

Colorado Commission on Judicial Discipline: 1983 Annual Report

Background and Organization

Colorado's first disciplinary commission for judges was created in 1966, when Colorado voters approved an amendment to the state constitution that replaced the political process of electing judges with a system based on merit selection, appointment and retention. At the time it was created, only five other states had disciplinary commissions to supplement impeachment as the traditional method for removing judges. Now, all of the states and the District of Columbia have commissions that investigate judicial conduct.

The voters again amended the constitution in November 1982, causing substantial changes in the Commission's procedures and membership that became effective on July 1, 1983. At that time, the name of the Commission was changed from the Commission on Judicial Qualifications to the Commission on Judicial Discipline, and its membership was expanded. The Commission's purpose was, and is, to investigate and act upon allegations of improper conduct by judges.

The Commission presently consists of ten members: two district court judges and two county court judges appointed by the Supreme Court; two lawyers, each having practiced for at least ten years in Colorado, appointed by the Governor; and four citizen members, who cannot be judges or attorneys, appointed by the Governor. All appointments made by the Governor must be approved by the Senate. Half of the members were appointed to two-year terms and half to four-year terms; thereafter, terms will be four years each.

Present Commission members are:

<i>Member</i>	<i>Residence</i>	<i>Type</i>
Hugh H. Arnold	Greeley	District Judge
Kenneth E. Barnhill, Jr.	Denver	Attorney
Blanche T. Cowperthwaite	Denver	Citizen
Lynne Dominick	Denver	Citizen
F. Lynn French	Delta	County Judge
James Golden	Grand Junction	Attorney
William H. McNichols, Jr.	Denver	Citizen
Henry E. Nieto	Lakewood	County Judge
Harold D. Reed	Denver	District Judge
Joyce Tavrow	Englewood	Citizen

Commission members serve without salary, but receive reimbursement for actual and necessary expenses.

The Commission's staff consists of a part-time executive director and a full-time administrative secretary. The Commission also

employs investigators and examiners for formal hearings as needed. While the Commission operates independently, it is housed within the judicial branch. Its operating budget is provided through the Judicial Department, and its procedural rules are promulgated by the Supreme Court.

Responsibilities and Powers

The Commission has constitutional jurisdiction to investigate allegations of, and act upon, a judge's:

- Willful misconduct in office
- Willful or persistent failure to perform judicial duties
- Intemperance
- Violation of any canon of the Colorado Code of Judicial Conduct
- Disability which interferes with the performance of official duties which is or is likely to become permanent.

The scope of judicial misconduct includes, but is not limited to, conduct prejudicial to the administration of justice or conduct which brings the judicial office into disrepute. Misconduct involving a violation of criminal laws also falls within the Commission's jurisdiction, although it is the Supreme Court that must take action under a companion section of the 1966 amendment to suspend or remove a state judge convicted of a felony or offense involving moral turpitude.

The Commission has jurisdiction over the conduct of the more than 217 justices and judges who serve in the state court system. It does not have jurisdiction, however, over the Denver county court judges or municipal judges. The City and County of Denver has established a separate disciplinary commission for its county judges.

Process and Procedure

Any person may request an investigation of a judge by filing a complaint with the Commission on forms available at the Commission's office or by letter addressed to the Commission. The Commission may also commence investigations on its own motion without filing a complaint. Copies of every written complaint are distributed to each of the Commission's members.

Complaints are reviewed during the Commission's regularly scheduled bi-monthly meetings. The Commission may also hold hearings, special meetings and telephone conference calls throughout the year, as needed. Some complaints are dismissed following the initial discussion and evaluation by the Commission because they do not fall within the responsibilities and powers granted to the Commission under the constitution. The Commission dismisses many complaints; for example, those which involve legal issues that can only be reviewed by an appellate court.

If a complaint is dismissed following the initial review, the judge is not notified of the complaint. If the Commission determines

further investigation is warranted, the judge is told of the complaint and the name of the complainant (or the fact that the Commission is proceeding on its own motion). The judge is then given an opportunity to respond to the complaint and to present additional information to the Commission.

Preliminary investigations may include reviewing court transcripts; studying the judge's response; obtaining statements from lawyers, judges, clerks, litigants or other persons who may have some knowledge of the incident complained of; and, if needed, conducting legal research into the substantive area of alleged misconduct. The Commission's staff or an outside investigator may be used to conduct some or all of a preliminary investigation.

