2009 Annual Report

Background and Jurisdiction

The framework for the Colorado Commission on Judicial Discipline (Commission) is found in Colo. Const. art. VI, § 23. Section 23(d) provides that a justice or judge of any court of record may be removed or disciplined for misconduct, and that a judge may be retired for a disability that interferes with the performance of his or her duties.

Colo. Const. art. VI, § 23(h) grants authority to the Colorado Supreme Court to provide by rule for the procedures to be followed by the Commission. Accordingly, the Supreme Court adopted the Colorado Rules of Judicial Discipline (Rules), which are applied in conjunction with the Colorado Code of Judicial Conduct (Code). Rule 35, in conjunction with § 23(e), provides for dispositions short of removal or retirement, such as admonition, reprimand, censure, and other action that the Commission believes will reasonably improve the conduct of the judge. The Rules and Code are published in the Colorado Revised Statutes, Court Rules, Book 1.

For a better understanding of the scope of the Commission's disciplinary authority, it is important to note the following:

➢ The Commission's jurisdiction is limited to disciplinary matters concerning district judges, county judges, Colorado Court of Appeals judges, justices of the Colorado Supreme Court, senior judges, and appointed judges. Excluded from this jurisdiction are magistrates, municipal judges, and administrative law judges (ALJs).

➢ The Office of Attorney Regulation Counsel (OARC) is charged with disciplinary oversight of magistrates and ALJs, and has jurisdiction over the conduct of lawyers generally, under the Colorado Rules of Professional Conduct.

➢ County judges in the City and County of Denver exercise dual jurisdiction over Denver municipal laws and state laws. Because the Commission lacks jurisdiction over persons serving as municipal judges, disciplinary matters for these judges are addressed by the Denver County Court Commission on Judicial Discipline. Certain other cities have established disciplinary procedures to oversee the conduct of their municipal judges.

The Commission and Its Executive Director

The Commission comprises ten Colorado citizens who serve without compensation, except for reimbursement for expenses reasonably incurred in the performance of their duties, such as travel to attend the Commission's meetings. The composition of the Commission is determined by Colo. Const. art. VI, § 23(3)(a) and (b). It includes two district court judges and two county court judges, who are appointed by the Supreme Court; two lawyers who have practiced in Colorado for ten years, neither of whom may be a justice or judge, and who are appointed by the Colorado Governor with the consent of the Colorado Senate; and four citizens who are not and have not been judges, who are not licensed to practice law in Colorado, and who are appointed by the Governor with the consent of the Senate. The list of current Commission members appears at the end of this report.

Rule 3 provides for the organization and administration of the Commission, including the Commission's appointment of an Executive Director, whose duties include the operation of a permanent office; the screening and investigation of complaints; the maintenance of records and statistics; the employment when necessary of investigators, special counsel, and masters; the preparation and administration of the Commission's operating budget; and the preparation and publication of this annual report.

Grounds for Judicial Discipline

The grounds for judicial discipline that may trigger the sanctions provided in Colo. Const. art. VI, § 23(d) are described in Rule 5(a). They include:

1) willful misconduct in office, including misconduct that, although not related to judicial duties, brings the judicial office into disrepute or is prejudicial to the administration of justice;
2) willful or persistent failure to perform judicial duties, including incompetent performance of judicial duties;
3) intemperance, including extreme or immoderate personal conduct, recurring loss of temper or control, abuse of alcohol, or the use of illegal narcotic or dangerous drugs;
4) any conduct that constitutes a violation of the Code; or
5) a disability interfering with the performance of judicial duties that is or is likely to become of a permanent character.

Because Rule 5(a)(4) incorporates the Code into the Rules, complaints filed with the Commission may involve allegations that a judge has not fulfilled his or her obligations under the nine Canons that are included in the Code. The Canons address the integrity and independence of the judiciary; impropriety or the appearance of impropriety; failure to perform duties promptly, impartially, and courteously; conduct off the Bench that is outside the boundaries of permitted quasi-judicial or extra-judicial activities; and inappropriate political activities.

