



REPORT AND RECOMMENDATIONS FOR IMPROVING
PENNSYLVANIA'S JUDICIAL DISCIPLINE SYSTEM

May 2011

PENNSYLVANIANS FOR MODERN COURTS



**REPORT AND RECOMMENDATIONS FOR IMPROVING
PENNSYLVANIA'S JUDICIAL DISCIPLINE SYSTEM**



PENNSYLVANIANS FOR MODERN COURTS

MAY 2011

Shira J. Goodman and Lynn A. Marks

**Pennsylvanians for Modern Courts
Three Parkway, Suite 1320
1601 Cherry Street
Philadelphia, PA 19102
Phone: (215) 569-1150
Fax: (215) 569-9153
Email: info@pmconline.org
www.pmconline.org**

TABLE OF CONTENTS

	Page
Introduction.....	1
Purposes of this Report.....	1
Executive Summary.....	3
The Pennsylvania Judicial Discipline System Today.....	5
I. The Judicial Conduct Board and the Court of Judicial Discipline.....	5
II. The Luzerne County Scandal.....	6
III. The Interbranch Commission on Juvenile Justice.....	7
Discussion of PMC’s Recommendations for Improving Pennsylvania’s Judicial Discipline System.....	8
I. Changes Recommended to Ensure that the Judicial Discipline System is Sufficiently Funded to Fulfill its Obligation to Protect the Public from Judicial Misconduct.....	8
A. The Judicial Conduct Board and the Court of Judicial Discipline Should Advocate for Increased Funding.....	9
B. The Governor and the General Assembly Should Adequately Fund the Judicial Discipline System.....	9
C. Pennsylvania Should Consider Separating the Budget Requests of the Judicial Conduct Board and the Court of Judicial Discipline from the General Judiciary Budget.....	10
II. Changes Recommended to Promote Public Understanding of the Judicial Discipline System.....	10
A. The Board Should Expand the Information Available on its Website.....	10
B. The Board Should Increase its Participation in Public Education Programs to Promote Public Understanding of its Work and of the Judicial Discipline System.....	10
III. Changes Recommended to Ensure that the Judicial Discipline System’s First Priority is to Protect the Public From Judicial Misconduct.....	10
A. The Standards and Procedures for Emergency or Temporary Removal of a Judge Should be Clarified and Applied Consistently.....	10
B. Even if the Board Defers an Investigation, It Should Not Defer Taking Action to Protect the Public When There Are Allegations of Judicial Misconduct in Office (Courtroom Decision-Making, Disposition of Litigation, and/or Treatment of Litigants).....	13

TABLE OF CONTENTS
(continued)

	Page
C. The Constitutional Confidentiality Provisions Should be Interpreted to Protect the Parties to a Complaint, not the Board	14
D. The Constitution and State and Federal Laws Should be Amended to Facilitate Communication and Cooperation between the Board and External Law Enforcement and Investigative Authorities	15
IV. Changes Recommended to Promote the Accountability and Transparency of the Judicial Conduct Board and the Court of Judicial Discipline.....	16
A. The Board Should Institute a Process for Reconsideration of Dismissed Complaints That Meet Specific Standards	16
B. The Court of Judicial Discipline Should Articulate and Apply Clear, Consistent Grounds for Decisions, Particularly Regarding the Sanction of Removal from Office.....	17
V. Changes Recommended to Ensure the Independence of the Judicial Conduct Board and the Court of Judicial Discipline	18
A. New Rules Should Govern Terms of Service on the Board and the Court	18
1. Term Limits Should be Imposed on Members of the Board and the Court.....	18
2. Mandatory Breaks Should Be Imposed Between Service on the Board and the Court	18
B. The Recusal and Disqualification Rules for Board Members Should be Clarified and Strengthened	19
1. The Board Should Create a Standard Recusal Rule to Guide Board Members.....	19
2. The Board Should Provide Expanded Guidance about Conflicts and Potential Conflicts between Board Members and Complainants and Board Members and Judges	20
3. The Board Should Adopt Procedures to Permit Recusal Requests	21
4. Recusal Motions Should Be Decided by the Board as a Whole.....	21
C. Recusal Motions Should be Decided by the Full Court of Judicial Discipline	21
VI. Changes Recommended to Improve the Service Provided to Users of the Judicial Discipline System.....	22

TABLE OF CONTENTS
(continued)

	Page
A. The Board Should Communicate More Effectively and More Directly with Complainants	22
B. The Board Should Adopt Clear Time Limits to Govern the Disposition of Complaints	23
C. The Board Should Institute an Electronic Complaint Filing Procedure Through a Secure Portion of its Website.....	24
Conclusion	24

INTRODUCTION

The last few years have brought too many stories of Pennsylvania judges engaging in unethical behavior, violating the Code of Judicial Conduct (“the Judicial Code”), and even engaging in criminal conduct. Public trust and confidence in our courts is weakened when judges are disciplined because of unethical or improper behavior on the bench or the campaign trail and when judges face criminal charges.

What helps maintain public confidence in the face of such problems is the knowledge that: there are clear ethical rules and guidelines governing judicial behavior; judges and the public are aware of these rules; the rules are enforced; and violations of the rules are punished.

We stand at a moment, however, where Pennsylvanians cannot be sure that this is the case.

Pennsylvanians for Modern Courts (“PMC”) is a statewide, nonprofit, nonpartisan organization working to reform Pennsylvania's courts in order to achieve the ideal of fair and impartial courts to which all can come for justice. It is PMC’s hope that all Pennsylvania judges abide by the rules governing judicial conduct, act impartially, and obey the law.

At times, unfortunately, some judges fall short. Therefore, a strong and effective method for disciplining judges who act improperly is critical to maintaining public confidence in the integrity of the judiciary and the entire judicial process.

The Judicial Discipline System reminds judges and the public that the power of the robe comes with great responsibility. When that power and responsibility are abused, the abuse should be dealt with harshly, yet fairly. This is a high standard, but not an unfair one. A strong, independent judicial discipline system must protect the public by ensuring that unethical and illegal conduct by judges is halted and punished. At the same time, it must insulate judges from unfounded allegations by disappointed litigants.

PURPOSES OF THIS REPORT

PMC intends this Report to serve as a roadmap for improving Pennsylvania’s Judicial Discipline System. We are not alone in the belief that change is needed: the Judicial Conduct Board has been internally reviewing and revising its rules and procedures and, with funding provided by the Pennsylvania Supreme Court, has engaged the American Bar Association to assess its policies and procedures; the Interbranch Commission on Juvenile Justice recommended changes to the Judicial Discipline System; the Pennsylvania Bar Association’s Task Force on the Report of the Interbranch Commission on Juvenile Justice recommended changes to the Judicial Discipline System; the Supreme Court has amended some rules related to judicial conduct; and several bills have been introduced in the General Assembly that propose changes to the Judicial Discipline System.

