Chicago-Kent Law Review

Volume 54
Issue 1 *Judicial Discipline and Disability Symposium*

Article 8

April 1977

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NEW YORK'S APPROACH TO JUDICIAL DISCIPLINE: THE DEVELOPMENT OF A COMMISSION SYSTEM

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In 1974 a district court judge became so enraged with the poor taste of the coffee he drank during a coffee break that he ordered the arrest of the coffee vendor. The judge apparently was so confident that he was acting within the scope of his authority that he directed a verbatim transcript made of his excoriation of the coffee vendor, who stood in handcuffs before the judge.[1]

A family court judge permitted his court clerk to do business with the judge's printing company.[2] Another judge, an acting supreme court justice, subjected attorneys and litigants to shouting, threats and accusations, and applied undue pressure to coerce settlements.[3] A civil court judge accepted a weekend stay at a country club from a law firm that appeared in his court.[4]

On another occasion, a city court judge agreed to accept a guilty plea in a traffic case from a person being sued in a separate negligence action arising out of the same incident. The judge, whose judicial office was part-time and who was permitted to practice law (with some restraints), was representing the plaintiff in the civil case. This same judge presided over cases involving defendants whom he was representing in other matters. He also referred cases that were to be heard in his court to another attorney, who happened to be a town justice.[5]

These cases vividly illustrate the fact that no process of judicial selection, however rigorous, can insure a judiciary composed only of scholarly, even-tempered and honest candidates for the bench. Qualifications often are not considered because, in fact, judgeships continue to be used as pawns for political advantage and power. Lapses of reasonable conduct by jurists, inevitable under any circumstances, are apt to be more prevalent when the selection process is misapplied. Thus, a disciplinary system must be effective in order to counter those flaws in the selection process.

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1. *In re* Perry, 53 App. Div. 2d 882, 385 N.Y.S.2d 589 (1976).
2. *In re* Feinberg, — N.Y.2d — (Ct. Judiciary 1976).
3. *In re* Mertens, 56 App. Div. 2d 456, 392 N.Y.S.2d 860 (1977).
4. 176 N.Y.L.J. 122 (1976).
5. TEMPORARY STATE COMMISSION ON JUDICIAL CONDUCT, FINAL REPORT TO THE GOVERNOR, THE LEGISLATURE AND THE COURT OF APPEALS OF THE STATE OF NEW YORK 7-8 (August

HISTORICAL BACKGROUND

In New York, where there are more than 1,000 full-time judges and 2,500 part-time judges, prior to 1976 the authority to investigate allegations of misconduct and to discipline judges had been vested in five judicial bodies. A special Court on the Judiciary, created in 1948, had jurisdiction to hear cases involving "higher" court judges. Four appellate courts, constituting the state's appellate division, had jurisdiction to hear cases of misconduct against judges of the state's "lower" courts.[6]

The creation of the Court on the Judiciary by constitutional amendment[7] was regarded as a major reform in the effort to identify and deal with judicial misconduct. For the first time in New York, a special court was established for the sole purpose of hearing disciplinary cases. Unlike the appellate divisions, the Court on the Judiciary had no other judicial responsibilities. According to Governor Thomas E. Dewey, it was intended to "provide more swift and more certain methods for the removal of the occasional individual who turns out to be dissolute or corrupt."[8]

The Court on the Judiciary, whose members had full-time responsibilities to other courts, was not a full-time court. It was comprised of the Chief Judge; the senior associate judge of the court of appeals, the state's highest court; and one justice from each of the four appellate divisions, selected on a case-by-case basis by the respective appellate divisions. The Court on the Judiciary was convened by the Chief Judge and appointed counsel in each case to conduct an investigation. Charges were served when warranted and the respondent-judge was given an opportunity to answer. Hearings were held before designated referees who made findings of fact and reported to the court. The 1948 amendment gave the Court on the Judiciary specific authority to remove judges.[9]

Despite the early hopes of the supporters of New York's bifurcated disciplinary system, it did not achieve its goals. One indication of this is the relative inactivity of the Court on the Judiciary for many years. From 1948 to 1973, it was convened only five times,[10] a fact which has been cited in at least one noted commentary as evidence of the court's failure to meet its

1976) (unpublished) [hereinafter cited as FINAL REPORT OF THE TEMPORARY STATE COMMISSION ON JUDICIAL CONDUCT].