Persons who contact the Commission may confuse the judicial disciplinary process with the appellate process by filing a complaint that focuses on a disappointing factual or legal ruling rather than on the elements of judicial misconduct described in Rule 5(a). Rule 5(c) states that the Commission is not to take disciplinary action against a judge "for making erroneous findings of fact or legal conclusions which are subject to appellate review." The review of alleged errors in a judge's findings of fact and legal conclusions is reserved to courts of record under Colo. Const. art. VI, §§ 1 and 2, and by provisions of the Colorado Revised Statutes.

An exception is provided under Rule 5(c), if the rulings subject to appeal also include any of the elements of Rule 5(a)—for example, willful misconduct; willful or persistent failure to perform judicial duties; intemperance; a disability; a violation of the Canons; or an indication of fraud, corrupt motive, or bad faith. Unless these factors can be identified—apart from the evidentiary issues and conclusions of law that are being litigated in the appeal—the Commission lacks the authority to initiate judicial misconduct proceedings. For example, a party may believe a judge is biased because

the judge repeatedly declined to sustain objections by the party to the admission of certain evidence, but a review of the record on appeal may indicate that the judge's rulings were supported by procedural rules or case law. In those matters where an appellate decision already has been rendered, the appellate court's opinion can be helpful in distinguishing alleged misconduct issues from appellate issues.

Other matters beyond the scope of the Commission's jurisdiction include concerns about a judge's overall performance and fitness for the position. Such issues may be more appropriate for evaluation by the Colorado Commission on Judicial Performance, which collects feedback from the community on a judge's competence, periodically reports such information to the judge, and disseminates public reports on performance prior to the judge's retention election.

Complaints and Disciplinary Proceedings

Rules 12 through 14 provide for the filing, screening, and preliminary investigation of complaints. Any person may file a complaint alleging judicial misconduct or a disability. A complaint form is provided by the Commission, which includes instructions and important information regarding the grounds for judicial discipline and guidelines for preparation of the complaint. However, the Commission will consider complaints in any format. Complaints usually take the form of a letter or summary that describes the alleged misconduct and includes or references other information that may be relevant, such as key dates, case numbers, exhibits and other documents, or transcripts of proceedings.

Complaints may be mailed, delivered, or faxed to the Commission. Arrangements can be made with the Executive Director to accommodate disabled persons in preparing and filing complaints. Security concerns related to the Internet currently limit the ability of the Commission to accept complaints by e-mail. The Commission has the authority to initiate a complaint on its own motion.

Disciplinary proceedings could involve three phases: the screening process under Rule 13; a preliminary investigation under Rule 14, for complaints that pass the screening process; or a formal proceeding under Rule 18, which is, in essence, a trial involving the appointment of special masters to hear the case.

The Executive Director screens all complaints. An example of a complaint that usually survives the initial screening would involve an unreasonable delay by the court in issuing a decision on an important motion or in rendering a final judgment on a matter that has been taken under advisement.

Rule 13 provides that "complaints that are frivolous, unfounded, solely appellate in nature, or outside the jurisdiction of the Commission shall be dismissed" by the Executive Director or the Commission. The most common example of a complaint that would be dismissed is an appellate matter. It can be difficult and frustrating for a complainant, particularly a *pro se* litigant, to understand the respective functions of trial and appellate courts in the adjudicative process, and to appreciate that errors a judge might commit in ruling on a motion, in resolving conflicting evidence, or in applying the law do not equate with judicial misconduct under the Canons. Simply put, factual and legal issues arising in litigation are different from the judicial misconduct issues described in the Constitution, the Rules, and the Code.