We intend this Report to provide the unique perspective of an independent, nonpartisan group that aims to improve Pennsylvania’s Judicial Discipline System, with the primary goal of promoting its role in protecting the public from judicial misconduct. We have researched judicial discipline systems in other jurisdictions in an effort to identify best practices that could be adopted here.

We hope that the Judicial Conduct Board (“Board”), the Court of Judicial Discipline (“Court”), the Pennsylvania Supreme Court, the General Assembly, the Governor, and bar associations will look to this Report as a resource.

EXECUTIVE SUMMARY

PMC believes that changes are needed to ensure that Pennsylvania's Judicial Discipline System is empowered to act – and does act – first and foremost to protect the public. Public understanding of the Judicial Discipline System should be enhanced. Changes are needed to ensure the independence of the bodies that comprise Pennsylvania's Judicial Discipline System and to improve the transparency and accountability of those bodies. Finally, changes in the operations of the Judicial Discipline System are needed to improve the service provided to those who use it.

What follows is an outline of PMC's recommendations to achieve these outcomes and to ensure that Pennsylvania's Judicial Discipline System functions more effectively to protect the public.

- I. Changes Recommended to Ensure that the Judicial Discipline System is Sufficiently Funded to Fulfill its Obligation to Protect the Public from Judicial Misconduct**
 - The Judicial Conduct Board and the Court of Judicial Discipline Should Advocate for Increased Funding
 - The Governor and the General Assembly Should Adequately Fund the Judicial Discipline System
 - Pennsylvania Should Consider Separating the Budget Requests of the Judicial Conduct Board and the Court of Judicial Discipline from the General Judiciary Budget
- II. Changes Recommended to Promote Public Understanding of the Judicial Discipline System**
 - The Board Should Expand the Information Available on its Website
 - The Board Should Increase its Participation in Public Education Programs to Promote Public Understanding of its Work and of the Judicial Discipline System
- III. Changes Recommended to Ensure that the Judicial Discipline System's First Priority is to Protect the Public From Judicial Misconduct**
 - The Standards and Procedures for Emergency or Temporary Removal of a Judge Should be Clarified and Applied Consistently
 - Even if the Board Defers an Investigation, It Should Not Defer Taking Action to Protect the Public When There Are Allegations of Judicial Misconduct in Office (Courtroom Decision-Making, Disposition of Litigation, and/or Treatment of Litigants)
 - The Constitutional Confidentiality Provisions Should be Interpreted to Protect the Parties to a Complaint, not the Board

- The Constitution and State and Federal Laws Should be Amended to Facilitate Communication and Cooperation Between the Board and External Law Enforcement and Investigative Authorities

IV. Changes Recommended to Promote the Accountability and Transparency of the Judicial Conduct Board and the Court of Judicial Discipline

- The Board Should Institute a Process for Reconsideration of Dismissed Complaints That Meet Specific Standards
- The Court of Judicial Discipline Should Articulate and Apply Clear, Consistent Grounds for Decisions, Particularly Regarding the Sanction of Removal from Office

V. Changes Recommended to Ensure the Independence of the Judicial Conduct Board and the Court of Judicial Discipline

- New Rules Should Govern Terms of Service on the Board and the Court
 - Term Limits Should be Imposed on Members of the Board and the Court
 - Mandatory Breaks Should Be Imposed Between Service on the Board and the Court
- The Recusal and Disqualification Rules for Board Members Should be Clarified and Strengthened
 - The Board Should Create a Standard Recusal Rule to Guide Board Members
 - The Board Should Provide Expanded Guidance about Conflicts and Potential Conflicts between Board Members and Complainants and Board Members and Judges
 - The Board Should Adopt Procedures to Permit Recusal Requests
 - Recusal Motions Should Be Decided by the Board as a Whole
- Recusal Motions Should be Decided by the Full Court of Judicial Discipline

VI. Changes Recommended to Improve the Service Provided to Users of the Judicial Discipline System

- The Board Should Communicate More Effectively and More Directly with Complainants
- The Board Should Adopt Clear Time Limits to Govern the Disposition of Complaints
- The Board Should Institute an Electronic Complaint Filing Procedure Through a Secure Portion of its Website

THE PENNSYLVANIA JUDICIAL DISCIPLINE SYSTEM TODAY

I. The Judicial Conduct Board and the Court of Judicial Discipline

In 1993, the Pennsylvania Constitution was amended to reform the Judicial Discipline System that had been in existence since 1968. The current system is two-tiered, with the Judicial Conduct Board, which investigates and prosecutes allegations of judicial misconduct, and the Court of Judicial Discipline, which adjudicates charges of judicial misconduct.

The Board is composed of twelve members: three judges, three lawyers, and six non-lawyers. Half of the members are chosen by the Governor; the other half are chosen by the Pennsylvania Supreme Court.¹

The Court of Judicial Discipline is composed of eight members: four judges, two lawyers, and two nonlawyers. Half the members are appointed by the Governor, and half are appointed by the Supreme Court.²

The Pennsylvania Supreme Court hears appeals of Court of Judicial Discipline rulings, except appeals involving members of the Supreme Court. In such cases, a Special Tribunal is convened to avoid having members of the Supreme Court hear an appeal involving one of their colleagues.³

According to Board statistics, in 2010, 649 complaints were filed with the Board and 596 were disposed of. During that year, the Board filed formal charges with the Court of Judicial Discipline against three judges.⁴

In 2010, 566 complaints were dismissed after a preliminary inquiry. Seven more were dismissed after a full investigation. Ten cases were dismissed after letters of caution⁵ were issued, and seven were dismissed after letters of counsel⁶ were issued. In addition, three judges resigned.⁷

¹ Pa. Const. art. V, §§ 18(a)(1) & (2). The Governor selects 1 Common Pleas Court judge, 2 lawyers, and 3 nonlawyers; the Supreme Court selects 1 judge of either the Superior or Commonwealth Court, 1 magisterial district judge, 1 lawyer, and 3 nonlawyers

² Pa. Const. art. V, § 18(b). The Governor selects 1 judge of the Common Pleas, Superior, or Commonwealth Courts; 1 non-lawyer; and 2 non-judge members of the bar. The Supreme Court selects 2 judges of the Common Pleas, Superior, or Commonwealth Courts; 1 magisterial district judge; and 1 nonlawyer.

³ This system replaced the Judicial Inquiry and Review Board, which had investigated allegations of misconduct and recommended sanctions to the Supreme Court (including in cases involving allegations against members of the Supreme Court).

⁴ Proposed Budget of the Unified Judicial System 2011-2012, at 164.

⁵ A letter of caution is a "private warning of conduct that could lead to judicial misconduct if not corrected." 2009 Annual Report of the Judicial Conduct Board, at 17.

