness to all concerned. Ultimately the Board's ability to do this would depend on the appropriations allocated to it by the General Assembly. The requirement of an annual report should enable the General Assembly and the public to appraise the performance of the Board and its financial needs.

B. Practice and Procedure of the Board

Recommendations:

First: Upon receipt of a complaint, the Board should investigate the complaint and determine whether it is reasonably based. The Board should promulgate its rules for determining whether a complaint is reasonably based.

Comment: The determination whether a complaint is reasonably based is ordinarily made by the Executive Officer of the disciplinary body. The ABA Standards explain "reasonably based": "[The complaints] need not be made in any specific form, nor need they be made under oath, but they must state facts that, if true, would be grounds for discipline." § 4.1, Commentary.

Second: The judge whose conduct is complained of should be given a fair opportunity to respond to the complaint and

to present to the Board such matters as the judge chooses. The judge should have the power by subpoena to compel testimony and the production of documents, books, accounts, and other records relevant to the investigation.

Comment: While it is accepted that a judge should be given procedural due process in disciplinary hearings, there is some disagreement agreement regarding the extent of due process rights. See Peskoe, Procedures for Judicial Discipline: Type of Commission, Due Process, and Right to Counsel, 54 Chi.-Kent L.Rev. 147 (1977). An individual confronted with possible loss of liberty in criminal proceedings expects to receive the "full panoply of due process protections." Id. at 151. Judicial discipline proceedings, however, are not criminal proceedings and do not threaten loss of liberty. "Once it is established that the balance, in disciplinary proceedings, must favor the need 'to protect the courts and the public from the official ministrations of the person unfit to practice' rather than the rights of the individual, it is clear that due process need not approach the criminal standard." Id.

Third: Until a determination of probable cause has been made and formal charges filed, all proceedings should be confidential except when the judge under investigation waives any right to confidentiality, or in any case in which independent of any action by the Board the fact that an investigation is in process becomes public, in which case the Board should be able to issue a statement to confirm the pendency of the investigation, to clarify the procedural aspect of the proceedings, to explain the right of the judge to a fair hearing without prejudgment or to state that the judge denies the allegations.

Comment: Ever since states established judicial discipline systems, the issue of confidentiality has been of primary concern.

All fifty states and the District of Columbia have enacted some type of confidentiality provision as part of their disciplinary systems. Shaman and Begue, Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process, 58 Temple L.Q. 755, 756 (1985). Nineteen states permit public disclosure when formal charges are filed with a commission; twenty-two permit public disclosure when, after formal hearings, a commission makes a recommendation of discipline to its state's highest court; and nine states and the District of Columbia permit disclosure only when the state's highest court orders a sanction. Id.

One of the primary arguments for confidentiality is that it encourages participation in the disciplinary process by protecting complainants and witnesses from retribution or harassment and by reducing the possibility of subornation of perjury. The argument is unpersuasive for several reasons. First, even when confidentiality is provided, most states allow the judge to respond to the complaint in the investigatory stage. From the complaint the judge can usually determine who brought the complaint. Confidentiality, Public Access to Records Examined at Judicial Conduct Conference, 70 Judicature 244 (Dec./Jan. 1987). Furthermore, upon a finding of misconduct, the names of the complainant and witnesses become a matter of public record. Thus, Shaman and Begue have concluded that "[b]ecause of the practical limitations preventing guarantees of genuine confidentiality and the existence of various competing considerations bearing on a decision to participate in the judicial disciplinary process,

claims that confidentiality necessarily fosters such participation may be exaggerated." Silence Isn't Always Golden, supra at 761-62. In this regard it should be noted that the Committee recommends that complainants and witnesses acting in good faith be granted immunity, see infra, which should encourage participation in the disciplinary process.

Another argument for confidentiality is that it protects the reputation of innocent judges wrongfully accused of misconduct. Todd and Proctor, Burden of Proof, Sanctions, and Confidentiality, 54 Chi.-Kent L.Rev. 177, 193 (1977). Proponents of confidentiality argue that 75% of complaints are unfounded, frivolous, or outside the disciplinary board's jurisdiction. Silence Isn't Always Golden, supra at 762. This argument has merit, but it does not support the present law in Pennsylvania, which is that proceedings before the Judicial Inquiry and Review Board lose their confidential character only when the Board recommends sanction and files the record of the proceeding in the Supreme Court. The testimony and statements received by the Committee were divided in opinion. Nevertheless, the Committee is persuaded that the interest in a judge's reputation is, on balance, adequately protected by assurance of confidentiality up to a finding of probable cause. Since the 75% of complaints that are dismissed as without merit would thus never be disclosed, the judge's reputation would not be harmed by them. Admittedly a judge's reputation might be harmed by disclosure of a complaint supported by probable cause but later dismissed after hearing. In the Committee's judgment, however, much greater harm is done by