Records of dismissals made by the Executive Director in the screening process are available for the Commission's inspection and review. Complaints that survive the initial screening by the Executive Director are reviewed further by the Commission. If the Commission deems that there are sufficient grounds to initiate disciplinary proceedings, it undertakes a preliminary investigation and, under Rule 14, gives notice to the judge of the investigation, the nature of the charge, and the name of the complainant (or that the Commission commenced the investigation on its own motion); and provides the judge an opportunity to respond.

The investigation of a complaint involves inquiries appropriate in the circumstances, such as an examination of court records and transcripts, the judge's response to the complaint, interviews with potential witnesses, and requests for further information from the complainant or the judge.

In 2009, the Commission authorized the Executive Director to notify a judge on receipt of a complaint—prior to its review by the Commission—if the complaint alleges a delay in diligently managing the court's docket. Motions for post-conviction relief under Rule 35 of the Colorado Rules of Criminal Procedure (C.R.Crim.P.) are a common subject of such complaints, which often result from the large volume of trial materials requiring review, the passage of several years since the trial, the retirement of the trial judge, or the reassignment of the trial judge from the criminal docket to the civil or domestic relations docket. Such factors may contribute to delays beyond the reasonable control of the judge who is currently assigned to the case. In 2009, the Commission recommended that the State Court Administrator's Office provide additional training and guidance for judges in handling C.R.Crim.P. 35 motions.

Dispositions available to the Commission in preliminary or formal proceedings include:

- dismissal of an unjustified or unfounded complaint or formal charge
- private admonishment for behavior that suggests the appearance of impropriety, although it meets the minimum standards of judicial conduct
- private reprimand or censure for misconduct that does not merit public sanction by the Supreme Court
- other actions the Commission believes will improve the conduct of the judge—for example, docket management techniques, training, or counseling.

Formal proceedings may result in additional recommendations to the Supreme Court to:

- remove the judge from office
- retire the judge for a disability
- publicly reprimand or censure the judge
- apply other sanctions that the Commission or the Supreme Court believes will curtail or eliminate the judge's misconduct.

As provided in Colo. Const. art. VI, § 23(3)(g), "all papers filed with and proceedings before the Commission" are confidential, unless and until such time as the Commission recommends formal action to the Supreme Court.

The Commission generally meets five to six times each year, as its agenda warrants, and may hold special meetings or convene by conference call, when necessary. In 2009, the Commission met in January, March, April, June, August, and November.

Review of Complaints Received in 2009

The Executive Director manages the intake of complaints and requests for information. When appropriate, callers are redirected

to the Commission on Judicial Performance, to OARC, or, if a municipal judge is involved, to the city or town where the judge presides. The Commission also receives inquiries from the judiciary regarding the application of the Rules and the Code.

Through December 31, 2009, the Commission received 190 written complaints. By comparison, the Commission received 217 complaints in 2008, 211 complaints in 2007, and 179 complaints in 2006. In 2009, the Commission also received approximately 675 telephone inquiries and written requests from potential complainants who were seeking information or who requested a copy of the complaint form or the Rules.

These 190 complaints concerned the conduct of judges of the district court, probate court, juvenile court, or county court in each of the twenty-two Judicial Districts. No complaints in 2009 were lodged against the judiciary of the Colorado Court of Appeals or Supreme Court. At year end 2009, the judiciary consisted of 380 trial and appellate court positions, including 164 district court judges, 128 county court judges, 59 senior judges, 22 court of appeals judges, and 7 Supreme Court justices.

Of the 190 complaints, 108 were based on situations that arose in the criminal law docket, 88 of which were filed by inmates in Colorado correctional facilities. A total of 38 complaints involved litigation in the general civil docket, 30 in domestic relations cases, 4 in juvenile court matters, and 8 in probate matters. One involved personal conduct outside the courtroom, and one concerned involvement in community matters.

In addition to inmates, the complainants, many of whom appeared in court *pro se*, included 29 spouses or ex-spouses and 61 other litigants; 3 attorneys who alleged delay in docket management or judicial demeanor issues; 4 people who were not parties—that is, family members or courtroom observers; and one judge who self-reported the judge's own conduct to the Commission for its review. No complaints were initiated by the Commission on its own motion.