Clearly, only a very small percentage of complaints result in the Board filing charges and pursuing formal hearings before the Court of Judicial Discipline. And only a very small subset of the cases that reach the Court result in the ultimate sanction of removal from the bench.⁸

These numbers may demonstrate that the majority of complaints filed with the Board are:

- misfiled, in that they raise issues more appropriately raised in ongoing litigation – either at the trial court or appellate level;
- outside the jurisdiction of the Board, in that they raise issues properly addressed by another body, such as the Disciplinary Board of the Supreme Court of Pennsylvania (which addresses complaints about attorney misconduct); or
- without merit, in that they do not give rise to probable cause that judicial misconduct occurred.

However, the low numbers have created a perception that the Board does not vigorously investigate or prosecute judges. It is necessary to reverse this perception and instill confidence in the public that the Board acts always with the priority of protecting the public.

II. The Luzerne County Scandal

In early 2009, Pennsylvanians were shocked when two judges from Luzerne County, Michael Conahan and Mark Ciavarella, pleaded guilty to federal charges involving a kickback scheme related to the sentencing of juvenile offenders to private detention facilities. Public outrage ensued when it was revealed that questions about the high rate of sentencing of juveniles without attorney representation had twice been raised with the Pennsylvania Supreme Court, which had refused to hear the case.

Extensive media coverage of the case revealed widespread corruption in the Luzerne County courthouse and a pattern of officials, lawyers, and others “looking the other way.” In addition, reports began to circulate that complaints about the judges had been filed with the Judicial Conduct Board but had not been investigated.

This highlights the need to ensure that lawyers, judges, and others who know of or suspect judicial misconduct report it to the Board. Reports by lawyers and others that they feared reporting misconduct because they expected either inaction by the Board or retaliation by the judges underscores the need for a strong, responsive, trusted Judicial Discipline System. Unfortunately, the Board’s handling of the complaints it received regarding Luzerne County

⁶ A letter of counsel is a private letter issued when there is "sufficient evidence of judicial misconduct" but it appears, based on the evidence, to be an isolated incident. 2009 Annual Report of the Judicial Conduct Board, at 17.

⁷ Proposed Budget of the Unified Judicial System 2011-2012, at 164.

⁸ 2009 Annual Report of the Judicial Conduct Board, at 33-38.

undermined confidence in its willingness and ability to protect the public from judicial misconduct.

III. The Interbranch Commission on Juvenile Justice

Realizing that decisive action needed to be taken, the Pennsylvania Supreme Court, the Governor, and the General Assembly agreed to the authorization of the Interbranch Commission on Juvenile Justice (“ICJJ”) to study “how the Luzerne County justice system failed, to restore public confidence in the administration of justice and to prevent similar events from occurring.”⁹ The authorizing legislation specifically empowered the ICJJ to “review procedures used in responding to judicial and attorney conduct and to make recommendations as necessary with respect to both disciplinary systems.”¹⁰

The ICJJ worked for just under a year, held eleven days of public hearings throughout the Commonwealth, heard testimony from more than sixty witnesses, and issued a report of its findings and recommendations.¹¹ For present purposes, the most significant aspect of these hearings was the testimony from the staff and members of the Judicial Conduct Board.¹²

Through the Board’s testimony before the ICJJ, it was ultimately revealed that in 2006, the Board received an anonymous complaint alleging extensive corruption in the Luzerne County courthouse, including *ex parte* communications, case fixing, nepotism, changes to the handling of juvenile cases, and an unusually high rate of placement of juveniles in private detention facilities. Although the Board’s Chief Counsel eventually prepared a memorandum for the Board about this complaint and recommended an investigation, he later recommended instead that the complaint be tabled while the prosecution of another judge from the same county was proceeding before the Court of Judicial Discipline.

No satisfactory explanation has been offered for this recommendation, nor for the fact that no investigation ever occurred into the anonymous complaint. Moreover, the complaint was not referred to outside law enforcement authorities until it was specifically requested by the federal authorities a year and a half after it was filed with the Board.

⁹ Administrative Office of Pennsylvania Courts, News Release “Chief Justice Names Members of Juvenile Justice Commission,” at 2 (Aug. 10, 2009).

¹⁰ H.B. 1648 (2009).

¹¹ In May 2010, the ICJJ produced a comprehensive report with extensive recommendations about how to improve the juvenile justice system, the Judicial Discipline System, and the attorney discipline system. The report is available at http://www.pacourts.us/NR/rdonlyres/6A64EA29-B7FD-4468-8CD1-075548469ED9/0/ICJFFinalReport_100604.pdf.

¹² Ultimately, the ICJJ’s request for documents from the Board led to litigation between the Board and the ICJJ regarding the confidentiality of Board materials. The case was resolved by the Pennsylvania Supreme Court, and the Board produced certain material under seal. *In re: Interbranch Commission on Juvenile Justice*, 988 A.2d 1269 (Pa. 2010).

The ICJJ’s investigation revealed that the Board had been alerted to serious problems in Luzerne County and failed to act on them. Had the Board investigated the anonymous complaint or consulted with outside law enforcement authorities, the scandal in Luzerne may have been revealed earlier, the offending judges probably would have been removed from the bench more quickly, and many juveniles likely would have been spared the egregious treatment and violation of their rights suffered at the hands of those judges.

DISCUSSION OF PMC’S RECOMMENDATIONS FOR IMPROVING PENNSYLVANIA’S JUDICIAL DISCIPLINE SYSTEM

The two-tiered judicial discipline system that Pennsylvania uses – separating the investigative and prosecutorial functions from the dispositional function – is designed to create independent agencies that conduct fair, impartial investigations that result in fair, impartial hearings. Although PMC believes this system should be preserved, we recommend several changes to it.¹³

PMC’s recommendations can be implemented through action by each of the three branches of government, including:

- constitutional amendments;
- legislative action;
- rule changes at the Judicial Conduct Board and/or the Court of Judicial Discipline;
- rulemaking by the Pennsylvania Supreme Court; and/or
- agreements between the Governor, General Assembly, and Supreme Court.

I. Changes Recommended to Ensure that the Judicial Discipline System is Sufficiently Funded to Fulfill its Obligation to Protect the Public from Judicial Misconduct

The Judicial Discipline System, like the entire Unified Judicial System, suffers from severely inadequate funding. The Pennsylvania Constitution provides that: “The budget request of the [Board of Judicial Conduct] shall be made by the board as a separate item in the request submitted by the Supreme Court on behalf of the Judicial Branch to the General Assembly.”¹⁴ Similar language governs the budget request of the Court of Judicial Discipline.¹⁵

In recent years, the Board has operated with only a Chief Counsel, an Assistant Counsel, and three investigators to cover complaints from a judicial system comprised of 1,025 justices,

¹³ Some of PMC’s recommendations were presented in its testimony to the ICJJ, some have grown out of findings made by the ICJJ, and some have developed from our research about judicial discipline systems in other states.

¹⁴ Pa. Const., art. V, § 18(a)(6).