keeping confidential even complaints supported by probable cause. As a practical matter, demonstrated by experience in Pennsylvania, information regarding such complaints may leak out anyway, and an attempt to maintain confidentiality can then only result in the public having less than complete information, encouraging the perception by some, and perhaps many, persons that there may be a "cover-up." As discussed above, a primary purpose of a judicial discipline system is to maintain public confidence in the courts, and an individual judge's interest in reputation must yield to every reasonable measure to achieve such confidence. No one need accept judicial office. Once accepted, the office confers great power and prestige, and correspondingly great responsibilities, among which should be the willingness to respond in a public proceeding to a complaint supported by probable cause.

It should also be noted that the present system has on occasion put the Judicial Inquiry and Review Board in an exceedingly awkward position. Although confronted with statements, which may well be inaccurate and misleading, about an investigation, the Board must remain silent.

Requiring that proceedings based on complaints supported by probable cause must be public will ensure that the adjudicative division, in ruling on such complaints, will conduct itself fairly, with full attention to the interests of the judge, the complainant, and the public generally. It is fundamental to our system of government that proceedings, except in rare cases, be public. Comment, A First Amendment Right of Access to Judicial Disciplinary Proceedings, 132 U.Pa.L.Rev. 1163, 1184-86 (1984).

An evaluation of the California system states that "[i]f a conclusion can be drawn from the much publicized investigation of the California Supreme Court, concluded this month, it is that confidentiality . . . can work to undermine the independence when it undermines public confidence in the courts." Benfell, The Wages of Secrecy, 65 ABA J. 1796 (1979). The Committee believes that the same may be said of the Pennsylvania judicial discipline system's requirement of confidentiality.

Finally is the argument that confidentiality is necessary to preserve informal mechanisms such as resignations and private admonishments. Supporters of this argument emphasize that disciplinary procedures are established to rid the bench of bad judges and informal procedures accomplish that end. Ridding the bench of bad judges is not the only purpose of judicial discipline, however. Two other purposes -- maintaining public confidence and educating other judges -- are as important if not more so. Neither of these purposes is accomplished where only a handful of cases reach the public eye. Private admonishments subject the judicial disciplinary system to accusations of favoritism. See Silence Isn't Always Golden, supra at 765. Indeed, some argue that private admonishments are much less effective than public censure and that their retention is warranted only in those jurisdictions where no formal sanction short of removal is available. Greenburg, The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting, 54 Chi.-Kent L.Rev. 69, 81-86, 92-94 (1977).

The Committee's proposal allows limited exceptions to the rule of confidentiality in order to address two concerns raised in testimony to the Committee. First, the fact that some judges would like public disclosure should be recognized. Second, the Board should have the ability to say that an investigation is in progress when that fact, independent of any action by the Board, already has been disclosed and the Board would be embarrassed by being unable to make any comment regarding the disclosure.

C. Immunity

Recommendation: Members of the Board, chief counsel, and staff should be absolutely immune from suit for all conduct in the course of their official duties. If in good faith, a complaint submitted to the Board or testimony related to the complaint should be absolutely privileged and no civil action or disciplinary complaint predicated on the complaint or testimony should be able to be maintained against any complainant or witness or their counsel. Neither should a judge hear a matter involving an individual who has filed a complaint, provided testimony, or acted as counsel in a disciplinary proceeding against the judge.

Comment: The ABA Standards provide that "[board] members and staff must be free from harassment. Immunity assures the independence of the commission and eliminates a major deterrent to service." §2.9, Commentary. Witnesses before the Committee also emphasized the importance of immunity. Testimony also revealed that at least on some occasions a judge subject to disciplinary proceedings has retaliated against persons who have participated in the proceedings.

V. The Adjudicative Division Of The Judicial Discipline System

A. Membership and Powers

Recommendations:

First: The adjudicative division should have a name that would identify it as a court that judges judges, as for example, The Court of the Judiciary (hereinafter "The Court").

