

Commission of Judicial Conduct

**Not Accountable to the Public:
Resolving Charges Against Judges
is Cloaked in Secrecy**

Report 90-S-23

**Office of the
State Comptroller
Edward V. Regan
State Comptroller**

COMMISSION ON JUDICIAL CONDUCT
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A. Introduction

The Commission on Judicial Conduct (Commission) investigates complaints against judges of the Unified Court System and determines if disciplinary action is warranted. In performing its investigatory and disciplinary role, the Commission holds closed door hearings. The entire proceedings remain secret from the public except when a judge is disciplined. Even then, all investigations and pre-hearing records remain confidential. If the judge is not disciplined, all records of the proceedings remain secret forever.

The Commission has shielded itself from any independent review of its operations by invoking confidentiality provisions of the Judiciary Law. During the course of this audit, their practice of operating in secrecy was cited to deny the State Comptroller's auditors access to confidential operating records thereby impairing the State Comptroller's ability to conduct an independent audit of Commission activities in accordance with generally accepted government auditing standards. The State Comptroller has traditionally served as the people's watchdog and, as such, has played a vital role in the system of checks and balances which strengthen our form of democratic government. When important hearings such as these are closed and the State Comptroller is denied access to independently review operating records, the citizens of the State are foreclosed from receiving any independent assurance regarding the prudent and fair operation of a critical State program, which, if abused, negatively affects the foundation of State government.

The Commission was established by Chapter 156 of the Laws of 1978 to receive, initiate, investigate and hear complaints of misconduct against judges in New York's Unified Court System. In doing so, it conducts investigations and hearings, subpoenas witnesses and documents, and makes appropriate determinations as to dismissing complaints or disciplining judges. The Commission also has jurisdiction over matters pertaining to the physical and mental disability of judges. It does not review judicial decisions or alleged errors of law, nor does it issue advisory opinions, give legal advice or represent litigants. When appropriate, it refers complaints to other agencies.

Misconduct includes, but is not limited to the persistent failure to perform duties, habitual intemperance, assertion of influence, gender bias, corruption and conduct on or off the bench prejudicial to the administration of justice. Discipline can be in the form of admonishment, censure, removal or retirement of the judge.

The Commission is composed of 11 members serving four year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court

of Appeals, and one each by the four leaders of the legislature. The Constitution requires that Commission membership include four judges, at least one attorney and no fewer than two lay persons. The Commission elects a chairperson and appoints an administrator, who is responsible for hiring and supervising staff under the direction of the Commission.

The Commission has an administrative staff of 41 employees, including attorneys, investigators, and support staff. Although the Commission's main office is located in New York City, investigations are also conducted from offices in Albany and Rochester. The Commission spent about \$2 million in fiscal year 1988-89.

Draft copies of the matters in this report were provided to Commission officials for review and comment. Their comments were considered in preparing this report and are attached as Appendix A to this report.

Commission officials disagree with our recommendation that the Commission propose legislation authorizing the State Comptroller to have access to the Commission's non-public operating records for audit purposes. The Commission states that it is not in the best position to seek a change in the law which makes Commission records confidential, because "...the Commission has some strong doubts about the kind of access being sought for the purposes expressed in your report...."

We sought access to Commission records to determine whether the Commission conducts thorough investigations and hearings, and that it documents its decisions for dismissing complaints against judges, or disciplining judges. We did not attempt to determine whether the Commission's decisions were appropriate, and we would not propose to do so. We believe that the Commission serves a vital public function in disposing of complaints against judges and that it is in the public's interest that this function be properly conducted. However, due to the Commission's invoking of the confidentiality provisions of the Judiciary Law during our audit, the Commission's activities remain shielded from independent review and the citizens of the State are denied independent assurance that a critical State program is operated in compliance with all applicable laws and procedures.

Because the Commission has refused to propose legislation to open its records to the State Comptroller's independent review, we suggest that the leadership of the State Legislature consider acting to provide the State Comptroller with specific statutory authority for access to the Commission's non-public records for audit purposes so there can be adequate public accountability over this vital government activity.