Following the preliminary investigation, the Commission may dismiss the case; continue the case for further action, investigation or review; issue a private admonishment, reprimand or censure, either in person or by letter to the judge; order a physical or mental examination of the judge; or enter into an agreement with the judge for a specific remedial program. The Commission may also begin a formal action against the judge. In each case, the complainant is advised of the Commission's decision.

A formal action is commenced when the Commission hires an attorney to act as its examiner. The examiner prepares a written complaint against a judge, files it with the Commission, and a formal hearing is scheduled after the judge responds to the formal complaint. The examiner and the judge, together with the judge's attorney if the judge has one, are present at the formal hearing which takes place before the entire Commission. After hearing the evidence, the Commission may dismiss the case, take any of the informal actions described above, or recommend to the Colorado Supreme Court that the judge be removed, retired, suspended, censured, reprimanded or otherwise disciplined.

All matters before the Commission are handled in strictest confidence, pursuant to constitutional and statutory requirements. While requests for the disqualification of a judge in a matter pending before that judge are not automatically granted, the Commission does have authority to disqualify a judge under certain circumstances. Complaints against judges who are members of the Commission are disclosed to them, and they must respond to all complaints whether frivolous or not. Commission members do not participate in any decision-making involving a case against them. Judicial members who sit on the bench in the same judicial district as a judge against whom a complaint is brought will disqualify themselves from participation in that case.

Caseload Description

Seventy-six complaints involving 52 different judges were filed with the Commission in 1983. Fifty-eight of the new cases were against district judges, 17 against county judges, and one was against a senior judge. In addition, the Commission usually receives about twice as many inquiries as it does complaints, and this year was no exception. During the year the staff responded to approximately 160 requests for information about Commission procedures and jurisdiction.

For statistical purposes, multiple complaints against a judge that arise from the same situation are counted as a single filing. This year, multiple complaints involving identical allegations were filed against several judges. In each instance, the complaints were treated as one filing against the judge involved.

Most of the new cases (45) were filed by litigants. Seven complaints were filed by attorneys, 20 were filed by people not directly involved in litigation, three were filed by the Commission, and one was initiated by a judge seeking a medical disability retirement. Civil and criminal matters accounted for 56 new cases filed. The remaining 20 arose from domestic relations cases or as the result of the personal, off-the-bench conduct of judges rather than their conduct as sitting judges.

The Commission held seven meetings and two telephone conferences in 1983. It resolved 80 cases, including some carryover cases from the previous year. Thirty cases were dismissed following initial review by the Commission (14 were appellate in nature

and 16 were unfounded, moot or not within the Commission's jurisdiction). Judges were asked to respond to complaints in 39 cases, all but ten of which were dismissed following the Commission's subsequent review.

In two of the remaining cases, the Commission recommended that the Supreme Court publicly reprimand the judges involved. The Court rejected the Commission's recommendation in one case, and directed the Commission to dismiss its complaint against the judge. The other case had not been acted upon by the close of the year.

As a result of the Commission's work during the last sixteen years, nine judges have been ordered retired for disability, and the Commission has issued 65 private admonitions or reprimands. Although not necessarily reflected in the statistics, 24 judges have resigned or retired during or following Commission investigations. The Commission emphasizes, however, that many judges resign or retire from the Colorado judicial system each year for reasons completely unrelated to the disciplinary activities of the Commission.

The following table shows the cumulative caseload of the Commission for the last two years.

Commission on Judicial Discipline Caseload Disposition for Calendar Years 1982 and 1983

	1982	1983
Cases pending at year beginning	20	24
Complaints received during year	84	76
Total caseload	104	100
Complaints Dismissed:		
Request withdrawn, additional information not submitted, matter became moot, or was resolved administratively	7	7
Appellate in nature	18	14
Lack of jurisdiction or unfounded	9	7
No evidence of misconduct or any other ground for judicial discipline (allegations unsubstantiated)	36	36
Retirement or resignation during or following investigation, while case still pending	1	1
Total complaints dismissed	71	65
Corrective Actions:		
Admonishment, censure or reprimand, either by private letter or personal appearance	9	11
Medical disabilities	0 ^a	4 ^b
Total corrective actions	9	15
Total cases terminated	80	80
Cases pending at year end	24	20

a) One medical disability was granted in 1982, but was included under one of the other categories.

b) Three of these cases involved the same judge; medical disabilities were granted to two judges.