Second: The Court should consist of seven members, three of them judges and one a district justice, two lay members and one lawyer. The judges should not be senior judges and should be from the Courts of Common Pleas, the Superior Court, and the Commonwealth Court; the district justice should be a lawyer. The members of the Court should be selected in a manner, and their terms should be, the same as with respect to members of the Board of Complaints Regarding Judicial Conduct.

Comment: It will be noted that the Committee recommends that, in contrast to the membership of the Board of Complaints Regarding Judicial Conduct, a majority of the membership of the Court be composed of judges and a law-trained district justice. The Committee believes that this difference in membership appropriately reflects the difference in the functions of the Board of Complaints and the Court. With respect to complaints, it is important that the lay public be broadly represented (some argue that all of the members of the investigative division should be lay), for judges and lawyers may not perceive the judicial system as it is perceived from the outside. Thus they may not be as sensitive as they should be to its shortcomings; indeed they may have become hardened to, or accepting of, conduct that properly measured, is unacceptable. The Court, however, would be a judicial body, and one of the highest importance for it would judge the judges. While the lay public should be represented to some extent, to prevent the members of the Court from being seen,

fairly or not, as showing favoritism towards a colleague, the majority representation should be judicial to ensure that the proceedings would be conducted with strict compliance to the law -- a task that a layman untrained in the law cannot fairly be expected to accomplish. Especially would such compliance be essential in view of the power the Court would have to enter an order not merely recommendatory but imposing sanctions, including removal from the bench. See infra.

Third: The Court should be a court of record, with all the attendant duties and powers appropriate to its function: The Court's proceedings should be public, conducted pursuant to rules duly adopted and promulgated by the Court and in accordance with the law of evidence; parties appearing before the Court should be enabled by subpoena to compel the attendance of witnesses and the production of documents, books, accounts, and other records as relevant; the Court's decisions should be in writing and include its findings of fact, conclusions of law, and discussion of reasons; the Court should be empowered to enter such order of removal from office, suspension, censure, or other discipline as authorized by the Constitution (see discussion supra of Standards of Judicial Conduct) and as warranted by the record; in the case of a disabled judge, the Court should be empowered to enter such order of removal from office, suspension, or other limitations on the judge's activities as warranted by the record; and finally, the proceedings before the Court should be transcribed.

Comment: The rules governing proceedings before the Judicial Inquiry and Review Board are as adopted and promulgated by the Supreme Court. The Committee believes that it would be more expeditious as well as consistent with the greater powers and responsibilities that the Court would have for the Court to be empowered to adopt its own rules. Such rules would not supersede but would have to be consistent with any rule adopted by the Supreme Court.

Fourth: The Court should have the power to order suspended, without loss of salary, any judge against whom formal charges have been filed with the Court by the Board or against whom there has been filed an indictment or information charging a felony.

Comment: Suspension without loss of salary upon indictment for a felony is consistent with the present practice of the Judicial Inquiry and Review Board. Suspension upon formal charges is consistent with other judicial discipline systems in which the investigative and adjudicative functions are divided. See, e.g., Ala. const. amend. 328, §6.19. An order of suspension would be interlocutory and not appealable; to permit appeal would entail undue delay. See infra.

Fifth: The Court should be empowered to prepare and administer its own budget, hire staff and otherwise make expenditures as appropriate. The Court's request to the General Assembly for the necessary monies should be made separately and not as an item in the request by the Supreme Court on behalf of the judicial system.

Comment: It is essential that the Court, although part of the judicial branch, be entirely independent.

B. Practice Before the Court

Recommendations:

First: Upon receipt of formal charges from the Board of Complaints Regarding Judicial Conduct, the Court should schedule a prompt hearing, affording, however, the respondent judge full discovery and a fair opportunity to prepare for the hearing. At the hearing, the Board should have the burden of proving the charges by clear and convincing evidence.

Comment: For other aspects of procedure before the Court, see the recommendations and comment on the powers of the Court,

supra. The Committee heard testimony that on occasion there has been undue delay in the proceedings of the Judicial Inquiry and Review Board, and there was some suggestion that a time limit comparable to the speedy-trial rule in criminal proceedings, Pa.R.Crim.P. 1100, should be imposed. The Committee concluded, however, that that should be left to the Court's rule-making power, although an admonition that hearings should be "prompt" seems appropriate. It appears that delay in the proceedings of the Judicial Inquiry and Review Board are to a considerable extent attributable to the fact that the Board must both investigate and hear complaints, often without adequate staff. Division of the judicial discipline system into investigative and adjudicative sections, each independent, and each with the power to request adequate appropriations, should enable the prompt investigation of all complaints and the prompt adjudication of any supported by probable cause.