Within 90 days after the final release of this report, as required by Section 170 of the Executive Law, the Administrator of the Commission shall report to the Governor, the State Comptroller and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

In addition to matters discussed in this report, we have provided the Commission with comments concerning certain financial management practices at the Commission. Although these matters, which are considered to be of lesser significance, are not included in this report, the recommendations should be implemented to improve operations. Included in this letter is our report of internal controls over financial management practices of the Commission.

B. Results of Examination

In reviewing the financial management practices of the Commission, nothing came to our attention that would lead us to believe that the Commission was not operating in accordance with sound fiscal practices. We were satisfied that there was sufficient documentation to support the specific financial transactions we selected for review.

However, we were unable to complete our compliance audit. Officials of the Commission on Judicial Conduct (Commission), citing confidentiality restrictions, denied our auditors access to certain operating records and we therefore were unable to independently determine whether the Commission is complying with all applicable laws and procedures. Because of this, and because there is no other independent review of Commission activities, the Commission operates without appropriate independent oversight of its activities. The public, therefore, lacks assurance that the Commission conducts thorough, objective investigations and hearings and that it documents its decisions for dismissing complaints or disciplining judges. Further, without an effective system of checks and balances, the potential exists that the Commission may be abusing its authority by wrongfully dismissing complaints against judges without cause and justification.

Government entities and employees are accountable to the public and to other branches of government. While not always specified by law, this accountability is inherent in our governing process through appropriate checks and balances. Accountability is generally established through the independent audit process or through some independent oversight body. An independent audit agency provides an objective evaluation of the extent to which government officials are faithfully, efficiently and effectively carrying out their responsibilities. To ensure that there is a proper assessment of accountability, an audit organization must have full access to records. Denying auditors access to records results in an audit scope impairment.

Scope impairments include factors external to the audit organization which can restrict the auditor's ability to render objective opinions and conclusions on the entity. Examples of external audit scope impairments include denying auditors access to sources of information, such as books, records, and supporting documents, and denying auditors the opportunity to meet with officials and employees of the organization under audit. Such impairments prohibit the audit organization from determining whether the auditee is operating in accordance with the law.

The Commission cited the confidentiality provisions of Sections 45 and 46 of the Judiciary Law as a basis to deny us access to certain non-public operating records. This law provides that all complaints, correspondence, Commission proceedings and transcripts thereof, other papers and data and records of the Commission are confidential and shall not be made available to anyone other than the Commission, its designated staff personnel and its agents in the performance of their power and duties. If the Commission determines that a judge be admonished, censured, removed or retired, the determination of the Commission, its findings and conclusions shall be made

public. However, all investigative and pre-hearing records remain confidential.

The Commission has successfully rejected requests for non-public records in the past. The New York County district attorney (Stern V. Morgenthau 62 NY 2d 331 [1984]) issued a subpoena to the Commission demanding production of all complaints, correspondence, letters, investigative reports and transcripts which the Commission maintained concerning a matter which the Commission was investigating. Although the lower courts denied the Commission's motion to quash the subpoena, the Court of Appeals held that Commission records were exempt from grand jury scrutiny.

In another case, the Commission on Judicial Nomination (CJN) requested non-public records from the Commission concerning nominees to the Court of Appeals. CJN considers and evaluates the qualifications of candidates for appointment to the Court of Appeals. The Commission denied access based on the confidentiality provisions of the Law. Subsequently, the Legislature amended Section 45 of the Judiciary Law to allow the Governor, the State Senate, and the Commission on Judicial Nomination to receive certain statutorily-specified Commission records with respect to judicial nominations. However, the amended law does not permit unlimited access to Commission records. Therefore, as a result of the confidentiality provisions, the Law as currently written and interpreted by the Commission, does not allow for any government organizations to monitor or review all Commission activities.

During our review of the Commission's public records, we noted that the Commission has allowed certain outside contractors and their employees access to confidential information. When we inquired to Commission officials about the disclosure of this information they indicated that access to information was necessary for the contractors to perform their work and that they were considered to be agents of the Commission.