The frequency of various grounds alleged in the 190 complaints (some of which alleged multiple grounds) is summarized below:

- appellate issues—for example, disputed rulings on motions, findings of fact, conclusions of law, final judgments, and sentences: 63
- docket management: 13
- C.R.Crim.P. 35 delays: 11
- bias/prejudice/recusal issues: 31
- courtroom demeanor: 12
- intemperance, including alcohol abuse: 1
- inappropriate personal relationships with litigants or staff: 1
- incompetence: 4
- *ex parte* communications: 2
- financial interest: 2
- inappropriate public statements: 2
- failure to report attorney misconduct: 1
- criminal procedure—for example, speedy trial, evidence, jury instructions: 11
- constitutional rights: 1
- request for confidential commission records: 2
- general misconduct (unspecified): 4
- allegations directed at officials other than state judges:
  - magistrates: 4
  - conduct of attorneys, district attorneys, or public defenders: 8
  - court records/clerk errors/transcripts: 7
  - police, sheriff, jail: 5
  - probation, parole, department of corrections: 7
  - municipal judges: 5
  - ALJs: 2
  - federal judiciary: 2
  - Commission on Judicial Performance: 2

Most incidents of misconduct are addressed by private disciplinary letters that include the dispositions described in the "Complaints and Disciplinary Proceedings" section above. These letters express the Commission's determination that there has been a direct violation of the Code and that such conduct is unacceptable, but that the conduct does not merit a formal hearing or recommendation to the Supreme Court for public discipline or removal from office.

Based on the Executive Director's screening under Rule 13, 168 of the complaints received in 2009 were dismissed. Through its November meeting, the Commission had considered three complaints carried over from 2008 to 2009, and 16 complaints received in 2009. During the year, the Commission dismissed 7 of these 19 complaints. It authorized the preliminary investigation of the remaining 12 complaints under Rule 14, by notifying the judge of the identity of the complainant and the basis of the complaint, requesting the judge's response, and examining transcripts and other documentation.

Following its preliminary investigation, the Commission dismissed 5 complaints as unfounded or appellate. It undertook corrective action with respect to 3 complaints and carried over 4 matters into 2010 for further evaluation. The Executive Director referred 6 additional complaints to the Commission, which were received at the Commission's office after the November meeting and carried over to 2010.

In 3 instances, the Commission applied the dispositions authorized by its Rule 35 to address allegations of judicial misconduct. Disciplinary action included a private letter of reprimand concerning violations of the Canons; a case in which the court found no misconduct but recommended training and counseling to augment the judge's experience in handling difficult courtroom situations; and a case in which the Commission found insufficient evidence of misconduct, but cautioned against potentially awkward situations involving court personnel. In addition, the Commission monitored periodic reports from judges in two cases in which disciplinary action from prior years required continuing docket management measures and additional legal education.

The corrective action taken in these 3 cases compared with corrective action taken in 4 cases in 2008, one case in 2007, and 2 in 2006. There were 3 voluntary retirements while complaints were pending in 2009, 7 in 2008 and none in 2007. There was one retirement for medical disability in each of 2006 and 2007, but none in 2008 or 2009.

Of the 168 complaints that were dismissed in 2009, 11 involved alleged delays in addressing C.R.Crim.P. 35 motions. In each case, prompt judicial action on the motion followed receipt of the Commission's notice of the complaint.

Private letters of discipline in recent years have been directed at the following misconduct:

- engaging in *ex parte* contact with litigants or attorneys
- docket management, including delays in issuing decisions
- loss of temper or control of the courtroom
- inappropriate remarks to the media regarding the conduct of a litigant, an attorney, or another judge
- hearing a case, as a part-time judge, involving a client of the judge's law firm
- intemperance and verbal abuse toward an employee, persons attempting to contact court staff, or a customer of a business establishment
- driving while impaired or under the influence of alcohol
- inappropriate personal conduct involving a court employee or litigant
- courtroom demeanor during sentencing
- appearing on behalf of a spouse in a magistrate's hearing.