The commentary in the ABA Standards is pertinent to the burden of proof:

> The judge is not required to present affirmative evidence in his own defense, but he has the burden with respect to affirmative defenses. The judge may claim the Fifth Amendment right to refuse to testify. Courts, however, have held that he may be removed from judicial office for failing to explain the conduct in question. See Napolitano v. Ward, 457 F.2d 279 (C.A. 7th 1972); and In re Osterman, 13 N.Y. 2d 1189 (Ct. on Jud. 1963).

§5.13, Commentary. This reasoning accords with the Pennsylvania Supreme Court's reasoning as regards financial disclosure. See In re Glancey, 527 A.2d 997 (Pa. 1987).

Since judicial discipline proceedings are not criminal, the standard requiring that charges be proved beyond a reasonable doubt is too high.

> The standard of proof beyond a reasonable doubt has been applied almost exclusively to criminal proceedings. In the case of In re Winship, the United States Supreme Court held that the due process clause 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' Society has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free. The consequences of the life, liberty, and the good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case...
>
> The reasoning for the imposition of such a strict standard in a criminal case is very compelling, but those interests are not present in judicial discipline and disability proceedings. Protection of liberty is guaranteed by the United States Constitution; the privilege of judgeship is not. The individual criminal case has priorities focusing upon fairness to the accused, deterrence, and rehabilitation. These factors take precedence. Although the protection of society is also an important priority, the determination of which acts are crimes and the determination of punishment is the way society's interest is ultimately fulfilled.
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> In judicial discipline cases, the foremost and primary obligations of the whole judicial disciplinary system are the protection of the public and the administration of justice. The interests of the individual judge are considered but they are not foremost. The primary purpose is not punishment, even though it may impose a penalty upon the individual judge. The proceedings are not criminal and the criminal standards of due process do not apply.

Todd and Proctor, supra at 180-81.

The standard of proof by clear and convincing evidence is regularly applied in administrative hearings where issues of personal security are at stake, for instance hearings for deportation or loss of social security benefits. See e.g., Woodby v. Immigration and Naturalization Srve., 385 U.S. 276 (1966).

Judicial discipline proceedings are more like such proceedings than criminal proceedings. Furthermore, the clear and convincing standard is applied by a majority of the state judicial discipline systems that have addressed the issue. The reasoning of the South Dakota Supreme Court is persuasive:

> We note that it would be inappropriate to require proof 'beyond a reasonable doubt' as this is not a criminal prosecution. Proof by a mere preponderance of the evidence is also inapposite because of the severity of the sanction which can be imposed. We conclude that the proper standard of proof is by 'clear and convincing evidence.' Such a standard provides adequate protection for the party subject to charges but at the same time does not demand so much evidence that the ability of the commission and this court to effectively oversee the judiciary is impaired.

In re Heurerman, 240 N.W. 2d 603, 605-06 (N.D. 1976).

Second: If the Court dismisses all complaints against a respondent justice, judge or district justice, the Court should on application enter an order that the respondent be reimbursed for reasonable counsel fees and costs.

Comment: As a general rule in the United States, in contrast to England, a party must bear the expense of representation in legal proceedings. Exception is made in certain cases where a private matter has a particular public dimension, as for example in civil rights cases, where the policy of the law is to encourage the enforcement of civil rights by provision for allowance of reasonable counsel fees and costs. Defense of a complaint of judicial misconduct may be protracted and expensive. Given the public interest in ensuring not simply that a judge who has engaged in misconduct should be disciplined but also that an innocent judge should be vindicated, the Committee believes a provision for allowances of fees and costs is proper.

Third: Members of the Court, chief counsel, and staff should be absolutely immune from suit for all conduct in the course of their official duties, and no civil action or disciplinary complaint predicated on testimony before the Court should be able to be maintained against any witnesses or their counsel.

Comment: See discussion supra of the importance of immunity in proceedings before the Board of Complaints Regarding Judicial Conduct.

C. Appellate Review

Recommendations:

First: A judge or district justice aggrieved by an order of the Court of the Judiciary should have the right to appeal to the Supreme Court, in a manner consistent with the rules of the Supreme Court.

Second: The Board of Complaints Regarding Judicial Conduct should have the right to appeal to the Supreme Court from an order of the Court of the Judiciary dismissing a complaint, but the appeal should be limited to questions of law.