¹⁵ Pa. Const., art. V, §18(b)(4).

judges, and magisterial district judges (collectively referred to herein as “judges”) who handle more than three million cases per year. This is clearly insufficient.

A. The Judicial Conduct Board and the Court of Judicial Discipline Should Advocate for Increased Funding

The Judicial Conduct Board and Court of Judicial Discipline should advocate for sufficient funding to support the hiring of additional staff, technological upgrades that will make it easier for public users of the system, and expanded public education efforts.

Although the Board and Court have requested increases in their budget allocations this year, the requested increases are modest, likely in recognition of Pennsylvania’s severe budget crisis. While fiscal restraint is admirable, if inadequate funding is hampering the ability of the Judicial Discipline System to function, the Board and Court must advocate for significant increases in funding.

B. The Governor and the General Assembly Should Adequately Fund the Judicial Discipline System

Pennsylvania’s severe budget shortfalls should not permit continued underfunding of the Judicial Discipline System, a critical mechanism for protecting the public and increasing public confidence in the courts. The Governor and General Assembly should work to ensure that the Judicial Discipline bodies are fully funded. Economic pressure and budgetary concerns should never be factors that influence whether a judge is investigated or prosecuted for misconduct.

All three branches of government must work together to ensure that the Judicial Discipline System has sufficient funds to process cases, investigate complaints, prosecute judges, and educate the public about its work.

C. Pennsylvania Should Consider Separating the Budget Requests of the Judicial Conduct Board and the Court of Judicial Discipline from the General Judiciary Budget

Including the budget for the Judicial Discipline bodies as part of the broader Judiciary Budget means that as the Judiciary Budget is reduced, so too might the budget for the Judicial Discipline bodies be. In many other states,¹⁶ the judicial discipline system makes a direct budgetary request to the legislature, and the budget is not part of the general judiciary budget.

¹⁶ States that have a separate budgeting process for the judicial discipline system include: Alabama, *see, e.g.*, AL Const. amend. 581 art. VI 6.17(d); Alaska, *see, e.g.*, State of Alaska Commission on Judicial Conduct, "Commission Finances and Budget" <http://www.ajc.state.ak.us/conduct/conduct.html#finances>; Arizona, *see, e.g.*, Judicial Branch, "Commission on Judicial Conduct Overview" <http://www.azcourts.gov/ethics/moreinformation/overview.aspx>; California, *see, e.g.*, CA Const art. VI sec. 18(1); North Dakota, *see, e.g.*, N.D. Century Code Ann. Jud. Branch § 27-23-12 (Westlaw 2011); New Hampshire, *see, e.g.*, N.H. Sup. Ct. Rules R 39(5)(a); New Mexico, *see, e.g.*, State of New Mexico Judicial Standards Commission, "2009 Annual Report" p. 47 (2009) http://www.nmjsc.org/docs/annual_reports/FY09AnnualReportPt1.pdf; and New York, *see, e.g.*, New York

Pennsylvania should consider amending the Constitution to provide for such a separate budgetary request. This would enable the Judicial Discipline System to directly request funds and to testify before the General Assembly to explain the request, rather than having its budget rolled up in the general Judiciary Budget.

In the interim, the Supreme Court should make clear in its budget requests to the General Assembly the importance of fully funding the Judicial Discipline System, and the General Assembly should invite representatives of the Board and the Court of Judicial Discipline to testify in support of their budgetary needs.

II. Changes Recommended to Promote Public Understanding of the Judicial Discipline System

We recognize the Board's important efforts to improve and expand – through its website and its Annual Report – the information available to the public about its procedures and the Judicial Discipline System. We especially applaud the inclusion in the Annual Report of the summaries of the complaints filed with the Board, the status reports on pending cases, and the information about disciplinary action taken throughout the year.

PMC also was pleased to see the Board's public release in 2010 of its Internal Operating Procedures ("IOPs"), as well as the Board's ongoing efforts to ensure that the IOPs are consistent with the Rules of Procedure and Board Member Rules of Conduct. It is important that these IOPs are in written form and available to the public, and we note favorably that these procedures are available on the Board's website.

Nonetheless, there is a general lack of public knowledge about the Judicial Discipline System and how it operates. More can and should be done to fill the information vacuum that surrounds the Judicial Discipline System. We understand that the Board is severely underfunded, but expanded public education should be prioritized.

A. The Board Should Expand the Information Available on its Website

In addition to the recent additions and improvements to the Board's website, PMC recommends that the Board's website also include a full explanation of the investigative process and the possible outcomes of a complaint filed with the Board. Although this information is included within the IOPs which are available on the Board's website, we recommend that it be featured more prominently on the website. This would educate the public about how the Board works, minimize questions about Board procedures, and make the operations of the Board more transparent and better understood.

In addition, we recommend that all rules governing Board policies, procedures, and member conduct be posted electronically in a prominent place on the website. This will facilitate easier access to the rules and increase the transparency of Board operations.

State Commission on Judicial Conduct, "Budget" (Aug. 10, 2010)
<http://www.scjc.state.ny.us/General%20Information/budget.htm>.

B. The Board Should Increase its Participation in Public Education Programs to Promote Public Understanding of its Work and of the Judicial Discipline System

We recommend that the Board expand its participation in outreach programs to educate the public about the Judicial Discipline System in general and the operations of the Board in particular. We appreciate that this will further tax limited resources, but it is critical that the public understand the role of the Judicial Discipline System and see that it is an accessible avenue for addressing concerns about judicial conduct.

Public education programs need not be separate conferences or continuing legal education sessions sponsored by the Board. Many legal and civic organizations hold conferences, and we believe they would be willing to include presentations about the Judicial Discipline System. PMC is willing to work with the Board on outreach programs, and we know the Pennsylvania Bar Association is as well.

III. Changes Recommended to Ensure that the Judicial Discipline System's First Priority is to Protect the Public From Judicial Misconduct

PMC believes that the first priority of the Judicial Discipline System must be protection of the public from judicial misconduct. Moreover, the public must perceive that the Board and the Court act in service of this mission. This priority also serves the broader goal of protecting the integrity of the judicial system.

A. The Standards and Procedures for Emergency or Temporary Removal of a Judge Should be Clarified and Applied Consistently

Not all types of judicial misconduct are equal. That is why there are different levels of discipline that are imposed, up to and including removal from the bench. In some cases, as in the Luzerne County scandal, alleged judicial misconduct is so dangerous and egregious that judges cannot be permitted to remain on the bench, presiding over cases and determining litigants' fate, until it is determined whether or not the misconduct occurred. In such cases, the Judicial Discipline System must elevate protection of the public above all other concerns.

Accordingly, there are avenues for temporary removal of a judge when charges have been filed by the Board or if criminal charges are pending against a judge. The Constitution specifically grants this power to the Court of Judicial Discipline:

Prior to a hearing, the court may issue an interim order directing the suspension, with or without pay, of any justice, judge or justice of the peace against whom formal charges have been filed with the court by the board or against whom has been filed an indictment or information charging a felony. An interim order under this paragraph shall not be considered a final order from which an appeal may be taken.¹⁷

¹⁷ Pa. Const. art. V, § 18(d)(2).