6. N.Y. CONST. of 1894, art. VI, § 9(a)(1948).

7. *Id.*

8. ANNUAL MESSAGE OF THE GOVERNOR, 1 N.Y. LEGIS. DOC. 13 (1947).

9. N.Y. CONST. of 1894, art. VI, § 9(a) (1948).

10. *In re* Pfingst, 33 N.Y.2d(a) (Ct. Judiciary 1973); *In re* Schweitzer, 29 N.Y.2d(a) (Ct. Judiciary 1971); *In re* Osterman, 13 N.Y.2d(a) (Ct. Judiciary 1971); *In re* Friedman, 12 N.Y.2d(a) (Ct. Judiciary), *appeal dismissed,* 19 App. Div. 2d 120, 241 N.Y.S.2d 793, *appeal dismissed per curiam*, 375 U.S. 10 (1963); *In re* Sobel-Liebowitz, 8 N.Y.2d(a) (Ct. Judiciary 1960).

stated objectives.[11] Although the appellate divisions during this same period removed and censured several lower court judges, New York did not have a coordinated and efficient disciplinary system.

The complaint process in the four judicial departments of the appellate divisions lacked uniformity and neither the appellate divisions nor the Court on the Judiciary had staff exclusively assigned to monitor the judiciary, identify problem areas and commence investigations in the absence of formal complaints. Each of the four judicial departments used court personnel to investigate complaints of judicial misconduct. Relatively limited resources were available to conduct inquiries. If an investigation uncovered evidence of relatively minor misconduct by a lower court judge, the judge might be privately admonished by the appropriate appellate division. When investigation led to evidence of serious misconduct, the appellate division might appoint counsel to initiate an adversary proceeding, after which a judge might be censured, removed from office or, of course, exonerated.

In 1969 the Appellate Division, First Judicial Department, introduced a new concept in the field of judicial discipline in New York. It established a Judiciary Relations Committee,[12] which ultimately was comprised of five judges, two lawyers and a lay person.[13] The committee was authorized to receive complaints against all higher and lower court judges in the First Judicial Department[14] and to conduct investigations and hearings.[15] The committee admonished several judges and held two adversary hearings.[16] A similar Judiciary Relations Committee was created in the Second Judicial Department in 1972.[17] In the two other judicial departments, the investigatory procedures remained less formal and the directors of court administration coordinated the complaint process.

The most significant disciplinary case considered by a judiciary relations committee was *In re Waltemade*.[18] The *Waltemade* case exemplified the strengths and weaknesses of the disparate system of judicial discipline which had evolved in New York. New York Supreme Court Justice Wilfred Waltemade was the subject of a single complaint of intemperate conduct on the bench. The charges alleged injudicious comments and extreme rudeness to attorneys and litigants.

11. Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look*, 40 FORDHAM L. REV. 1, 23 (1971).

12. 22 N.Y. CODES, RULES & REGS. § 607 (1969).

13. 22 N.Y. CODES, RULES & REGS. § 607.2(a)(1972).

14. 22 N.Y. CODES, RULES & REGS. § 607.1 (1969).

15. 22 N.Y. CODES, RULES & REGS. § 607.6 (1969, amended 1976).

16. *In re* Suglia, 36 App. Div. 2d 326, 320 N.Y.S.2d 352 (1971) (which culminated in a public censure); *In re* Waltemade, 37 N.Y.2d(a) (Ct. Judiciary 1975) (*see* text accompanying notes 18-19).

17. 22 N.Y. CODES, RULES & REGS. § 704 (1973).

18. 37 N.Y.2d(a) (Ct. Judiciary 1975).

The committee undertook to interview scores of witnesses who appeared in the judge's courtroom. After a thorough investigation, involving extensive interviews and hearings, the entire Judiciary Relations Committee of the First Judicial Department agreed that the charges had been sustained. The committee was divided, however, as to the appropriate disciplinary sanction and it filed two reports. Four members urged that the judge be publicly censured and the other four sought to convene the Court on the Judiciary to determine whether the judge should be removed from office.

Though the Presiding Justice of the appellate division refused to request the convening of the Court on the Judiciary, Chief Justice Charles Breitel of the New York Court of Appeals read both committee reports and convened the Court on the Judiciary on his own motion. Counsel was appointed by the court, forty-six charges were filed against Justice Waltemade, and a lengthy hearing was subsequently held by a court-designated referee. Although a full adversary hearing had been conducted before the Judiciary Relations Committee, the state constitution required a hearing before the Court on the Judiciary.[19] Convening the court meant presenting much of the same evidence that had earlier been presented during the committee's formal hearings, calling many of the same witnesses to testify and, by and large, repeating the same lengthy presentation, testimony and cross-examination that had led to the court's convening in the first place. In addition, because of the complexity of the case, counsel appointed by the Court on the Judiciary conducted his own investigation of the matter before proceeding. This new investigation lasted several months and resulted in even more charges being filed against the judge.