Proactive Measures

The Commission participates in judicial education programs to inform new and continuing judges of their ethical duties and responsibilities under the Canons and to explain the Commission's responsibilities regarding oversight and discipline under the Rules. The Commission also takes steps to remind judges of their docket management obligations.

The Commission is undertaking a comprehensive review of its Rules, policies, and procedures, with the goal of becoming more transparent in its operations; providing more public information about the Commission's responsibilities; facilitating the complaint filing process; and providing more judicial education, counseling, and rehabilitation options for the judiciary. Any changes will continue to respect the principles of confidentiality set forth in the Constitution, the Rules, and CRS §§ 24-72-401 and -402.

In March 2010, the Commission launched a website, which includes an explanation of the Commission's procedures; a downloadable complaint form; frequently asked questions; recent annual reports; and links to the Constitution, Rules, and Code. The website is available at www.coloradojudicialdiscipline.com.

The Commission and Staff

As of December 31, 2009, the Commission's membership comprised the following persons:

Member	*City*	*Category of Appointment*
Federico C. Alvarez	Denver	Attorney
Stewart Bliss	Denver	Citizen
Hon. Roxanne Bailin	Boulder	District Judge
Joseph Samuel	Highlands Ranch	Citizen
Hon. Charles T. Hoppin	Golden	County Judge
Kathleen Kelley	Meeker	Citizen
David Kenney	Denver	Citizen
Hon. Martha T. Minot	Durango	County Judge
Richard O. Campbell	Denver	Attorney
Hon. Douglas R. Vannoy	Ft. Morgan	District Judge

The Commission operates independent from but with the support of the Supreme Court, the Judicial Department, and the OARC. Beginning in fiscal year 2009–10, the source of funding for the Commission's operations was transferred from the Judicial Department to the attorney registration fees paid to the Supreme Court by attorneys and judges.

The Commission performs a vital role in maintaining a fair and impartial judiciary. Because the judicial selection and retention system in Colorado is based on merit selection rather than on partisan elections, it is especially important that the Commission operate effectively and with the public's confidence in monitoring and improving judicial conduct.

William J. Campbell is the Interim Executive Director of the Commission, having been appointed on February 11, 2009, following a thirty-seven-year career as a practicing attorney. He is not related to Commission member Richard O. Campbell.

Correspondence with the Commission or its members should be addressed to the Executive Director's attention. The Commission's mailing address is 1560 Broadway, Ste. 1925, Denver, CO 80202. The Commission's telephone number is (303) 866-6431; its fax number is (303) 861-6822. ■

Colorado Lawyers Committee Names Denver Office of Morrison & Foerster LLP 2009 Law Firm of the Year

Morrison & Foerster LLP's Denver office has been named the 2009 Law Firm of the Year by the Colorado Lawyers Committee (CLC) for its wide-ranging work on critical state issues. In addition to supporting key task force initiatives, the firm has represented the CLC in key cases involving educational funding and social services.

Morrison & Foerster prepared an *amicus* brief for the CLC in a case before the Colorado Supreme Court regarding educational funding. The firm has also researched efforts in other states to provide civil legal services for the indigent, chaired the Food Stamps Task Force, and worked to assure that Colorado counties process food stamps applications in accordance with federal deadlines. The firm also has provided legal information and referrals at twice-monthly Legal Night clinics and at Project Homeless Connect, and has participated on the Hate Violence Task Force, presenting fictional trials to school children on Colorado's hate crimes/bias statute.

The CLC has been in existence for thirty-two years. It is part of a non-profit, non-partisan consortium of fifty-five Colorado law firms that do high impact *pro bono* work and that are dedicated to using "all the skills and discipline of the law in the service of others." Visit the CLC at coloradolawyerscommittee.org.