In addition, the Board's IOP 4.13 refers to the "emergency removal when administration of justice is significantly impaired." This procedure is an important safeguard for the public and particularly for parties in the judge's courtroom.

What is missing – and clearly needed – is an explanation of how and when the Board can act to protect the public before formal charges have been filed with the Court or criminal charges have been filed against the judge. It appears that there may be an alternate avenue available for such cases; namely, an appeal to the Supreme Court of Pennsylvania to exercise its temporary removal powers.

The Supreme Court recently held that it has the inherent power to order an emergency suspension of a judge during an investigation by the Board.¹⁸ The *Merlo* Court emphasized "the imperative to safeguard the integrity of the judicial system while the prosecution of judicial misconduct charges advances. The public interest in minimizing the disruption necessarily occasioned by the pendency of judicial misconduct charges on the operation of the judicial system is significant, and requires immediate action."¹⁹

The Supreme Court's assertion of authority in this realm does not absolve the Board or the Court of Judicial Discipline of responsibility or authority to act. The Board should have alternative avenues for requesting an emergency removal, depending on the status of the case. These procedures should be clearly outlined in Board rules and procedures and should be consistently followed. This will ensure that there is no impediment to the Board acting to protect the public from a judge accused of serious misconduct in office, regardless of the procedural status of the case.

A decision by either the Court of Judicial Discipline or the Supreme Court to temporarily remove a judge should be unreviewable, even by the other body. The purpose is to ensure that the public is protected while an investigation is ongoing; without some finality to the process, that protection will be delayed.

PMC recommends that:

- the Board explain in greater detail in its rules and procedures how and when the emergency removal procedure will be invoked;
- the Board delineate a procedure for requesting emergency removal by the Supreme Court in cases where formal charges have not yet been filed with the Court of Judicial Discipline or criminal charges have not yet been filed against the judge;
- the Court of Judicial Discipline make clear in its rules the procedures and circumstances under which it will issue an interim order of suspension; and

¹⁸ *In re Merlo*, ---A.3d ---, 2011 WL 453008 (Pa. 2011).

¹⁹ *In re Merlo*, ---A.3d ---, 2011 WL 453008 (Pa. 2011).

- the Supreme Court clearly explain and apply the standards governing its authority to temporarily suspend a judge.
- B. *Even if the Board Defers an Investigation, It Should Not Defer Taking Action to Protect the Public When There Are Allegations of Judicial Misconduct in Office (Courtroom Decision-Making, Disposition of Litigation, and/or Treatment of Litigants)*

Judicial misconduct in office – misconduct related to a judge’s courtroom decision-making, disposition of litigation, and/or treatment of litigants – is the worst form of ethical misconduct. Allegations of case-fixing, extortion, accepting bribes, favoring one party over another because of personal relationships, substantive *ex parte* conversations, or anything else that improperly affects how a litigant fares in the judge’s courtroom are wholly at odds with the judicial function. Such allegations must be accorded top priority by the Board. The Board’s primary goals must be to ensure the integrity of the courtroom, protect the litigants facing that judge, and halt such misconduct as quickly as possible.

We are aware that at times such allegations may also involve violations of criminal laws. However, PMC believes cases involving allegations of misconduct in office and subversion of the judicial function require the special attention of the Board. The Board must serve – and must be viewed by the public as serving – as the primary defender of the judicial system with respect to improper actions by judges, irrespective of who else is investigating the judge.

In some cases, it may be appropriate for the Board to defer investigation because external criminal investigations are pending. We submit, however, that even if the Board determines that it should defer an *investigation* into allegations of judicial misconduct in office (allegations related to the judicial role or function itself), it cannot delay taking *some action* to protect the public. In such cases, the obligation of the Board to protect our system of justice from rogue judges should wait for no other process.

IOP 4.07 defines the circumstances in which the Board may defer an investigation or refer allegations in a complaint to an external law enforcement agency:

Any complaint filed with the Board that alleges criminal activity by a respondent judicial officer shall be brought to the Board’s immediate attention but no later than thirty (30) days of receipt at the Board’s office. . . . The Board shall review the particulars of the complaint and may, by majority vote, refer the matter to the appropriate law enforcement agency. The Board also shall determine whether it will actively investigate any part of the complaint that addresses potential ethical violations that are severable from the alleged criminal conduct. In its consideration of whether or not to retain jurisdiction in whole or in part, the Board shall consider whether its investigation may be prejudicial to the process of a pending grand jury investigation or other law enforcement investigation. The Board also may consider whether a duplicative, potentially over-lapping investigation would

represent the best use of its limited resources. In the case of a referral, the Board may continue to monitor the status of the external investigation to the extent practicable, and shall hold in abeyance its prosecutorial authority awaiting the outcome of the disposition by the law enforcement agency.

Although we commend the Board for updating its procedures after the Luzerne problems came to light, PMC still believes these procedures are insufficient. What is needed is a clear procedure outlining what steps the Board will take to protect the public during a deferred investigation awaiting the outcome of external law enforcement activity.

As noted above, procedures exist under which the Board, the Court of Judicial Discipline, and the Pennsylvania Supreme Court may act on an emergency basis to temporarily remove a judge from service. PMC recommends that the Board's IOPs make clear that this option for immediate action will be pursued in cases involving charges of misconduct in office, even when an outside criminal investigation is pending and even if a full investigation by the Board is being deferred.

Although the Board should take care not to impede or jeopardize a state or federal criminal investigation or violate grand jury secrecy, respect for outside law enforcement activities should not derail the temporary removal of a judge from service when public safety requires it. In such cases, the Board must be mindful of its duty to protect the public. This is the purpose of the constitutional procedures that permit temporary removal.²⁰

The people of Pennsylvania need and deserve certainty – certainty that the Board will act to protect the public from judicial misconduct in office, regardless of pending criminal investigations.

C. The Constitutional Confidentiality Provisions Should be Interpreted to Protect the Parties to a Complaint, not the Board

The Constitution provides that “All proceedings of the board shall be confidential except when the subject of the investigation waives confidentiality.”²¹ This language was intended to ensure that litigants and lawyers are not afraid to file complaints against judges they believe have engaged in misconduct and to protect judges when erroneous, unfounded, or malicious complaints are filed.

The Luzerne County scandal and its aftermath, however, demonstrated that the confidentiality rule can be used as a shield to avoid scrutiny of Board action or inaction. During the ICJJ hearings, the Board resisted providing information about a complaint and its handling to the ICJJ, based on its interpretation of the confidentiality provisions.