The attempts at insuring thoroughness and due process proved to be both expensive and time consuming. While the public must bear certain costs and tolerate certain delays to insure the integrity and fairness of the disciplinary process, it is difficult to justify such duplicative hearings, especially in light of the timing of the final disposition of the *Waltemade* case. The Court on the Judiciary sustained several of the misconduct charges against Justice Waltemade in a decision handed down in December 1975, three years after the initial complaint was made to the Judiciary Relations Committee and only weeks before the expiration of the judge's term.

Even before the *Waltemade* case was resolved, dissatisfaction with the existing system of judicial discipline was growing. Following intensive media criticism of a few judges as well as the system to discipline the judiciary,[20] legislative leaders and court-reform organizations developed

19. N.Y. CONST. art. VI, § 22(a) (1961, amended 1975).

20. Goldstein, *How to Measure a Judge's Conduct*, N.Y. Times, Aug. 17, 1975, § 4, at 4, col. 3.

plans for a better alternative. Their efforts led to an amendment to the New York State Constitution which: (1) reconstituted the Court on the Judiciary; (2) in disciplinary cases gave the court jurisdiction over *all* judges in the state, thus including lower court judges, who previously had been under the jurisdiction of the four appellate divisions; and (3) created a statewide Commission on Judicial Conduct with full investigatory and limited disciplinary authority of its own.[21] The statewide scope of the commission's jurisdiction effectively put an end to the fragmented departmental approach to investigations of misconduct and consolidated the entire state process in one agency.

THE ESTABLISHMENT OF A STATE COMMISSION ON JUDICIAL CONDUCT: TWO PHASES

The State Commission on Judicial Conduct was created by the legislature in two steps. In 1974 a temporary commission was created to receive and investigate complaints of judicial misconduct and to initiate investigations on its own motion.[22] The temporary commission was a forerunner to a permanent commission which was created by a constitutional amendment.[23]

The legislation and the proposed constitutional amendment provided for a nine-member commission. No more than two judges could be appointed to the commission and at least two lay persons were to be appointed. Three members were to be appointed by the governor, two by the Chief Justice of the New York Court of Appeals and one by each of the four legislative leaders. The diversity of those who made the appointments ensured that the commission would be independent of any single branch of the government.

The Temporary State Commission on Judicial Conduct was organized in late 1974. Under the provisions of the legislation establishing the temporary commission and the subsequent legislation setting forth the specific powers and duties of the permanent commission, an administrator was employed with authority to hire a staff, to establish their duties and salaries, and to supervise all staff work. The administrator also acted as counsel to the commission and to the Court on the Judiciary in the cases initiated by the commission.

The permanent State Commission on Judicial Conduct became effective in September 1976 by virtue of a state constitutional amendment[24] which was overwhelmingly approved by the electorate in November 1975. The new commission is given the power to censure publicly, suspend

21. N.Y. CONST. art. VI, § 22 (1961, amended 1975).
22. N.Y. JUD. LAW § 43, para. 2 (McKinney Supp. 1974).
23. N.Y. CONST. art. VI, § 22 (1961, amended 1975).
24. *Id.*

without salary for up to six months and retire for disability. All three of these powers, however, are subject to the right of a respondent-judge to receive a de novo hearing in the Court on the Judiciary. The commission must accord a hearing before any of these sanctions are employed. Following a determination by the commission to exercise any of these powers, the respondent-judge has ten days to decide whether to accept the determination or to seek a new hearing in the Court on the Judiciary. The commission can also convene the Court on the Judiciary in cases believed sufficiently serious for removal.

The temporary and permanent commissions have followed similar procedures in conducting investigations. Both have accepted all complaints alleging misconduct and have routinely dismissed without inquiry complaints which concerned judicial discretion and decision-making. The commission has expressed its belief that the independence of the judiciary requires it to refuse to become involved in issues which may more appropriately come within the purview of appellate courts.[25] For example, the commission does not review the issues of whether bail in a particular case is grossly inadequate or whether a judge took into account the protection of the public in sentencing a convicted felony offender. Nor does it review the merits of litigated civil cases or decisions or rulings made by the courts.