Section 46, which deals with the breaches of confidentiality, refers to agents of the Commission. The reference to agent in Section 46 of the Judiciary Law could be, and apparently has been, interpreted by the Commission to permit it to provide access to agents of the Commission where such access is necessary for the agents to carry out their duties. We therefore asked if on a similar basis, the Commission could designate the Comptroller's auditors as agents. Commission officials responded that it would be inappropriate to provide such designation to our auditors.

Commission officials need not look any further than their own operations to understand the difficulties of carrying out mandated objectives when denied access to records. In their 1989 annual report, Commission officials discuss problems with access to sealed or other confidential court records from judges who are the targets of complaints. According to the report, the Commission has encountered difficulty in expeditiously obtaining required material with respect to records either under court seal or made confidential by statute. It is often the case that the judge with jurisdiction over the required file is also the judge under investigation.

In one instance, a judge placed his records under court seal after a complaint was lodged against him.

The annual report states that no judge should be shielded from proper inquiry because the alleged misconduct is under court seal. It further says that any concern that releasing such files to the Commission might compromise innocent participants of the proceedings should be allayed by the strict confidentiality mandate which would cover such files upon receipt by the Commission. The report concludes that the Commission cannot discharge its own mandate without expeditious access to confidential files when circumstances warrant.

Just as the Commission requires access to confidential files to carry out its mandate, the Comptroller's Office requires access to carry out its constitutional mandate. We indicated to Commission officials that not only would we be subject to the same confidentiality provisions of the Judiciary Law, but we would also be subject to restrictions included in the Freedom of Information Laws which would preclude us from making public any data that is held to be confidential by Sections 45 and 46 of the Judiciary Law.

Without complete access to Commission records we cannot determine whether the Commission has made appropriate and efficient use of State resources, has conducted thorough investigations and hearings in compliance with laws and procedures, and has documented its determinations for dismissing complaints or disciplining judges. Since the Commission was established, there reportedly have been 10,680 complaints of judicial misconduct, of which 7,615 (71 percent) have been dismissed without investigation. During 1987 and 1988, the Commission acted on 1,906 complaints, including 1,271 complaints against State judges and 635 complaints against town justices. The Commission investigated only 152 (12 percent) complaints against State judges and 238 (37 percent) complaints against town justices. The remaining 1,119 complaints against State judges and 397 complaints against town justices were dismissed. In higher courts, the Commission investigated only 53 of 436 (12 percent) complaints against Supreme Court judges and 2 of 25 (8 percent) complaints against appellate judges. The Commission's complaint statistics do not distinguish between judges on the Appellate Division and judges on the Court of Appeals. There are only seven judges on the Court of Appeals and the Commission wants to protect the identity of those judges who are targets of complaints. Because our auditors did not have access to Commission records, we could not determine the reasons the Commission investigated a higher percentage of complaints against town justices than State judges, and we could not determine whether the Commission followed proper procedures when complaints were dismissed without investigation.

Further, if the Commission determines that a judge should be admonished, censured, removed or retired, the judge can request the Court of Appeals to review the Commission's determination. The Court of Appeals can then either accept or reject the Commission's determined sanction, impose a different sanction, or impose no sanction. This appears to be an inherent conflict of interest in that the Court of Appeals, which is a body whose members the

Commission is responsible for handling complaints against, its ruling on Commission determinations of sanctions to be imposed.

Section 45 of the Judiciary Law has, in effect, allowed the Commission on Judicial Conduct to shield itself from independent review of its operating activities. Because of this lack of independent review and accountability, we recommend that the Commission propose legislation to provide specific statutory authorization for access by the State Comptroller to the Commission's non-public operating records to allow for effective independent review of Commission activities. This could be accomplished without violating the confidentiality of the judges involved.

Recommendation

Propose legislation to provide specific statutory authorization for access by the State Comptroller to Commission on Judicial Conduct non-public operating records for audit purposes. Such legislation would allow for effective independent review of Commission activities, improve accountability, and enhance the credibility of Commission operations.