²⁰ These procedures protect the judge as well: usually, the judge is temporarily removed and placed on administrative suspension with pay. There usually is no loss of salary or benefits, nor is the judge being permanently removed from the bench before a full and fair investigation and hearing are conducted.

²¹ Pa. Const. art V, § 18(a) (8).

The two bodies litigated the issue before the Supreme Court.²² The Supreme Court held that the Board was required to submit some of the requested materials, although under seal, in accordance with Board Rule of Procedure 18(C), which provides: “Information related to violations of criminal laws may be disclosed to the appropriate government agency.” The Supreme Court found the ICJJ was such an entity.

PMC believes that the Board’s IOP governing confidentiality misconstrues and improperly expands the constitutional confidentiality provisions into a privilege for the Judicial Conduct Board, its members, and its staff. IOP 5.01 provides:

All complaints, processes, deliberations and records of the Board shall be treated as strictly confidential, and shall not be divulged in any context or in any forum except when otherwise authorized by the Authority or in response to a court order. The respondent judicial officer may waive confidentiality with respect to the complaint, but the Board shall reserve judgment, in its discretion, whether or not to make the complaint public. . . . In support of the broad privilege of confidentiality concerning the Board’s work, see Pa. Constit. Art. V., § 18(a)(8). . . .

This expansive reading of the confidentiality provisions ignores the purpose of the confidentiality rules and instead shifts the protection to the Board and its members. The Board’s claim to this expanded confidentiality privilege is not intended to protect the public, and it is not being asserted on behalf of judges against whom complaints have been filed. The Constitution provides full immunity for Board members for actions taken in their role as Board members, and it is not apparent why the Board would need any further protections or privileges.²³

We recommend that the 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.

D. The Constitution and State and Federal Laws Should be Amended to Facilitate Communication and Cooperation between the Board and External Law Enforcement and Investigative Authorities

External investigation of a judge must be permitted to proceed unimpeded by the confidentiality provisions of the Constitution. PMC therefore recommends that the Constitution be amended to require the Board to inform the appropriate legal authorities when a complaint raises allegations of criminal misconduct.

²² See *In re: Interbranch Commission on Juvenile Justice*, 988 A.2d 1269 (Pa. 2010).

²³ The cases cited by the Board (in IOP 5.01) in support of its interpretation mainly involve discovery disputes and the deliberative process privilege. While the deliberative process privilege should protect deliberations of Board members, there are limits to its coverage.

Board Rule of Procedure 18(C) and IOP 4.07 permit the Board to refer matters to the appropriate external law enforcement authorities when a complaint raises issues within the jurisdiction of such authorities. However, there is no guidance about how confidentiality concerns come into play.

To avoid future conflicts such as the one between the Board and the ICJJ, we recommend that the Constitution be amended to provide that the Board must respond to subpoenas by law enforcement agencies, Inspectors General, and specially convened bodies authorized to investigate the Board (such as the ICJJ).

At the same time, external investigations of judges must not impede the ability of the Board to protect the public from judicial misconduct. PMC therefore recommends that the Constitution and, as necessary, existing statutes be amended to require state and federal prosecutors to fully inform the Board of information they uncover in the course of an investigation relating to the actions of a judge in the exercise of his or her official duties.

Federal and state grand jury secrecy rules should be amended to provide that the Board can and will be informed of an investigation into judicial misconduct in office. Without such communication, the Board may be unaware of the allegations and unable to avail itself of the temporary suspension or emergency removal processes to protect the public.

Finally, we support the Supreme Court's amendment to the Rules of Judicial Administration requiring that any judge who receives notice that he or she is the target of an investigation notify the Supreme Court within five days.²⁴ We further support the provision in Senate Bill 59, Printer Number 44 (2011) that requires a judicial officer who receives notice that s/he is the target of a grand jury investigation or other law enforcement investigation to notify the Board of that status.

IV. Changes Recommended to Promote the Accountability and Transparency of the Judicial Conduct Board and the Court of Judicial Discipline

A. The Board Should Institute a Process for Reconsideration of Dismissed Complaints That Meet Specific Standards

Under current Board procedures, there is no appeals process if a complaint is dismissed. Many complainants who learn their complaints are dismissed do not understand the process and often feel that the Board did not give their complaints full attention. PMC recognizes that most dismissals are fully warranted. However, we also recognize the public's lack of understanding of and frustration with the Judicial Discipline System.

The ICJJ recommended that there be consideration given to instituting an appeals process for dismissed complaints.²⁵ Having no recourse to "undo" the Board's dismissal of a complaint can

²⁴ Chief Justice Ronald D. Castille, A Progress Report on Implementation of the Recommendations of the Interbranch Commission on Juvenile Justice (Mar. 1, 2011).

²⁵ Interbranch Commission on Juvenile Justice Report, at 56.

be frustrating, yet enacting an appeals process with a separate body reviewing the Board's work would create undue administrative and financial burdens.

We recommend that the Board institute a reconsideration procedure, similar to the one used in Texas.²⁶ The Texas procedure provides that a complainant may request reconsideration of a dismissal but only if "the complainant provides additional evidence of misconduct committed by the judge."²⁷ Without such evidence, the request to reconsider is denied. If such evidence is supplied, the Commission may vote to reopen the complaint or affirm the dismissal.

This procedure would not unduly overburden the Board by opening up the reconsideration process to every complainant. But it would offer the opportunity for further investigation or consideration if new or additional evidence has come to light.

B. The Court of Judicial Discipline Should Articulate and Apply Clear, Consistent Grounds for Decisions, Particularly Regarding the Sanction of Removal from Office

The Court of Judicial Discipline is a court of record. As such, its procedures and rules are clearly set forth. The Court resolves cases before it by holding public hearings and announcing its decisions in written, published opinions. Like any court, it must apply clear standards to govern the disposition of its cases.

The public and the judiciary look to the Court for clear statements about what constitutes judicial misconduct and how such misconduct will be punished. Accordingly, the standards governing the imposition of sanctions by the Court, especially removal from the bench, should be clearly articulated and applied consistently.

Some Court decisions in the last few years, however, have resulted in seemingly inconsistent verdicts. In some cases, judges who were severely chastised for misconduct by the Court received only short suspensions.

The public must be able to reasonably expect that similar misconduct will result in similar sanctions by the Court. Judges, too, need this consistency. Without it, they are unable to rely on the Court's decisions for much needed guidance. The Court's decisions – which are based on real conduct by sitting judges – are the best source of information for judges about the Judicial Code, ethical requirements, and the constraints on judicial behavior.

²⁶ See e.g., TX Gov't Code Jud. Branch § 33.035. Other states with reconsideration procedures include Arizona, see, e.g., AZ Cmmsn on Jud. Cond. Rules R 23 (2010); Louisiana, see, e.g., LA Rules of the Jud. Cmmsn. R IV (2010); Ohio, see, e.g., SC Rules for the Gov't of the Bar of OH R V § 4(I)(5) (2006); and Utah, see, e.g., UT Admin. Code Jud. Cond. Cmmsn. Admin R 595-3-13 (2011).