The commission has exercised the subpoena power granted by the legislature[26] and has initiated its own investigations upon the receipt of reliable information.[27] Attorneys, judges, district attorneys, court personnel and law enforcement officials may make informal complaints to the commission. The statute governing the permanent commission's procedures requires a written and signed complaint.[28] The commission may initiate an inquiry upon the signed complaint of its administrator[29] or investigate the written, signed complaint of any other person. All investigations are authorized by the members of the commission, who meet regularly and review all complaints and the progress of investigations. Following commission authorization to investigate a complaint, witnesses may be subpoenaed by the administrator and sworn testimony may be taken by him or a staff attorney, pursuant to a delegation of commission authority permitted by statute.[30]

25. TEMPORARY STATE COMMISSION ON JUDICIAL CONDUCT, FIRST REPORT TO THE GOVERNOR, THE LEGISLATURE AND THE COURT OF APPEALS OF THE STATE OF NEW YORK 6-7 (October 1975) (unpublished).
26. N.Y. JUD. LAW § 42, para. 1 (McKinney Supp. 1976).
27. *Id.* § 43, para. 2.
28. *Id.* § 43, para. 1.
29. *Id.* § 43, para. 2.
30. *Id.* § 43, para. 1.

Since 1974, the commission has reviewed more than a thousand complaints,[31] many of which were sent by disappointed litigants who raised no substantive issues of misconduct. The commission has reprimanded fifty-one judges and commenced removal proceedings against eleven others.[32] Two of these nine judges were removed from office.[33] Two were suspended without pay for six months.[34] Four were publicly censured,[35] two resigned, and one case is pending because the judge is under indictment. Twenty-nine other judges resigned after learning that charges or investigations were pending before the commission.

The commission has also issued a public report on its investigation of alleged ticket-fixing by judges in thirty-eight of New York's sixty-two counties.[36] The report discloses that the commission has amassed documentary evidence that more than 250 judges, most of whom are part-time town and village justices, have been improperly influenced in the disposition of speeding and other traffic offenses by friends, relatives, political officials and other judges. The report noted that the commission would pursue appropriate disciplinary action in each case. As a result of this inquiry, 38 Courts on the Judiciary have been convened.

A Constitutional Amendment to Create a New Commission on Judicial Conduct and to Eliminate the Court on the Judiciary

A constitutional amendment concerning judicial discipline[37] has been approved overwhelmingly in a public referendum. It is effective as of April 1, 1978. The amendment will eliminate the Court on the Judiciary, expand the membership of the commission to eleven members and authorize the state's highest court to review the commission's proceedings and to impose disciplinary sanctions. The commission will conduct investigations and all hearings and will render determinations and specific sanctions. Upon application of the respondent-judge, the New York Court of Appeals will review the commission proceeedings, as well as the briefs presented by the commission and the respondent-judge, and then render a decision. If no applica-

31. The appropriate statistics, reported in the Final Report of the Temporary State Commission on Judicial Conduct, *supra* note 5, at 4, have been updated from the commission's files.

32. *Id.*

33. *In re* Mac Dowell, 57 App. Div. 2d 169, 393 N.Y.S.2d 748 (1977); *In re* Perry, 53 App. Div. 2d 882, 385 N.Y.S.2d 589 (1976).

34. *In re* Vaccaro, 178 N.Y.J.L. 61 (1977); *In re* Tracy (unreported).

35. *In re* Filipowicz, 54 App. Div. 2d 348, 388 N.Y.S.2d 920 (1976); *In re* Feinberg, — N.Y.2d — (Ct. Judiciary 1976); *In re* Mertens, 56 App. Div. 2d 456, 392 N.Y.S.2d 860 (1976).

36. New York State Commission on Judicial Conduct, Ticket-Fixing: The Assertion of Influence in Traffic Cases (June 1977) (unpublished).

37. Amendment to N.Y. Const. art. VI, § 22 (McKinney Supp. 1976).

tion for review is made by the respondent-judge, the commission's determination will be final.

The advantage of the proposed system is that duplicate hearings will be eliminated. The disadvantage is that the investigative and trial functions will be carried out by the same agency. Nevertheless, developing fair procedures by separating investigative and hearing functions will solve some of the problems inherent in this system. There exists a further safeguard in that the fairness of the commission's procedure will be subject to review by the New York Court of Appeals, which will have ultimate jurisdiction to impose disciplinary sanctions.

A COMMENTARY ON THE COMMISSION SYSTEM OF JUDICIAL DISCIPLINE

More than forty states have disciplinary commissions of one type or another.[38] They vary in size, approach and effectiveness. There is no perfect model for judicial discipline procedures. Commissions which conduct investigations and hearings and then report to the state's highest court which renders a decision (a "one-tier" system) may be as effective as commissions which investigate and recommend charges to a court, or other body of judges, which then conducts the hearing (a "two-tier" system). The success of a discipline system is dependent upon other factors.