Sample Cases

The Commission is often asked to describe the types of misconduct it considers serious enough to merit discipline. Excluding the recommendations it made to the Supreme Court, the following are

examples of judicial misconduct that required action by the Commission during 1983. As used here, admonitions consist of a private, informal action of the Commission, providing a warning against future misconduct or oversight by the judge for behavior that suggests the appearance of impropriety even though it meets minimum standards of judicial conduct. Reprimands are private, formal actions of the Commission that the judge's conduct is unacceptable but does not require a formal recommendation to the Supreme Court.

The Commission issued admonitions to judges who:

- appeared in court unreasonably late and made facetious remarks while on the bench;
- failed to disclose information pertinent to a lawsuit in which the judge was personally involved as a litigant;
- made rude and insensitive remarks while on the bench;
- made inappropriate remarks concerning litigation pending in another judge's court;
- conducted a trial in an unorthodox manner;
- seemed unconcerned about legitimate reasons provided by the attorneys in the case for rescheduling a trial date.

The Commission issued reprimands to judges who:

- communicated with one party in a lawsuit without proper notice to the other party;
- exhibited disparity in the manner in which two litigants in the same lawsuit were treated;
- delayed a final decision in a trial for more than a year.

In addition, the Commission recommended to the Supreme Court the retirement of two judges who exhibited permanent medical disabilities that interfered with the performance of their judicial duties. The Commission also made suggestions to judges concerning the overall management of dockets, referred complainants to other agencies or departments for the resolution of their problems, and aided in the administrative resolution of several matters.

Legislation

The 1982 constitutional amendment provides that prior to the filing of a recommendation to the Supreme Court, all Commission papers and proceedings are confidential. The amendment is silent as to the confidentiality of papers and proceedings after a recommendation is filed, and the Commission has assumed that all of the papers and proceedings in a case in which a recommendation is filed with the Supreme Court would become available to the public.

Perhaps because of a concern that the 1982 amendment was too broad and could have a chilling effect on complainants, the 1983 General Assembly passed a bill that placed specific restrictions on the disclosure of Commission files. House Bill 1335 added a new section to the state's Public Records Act that prohibited disclosure of Commission files and made it a misdemeanor for anyone to reveal Commission records or proceedings. See CRS § 24-72-401. The only exception to this rule is when the Commission recommends the removal or retirement of a judge. In effect, the statute reinstated the rule of confidentiality that existed prior to the 1982 constitutional amendment.

The Commission's experience under the new amendment and the statute has shown that the present rule of confidentiality is too stringent. Even in situations where the interests of both the judge and the public would be better served by disclosure, the Commission is prohibited from revealing either the nature or outcome of its proceedings.

The Commission believes that a more flexible rule of confidentiality should be adopted. A judge should be able to waive his or her right to confidentiality voluntarily, especially if disclosure of Commission action would help clarify public perceptions. Likewise, the Commission should be able to exercise discretion when conditions merit disclosure.

A better rule of confidentiality appears in Standard 4.9 of the American Bar Association's *Standards Relating to Judicial Discipline and Disability Retirement*. This standard or rule states that: "In any case in which the subject matter becomes public, through independent sources or through a waiver of confidentiality by the judge, the commission may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge to a fair hearing without prejudgment, and to state that the judge denies the allegations." In addition, Standard 4.11 suggests that a disciplinary commission should be able to release information "if the inquiry was initiated as a result of notoriety or because of conduct that is a matter of public record."

In summary, the Commission supports modification of the present rule of confidentiality to permit greater flexibility in use and application. This can be accomplished by repeal or change of the pertinent section of the Public Records Act together with a change in the Commission's rules of procedure. The Commission will seek such a change in the next legislative session.

Conclusion

The Commission's caseload remained relatively constant during 1983. The actual workload was much greater than the preceding year, however, since several difficult and complex cases were handled during the year, including one case that received considerable national and local publicity.

Although Commission procedures can be improved and the Commission itself encourages a revision of the existing rule of confidentiality, the Commission members believe that the Commission performs a vital role in maintaining a fair and impartial judiciary. Since the judicial selection and tenure system is based on merit rather than political election, the Commission views itself as serving an important role in maintaining the balance between judicial independence and public accountability.

Much of the Commission's work is not visible to the public; however, every effort is made to act in the public interest while safeguarding individual rights and reputations from unfounded accusations of misconduct. The Commission's performance during the last sixteen years suggests that it has succeeded in improving and strengthening the judiciary while carrying out its public responsibilities.

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