²⁷ TX Gov't Code Jud. Branch § 33.035.

We urge the Court to clearly articulate the standards guiding its decision-making and develop a consistent line of cases. This will help judges and the public understand what is expected of the judiciary and will make clear the consequences for failing to meet those high standards.

V. Changes Recommended to Ensure the Independence of the Judicial Conduct Board and the Court of Judicial Discipline

The 1993 Constitutional Amendment that created the current Judicial Discipline System intentionally separated the investigative and prosecutorial functions from the dispositional function. The goal was to have two independent bodies comprising the Judicial Discipline System.

Over time, however, members have served multiple terms on the Board and Court. Moreover, there has been significant overlap in the memberships of these bodies, as individuals move from service on the Board to the Court and vice versa. We have heard complaints that the Board and Court appear to be interconnected agencies rather than independent bodies.

The proposals that follow require amending the Constitution. In the interim, the recommended changes can be accomplished by agreement of the authorities who appoint the members of the Board and Court: the Pennsylvania Supreme Court and the Governor.

A. New Rules Should Govern Terms of Service on the Board and the Court

1. Term Limits Should be Imposed on Members of the Board and the Court

The Constitutional provisions governing the Judicial Discipline System set 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 must wait a year following conclusion of his or her four year term before being reappointed to that body.²⁸

Institutional memory and a fuller understanding of the work of either body may be informed by continued service. However, there must be some consideration for the fresh perspective that new members bring.

PMC recommends that there be a maximum number of years that one can serve on either body: no one should be permitted to serve more than three full terms on either the Board or the Court. Further, no one should be permitted to serve more than four full terms total when time on both bodies is combined.

2. Mandatory Breaks Should Be Imposed Between Service on the Board and the Court

The frequent rotation of the members of the Board and Court weakens – at least in appearance – the independence of the bodies and the purpose of having a two-tiered discipline system. PMC

²⁸ Pa. Const. art. V, §§ 18(a)(3) & (b)(2).

recommends that restrictions be imposed on an individual's ability to serve on the Board and then, following that service, on the Court (or vice versa). We recommend that a break in service of at least two years be required during which a former member of the Board should not be permitted to be appointed to the Court and vice versa.²⁹

B. The Recusal and Disqualification Rules for Board Members Should be Clarified and Strengthened

To function effectively, the Board must always be wary of actual or potential conflicts of interest and act to ensure that when such conflicts arise, there are clear procedures in place to guarantee a fair, unbiased resolution. Further, the Board must be perceived by the public as acting impartially and fairly to resolve complaints, without regard to self-interest or bias towards or against a particular complainant or judge.

1. The Board Should Create a Standard Recusal Rule to Guide Board Members

Recusal rules may be found in Board Rule of Procedure 10,³⁰ Judicial Conduct Board Member Rules of Conduct 7³¹ and 8,³² and IOP 2.15.³³ Each of these has different content. The Board

²⁹ This will also minimize the necessity for a member of the Court to recuse from cases in which he or she may have made decisions as a member of the Board.

³⁰ Board Rule of Procedure 10 provides: "No member of the Board shall participate in a proceeding in which the member is a complainant, the subject of the complaint, a party, or a material witness."

³¹ Judicial Conduct Board Member Rule of Conduct 7, Lawyer-Member Practicing Before a Judge Subject to Judicial Conduct Board Investigation or Complaint, provides:

- (1) When a lawyer-member is appearing before a Judicial Officer for pretrial or trial proceedings and learns the Judicial Officer is the subject of a complaint, or investigation by the Board, the lawyer-member shall refrain from voting at any time on any Board action with regard to the Judicial Officer on that matter. However, because a lawyer-member may have pertinent information concerning the Judicial Officer under scrutiny, the member may participate in discussions before the Board concerning the Judicial Officer.
- (2) If a lawyer-member is assigned to a Judicial Officer against whom the Board has filed formal charges, the member must seek the Judicial Officer's recusal, and, if recusal is refused, the member shall refrain from voting on matters involving those charges that may come before the Board.

³² Judicial Conduct Board Member Rule of Conduct 8, Recusal or Disqualification, provides:

- (1) General Rule. A member of the Board shall withdraw from participating in a matter or proceeding where there is a substantial showing that the member cannot participate in a fair and reasonable manner, including but not limited to instances where the member:
 - (a) has a fixed bias or prejudice for or against the Judicial Officer, or personal knowledge of disputed evidentiary facts relating to the matter or proceeding;
 - (b) is a lawyer, and served as a lawyer in connection with any events relating to the matter or proceeding which is the subject of the complaint, or a lawyer with whom the member practices or previously practiced law

should clarify its rules and procedures in a single set of guidelines governing recusal and disqualification.

2. The Board Should Provide Expanded Guidance about Conflicts and Potential Conflicts between Board Members and Complainants and Board Members and Judges

The Board’s current recusal rules are underinclusive. There is insufficient direction given as to how a member should identify actual or potential conflicts of interest aside from direct participation in a pending case before the judge involved in the Board action.

The Board should include in its recusal rules guidance about out-of-court relationships between Board members and judges that may create a basis for recusal. For example, the Court of Judicial Discipline specifically prohibits its nonjudicial members from endorsing, soliciting for, or contributing to judicial candidates.³⁴ PMC recommends that a similar rule be adopted for Board members. At a minimum, the Board should include in the recusal rules a provision like the Arkansas rule that requires a member to recuse if the matter at hand involves a judge whom the member has publicly supported or opposed in a judicial campaign within five years of the proceedings.³⁵

Currently, there is virtually no consideration given to conflicts that could exist or arise between a complainant and a Board member. This is a crucial omission which should be corrected; such conflicts are just as problematic as conflicts between a judge and Board member.

served during such association as a lawyer concerning the matter, or the member or such lawyer has been a material witness concerning it;

(c) or the spouse of the member or the member's child has a financial interest in any events relating to the matter or proceeding, individually or as a fiduciary;

(d) has instituted the charges or is in any manner involved in a case which may be a subject of the charges before the Board or involve a person who is related to the member within the ninth degree by consanguinity or within the fifth degree by affinity.

(2) No member of the Board shall participate in a proceeding in which the member is a complainant, the subject of the complaint, a party, or a material witness.

³³ IOP 2.15 provides: “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 himself or herself from participating in any way in the ongoing case.

³⁴ Court of Judicial Discipline, Member Conduct, Rule 7(C)(2).

³⁵ Arkansas Judicial Discipline & Disability Commission, Appendix E, Guidelines and Operating Policies for Commission Members, Alternates, and Staff <http://www.state.ar.us/jddc/guidelines.html>.