Adequate funding is essential. Sufficient investigative, trial and supportive staff should be hired and should be under the control of a single executive officer. It is indisputable that investigating agencies established without sufficient means to conduct adequate investigations exist in name only. There is, of course, no simple standard for adequate funding because some states have many more judges than other states. Nevertheless, funding must be sufficient enough to permit a commission to hire adequate staff to conduct comprehensive investigations, try disciplinary cases and submit briefs and memoranda of law. While a commission is obligated to ascertain whether there has been misconduct in a particular matter, it has an added, and perhaps greater, responsibility to the public and to the judiciary. That is, when an ethical violation is identified, an attempt should be made to determine whether it is an isolated incident or part of a pattern of misconduct. Sufficient funding should be available so that commissions are able to uncover the full extent of misconduct and determine whether judges who have been admonished have heeded such admonitions. Such comprehensiveness is costly, but it is a cost which should be borne so that a commission may meet its responsibility.

38. Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look*, 40 FORDHAM L. REV. 1, 37-40 (1971).

Monitoring of live judicial proceedings is an essential investigative tool. It is useful in determining whether a judge is patient and courteous and may be used to provide supplementary data in connection with a complaint alleging rudeness by a judge. To ensure the reliability and accuracy of specific investigations, commission personnel should observe public court proceedings without notifying the judge who is under inquiry. This procedure is not without some controversy, however. No one likes being monitored and there is some unfounded fear that the monitoring staff will make decisions as to the competence of the judges being monitored. It is important to have a carefully selected and trained monitoring staff whose *sole* purpose is to provide information. Monitors must be cautious in reporting behavior similar to that alleged in the complaint. A judge is not expected to be perfect or immune from becoming annoyed at the incompetence or brashness of the people in his court. While monitoring does not establish what occurred in connection with the original complaint, it can serve the purpose of assessing a judge's in-court temperament, especially if the monitoring takes place over a sufficiently long period of time. The great majority of monitoring reports in New York confirm the lack of a demeanor problem and consequently lead to the dismissal of many complaints.

The success of any disciplinary system is dependent upon the complaint process. Judges, attorneys, public and law enforcement officials should be reminded of their legal and ethical obligations to report judicial misconduct and to cooperate with commission investigations. A commission should utilize its subpoena powers in connection with investigations. In this regard, the reluctance of attorneys to testify against judges should not be permitted to frustrate commission goals. More importantly, the commission should utilize its authority to initiate investigations on its own motion. While written complaints should be encouraged, they should not be mandatory. Newspaper articles and reliable information should be sufficient to cause inquiries to be commenced. The public also should be encouraged to bring complaints to the commission, which should be highly visible and accessible. Attempts should be made to advise the public of the commission's existence and the scope of its jurisdiction. Administrators should take care not to discourage public complaints by employing complex forms or placing burdens upon complainants to submit affidavits or other cumbersome, written materials.

Finally, the courts must be just and appear to be just in order to have the respect of the public. Similarly, commissions on judicial conduct must perform responsibly and professionally and appear to do so without sacrificing the rights of individuals. Judges' rights should also be respected and be honored. A commission should protect the independence of the judiciary and the right of judges to render decisions free of interference. All investiga-

tions should be strictly confidential in order to protect judges from prejudicial publicity which might seriously damage their judicial stature and reputations. Newspaper "leaks" do not result in respect for investigating agencies. A commission on judicial conduct will only earn respect through the diligence of its efforts and its respect for the rights of those who are being investigated. Anything less will fuel the public's growing skepticism toward the integrity of the judiciary.

CONCLUSION

There has been considerable discussion about a commission "system" of judicial discipline. As a practical matter, there is no single system. The basic procedures followed by individual commissions are similar, but there is considerable variation in the efforts being made to identify judicial misconduct. Some commissions are known to respond only to written, and sometimes verified, complaints. Others regard it an obligation to monitor the judiciary and invite complaints, both written and oral.

The state of New York has established an active, adequately funded commission which has the authority to initiate investigations without receiving complaints. With an overwhelming electoral mandate in November 1977 expanding its authority and restructuring it as a single-tier commission, the New York State Commission on Judicial Conduct will continue in its efforts to make the judiciary more sensitive to the high ethical standards expected of judges. This, in the final analysis, should be the primary goal of every commission.