Third: On appeal, the Supreme Court should not review the record de novo but rather as it would review the record in a civil action in which the moving party has the burden of proving its allegations by clear and convincing evidence. The Supreme Court should be entitled, in its discretion, to award counsel fees and costs.

Comment: Appeal by a Justice of the Supreme Court is considered below. In Illinois there is no right of appeal. See People evaluation rel. Harrod, supra. As a practical matter, however, the court of last resort may nevertheless assert a right to some sort of review. Nor do considerations of prompt disposition seem to the Committee to warrant denial of appeal.

Fourth: A justice aggrieved by an order of the Court of Judiciary should have the right to appeal to a special tribunal composed of seven judges, not senior judges, chosen by lot from

the judges of the Superior and Commonwealth Courts. The special tribunal should hear and decide the appeal in the same manner in which the Supreme Court would hear and decide an appeal to it from an order of the Court of the Judiciary.

Comment: The Committee believes that if there is to be public confidence in the judicial discipline system, Justices of the Supreme Court should not be permitted to judge one of their number. It is unreasonable to expect impartiality in such a situation, and in any event, the appearance either of favoritism or hostility is unavoidable. It is further unreasonable to expect that a harmonious working relationship between the justices could survive if an appeal by one of them were to be sustained with, however, one or more dissents.

Because of such conflicts, a pro tempore court was resorted to in California when the appeal of Justice Mosk reached the Supreme Court during an investigation of the Supreme Court by the disciplinary body in California. Mosk v. Superior Court, 25 Cal. 3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979). This withstood constitutional challenge on the ground that the chief justice had the ability to assign lower court judges to expedite the work of the Supreme Court. Furthermore, other states have resorted to pro tempore panels. See Yelle v. Kramer, 83 Wa. 2d 464, 520 P.2d (1974) (use of pro tempore panel after all nine justices of the Washington Supreme Court disqualified); State Bd. of Law Examiners v. Spriggs, 61 Wyo. 70, 155 P.2d 285 (1945), cert. denied 325 U.S. 886 (1946) (judges pro tempore assigned after all justices disqualified); and State evaluation rel. Langer v. Kositzky, 38

N.D. 616, 166 N.D. 616, 166 N.W. 534 (1918)(disqualification of four of five justices requires four pro tempore judges).

The Committee recognizes that the proposal it makes was deleted from Senate Bill No. 2, which as amended would have the Supreme Court review all appeals, including an appeal by a justice of the Supreme Court. The Committee nevertheless believes for the reasons stated above that its recommendation is sound.

Fifth: An order of suspension, without loss of salary, entered against a justice, judge, or district justice against whom formal charges have been filed with the Court of the Judiciary by the Board of Complaints Regarding Judicial Conduct or against whom there has been filed an indictment or information charging a felony should not be appealable.

Comment: To permit appeal would entail undue delay. Prompt disposition of complaints is imperative.

VI. Finances

Recommendations:

First: The judicial disciplinary system should be assured by Constitutional provision that the General Assembly will appropriate sufficient funds to enable the prompt and fair investigation and adjudication of all complaints regarding judicial conduct.

Second: The financial affairs of the judicial disciplinary system should be regularly audited by the Auditor General.

Comment: As noted supra, the Board of Complaints Regarding Judicial Conduct and the Court of the Judiciary would each be responsible for preparing and administering its own budget and for seeking appropriations from the General Assembly. While the General Assembly cannot, and should not, be bound to make any

particular appropriation, the Committee believes that it would be useful to include in the Constitution a provision mandating that the judicial disciplinary system be adequately financed.

Conclusion

The highest aspiration of our society is that our government be a government under law. No doubt, given human imperfection, we shall never entirely achieve that aspiration, but we may hope that with continued effort we may steadily come closer. It is in that spirit that the Committee respectfully submits the foregoing recommendations.

The Committee does not suppose that the recommendations cannot be improved. Moreover, it recognizes that with respect to at least some of the recommendations, reasonable persons will be in disagreement. Nevertheless, the Committee submits that in substance the recommendations are sound. If they are adopted, the Committee anticipates that the quality of the judiciary will be improved, with a corresponding increase of public confidence that justice is being served.

SEPARATE STATEMENT TO THE DISCIPLINE REPORT

by Hon. Stewart J. Greenleaf*

In my view the majority of the members of the Board of Complaints Regarding Judicial Conduct should be lay persons.

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* Separate statements were not circulated to the Commission and represent the views of the individual making the statement.