3. The Board Should Adopt Procedures to Permit Recusal Requests

Both the complainant and the targeted judge should have the opportunity to request the recusal of a Board member. This should be done as early as possible in the proceedings; because Board members are listed on the Board's website, this is not an unreasonable demand of complainants. The complaint form should advise complainants of the ability to request a recusal and should explain that the complainant must provide the basis for the request and any evidence supporting a claim of bias or conflict on the part of a Board member.

Similarly, a targeted judge should be apprised of the right to request recusal of a Board member. The judge should be required to make such a request, accompanied by the basis for the request and any supporting evidence, in his or her initial response to the Board.

4. Recusal Motions Should Be Decided by the Board as a Whole

The Board should require that Board members present actual or potential conflicts to the Board as a whole, which will then decide as a body whether the member will be required to recuse. The complainant and the targeted judge should be made aware of any Board member recusals or decisions not to recuse. These procedures would make the actions of the Board – acting with or without the affected member – more transparent.

C. Recusal Motions Should be Decided by the Full Court of Judicial Discipline

Like any court, to function effectively and to be perceived by the public as acting fairly, the Court of Judicial Discipline must always be wary of actual or potential conflicts of interest. Further, the Court must ensure that when such conflicts arise, there are clear procedures in place to guarantee a fair, unbiased resolution.

The Pennsylvania Constitution³⁶ and Rule 5(C) of the Rules Governing Conduct of the Members of the Court of Judicial Discipline³⁷ provide guidance on the issue of disqualification. Taken

³⁶ Pa. Const. art. V, § 18(c)(4).

³⁷ Rule 5(C) of the Rules Governing Conduct of the Members of the Court of Judicial Discipline provides:

- (1) A member shall not participate in the adjudication of any matter in which the member is a complainant, the subject of a Board complaint, a party or a witness.
- (2) A member should not participate in a proceeding in which the member's impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) the member has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (b) the member served as a lawyer in the matter in controversy, or a lawyer with whom the member practices or previously practiced law served during such association as a lawyer concerning the matter, or the member or such lawyer has been a material witness concerning it; or

together, these provisions are similar to the general guidelines provided in the Judicial Code, Canon 3(C) governing recusal of judges generally.

PMC recommends that motions for members of the Court of Judicial Discipline to recuse be reviewed and decided by the entire Court, not solely by the member at issue.

VI. Changes Recommended to Improve the Service Provided to Users of the Judicial Discipline System

A. The Board Should Communicate More Effectively and More Directly with Complainants

Currently, the Board acknowledges the filing of a complaint and explains that it may interview or request materials of the complainant. The Board does not provide status updates or inform a complainant about how a case is proceeding. Until the dismissal or formal filing of charges, there is little or no further contact from the Board.

PMC handles inquiries from such complainants, who often express the concern that “nothing is happening” with their complaint. Then, once they receive notice that the complaint has been dismissed for lack of probable cause, they question whether the complaint was even investigated.

PMC recommends that the Board provide more information to complainants about the process. When the Board acknowledges that a complaint has been received, it should include an explanation of its general investigative procedures, the expected timeline for processing the complaint, and a list of possible outcomes (ie., dismissal after preliminary investigation, dismissal after a full investigation, and possible levels of discipline, up to and including the filing of charges with the Court).

-
- (c) the member or the member's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding, or an employee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the member to have a substantial financial interest in the outcome of the proceeding or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; or
 - (iv) is to the member's knowledge likely to be a material witness in the proceeding.
 - (3) A member should inform himself or herself about that member's personal interests and make a reasonable effort to be informed about the personal or financial interests of the member's spouse and persons within the third degree of relationship to either of them or their spouses.
 - (4) For the purposes of this section, the degree of relationship is calculated according to the civil law system.

During an investigation, the Board should provide status updates to complainants, explaining where the complaint is in the process. These updates need not be detailed or even unique to each case. An update could simply inform a complainant that a full investigation will be conducted, that the judge's response will be or has been solicited, the expected timeline, and the possible outcomes.

Upon dismissal of a complaint, the Board should explain generally why the complaint was dismissed and what steps were taken to reach the decision to dismiss. Form letters would suffice in most cases. For example, the dismissal notice could explain that the evidence reviewed did not demonstrate misconduct. This will reassure complainants that their allegations were considered, even if they did not result in full investigations or the imposition of discipline.

B. The Board Should Adopt Clear Time Limits to Govern the Disposition of Complaints

To be effective, the Board must efficiently consider and resolve complaints. To that end, there should be clear timelines that govern the disposition of complaints. This would serve both complainants and judges by giving them a timeframe in which they can expect the complaint to be addressed.

IOP 4.01 reads: "It is the policy of the Board that each and every matter shall be brought to a prompt, efficient, and fair conclusion commensurate with the available resources of the Board." Although this is a laudable goal, the vague wording and lack of clear timelines provide no guidance to the Board, the public, or judges about the process. In fact, the Board's own website explains in its Frequently Asked Questions:

How long does it take before the Board makes a decision on a complaint?

There are no fixed time limits within which the Board must act on a complaint. This is primarily because it is hard to pinpoint how long an investigation will take.³⁸

The need for a timely disposition of complaints must be balanced with the assurance that there will be a meaningful investigation of the complaint and that judges will have ample opportunity to respond. Accordingly, PMC recommends that the Board adopt time limits for different stages in the disposition of its cases.

General timelines could be set forth in the Board's IOPs, which could provide that the Board will have flexibility to depart from these timelines when necessary. In such cases, the complainant and the accused judge should be informed that the timelines have been extended and should be given some expectation about the new timelines for proceeding.

³⁸ Website of the Judicial Conduct Board of Pennsylvania, <http://judicialconductboardofpa.org/faq/faq-jcb/how-long-does-it-take-before-the-board-makes-a-decision-on-a-com/>.

C. *The Board Should Institute an Electronic Complaint Filing Procedure Through a Secure Portion of its Website*

Currently, the Board requires that all complaints be filed in writing via regular mail. PMC recommends that the Board institute an electronic complaint filing procedure through a secure section of its website. Electronic filing will afford the public increased access to the Judicial Discipline System.³⁹

CONCLUSION

Ideally, the Judicial Discipline System rarely would be used because judges would not engage in questionable conduct. To the extent it must be used, we hope that PMC's suggestions for improving the Judicial Discipline System will be considered and adopted in service of the ultimate goal of protecting the public.

³⁹ Many courts in the Commonwealth now require electronic filing.

ACKNOWLEDGEMENTS

Pennsylvanians for Modern Courts thanks the Independence Foundation, the Philadelphia Bar Foundation, the Thomas Skelton Harrison Foundation, and the William Penn Foundation for supporting the research and production of this Report. The supporting grants do not imply agreement with the opinions or conclusions expressed herein.

Pennsylvanians for Modern Courts thanks the following for their research and drafting assistance: Caryn Steiger, Hans Smith, Erica Beinlich, and K.O. Myers.

Pennsylvanians for Modern Courts thanks Dechert, LLP for word processing and printing services.