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Proposed Standards Relating to Judicial Discipline and Disability Retirement

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APPENDIX

PROPOSED STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT

1 JUDICIAL AUTHORITY

1.1 Inherent Powers of The Court. The power to discipline judges is inherent in the state's highest court. The inherent power of the court includes the power to:
(a) Recommend impeachment;
(b) Impose discipline upon a judge as an attorney;
(c) Suspend with salary;
(d) Censure;
(e) Reprimand;
(f) Impose administrative sanctions, including transfer or reassignment; and
(g) Take other action, as appropriate, including summary action in an emergency.

Commentary

Inherent power is sometimes described as "implied," "essential," "incidental," or "necessary," but it is most often described as "inherent." It is essential to the existence, dignity and operation of the court as a separate but equal part of government. The authority is implied because it is indispensable to the court if the court is to perform the duties specifically assigned to it.

This inherent power includes the authority to discipline judges independent of any express constitutional grant. The court has this power because it is responsible for the operation of the judicial branch and because the power has not been granted to either of the other two branches. The power to remove a judge from office is specifically omitted from the list of inherent powers of the court; inherent power does not include the power to remove. Since that power is essential to an effective disciplinary system, a constitutional provision is needed to give the court the authority to remove judges. See Standard 1.3.

These standards are designed for all American judicial systems. Because state courts are greater in number than their federal counterparts, and because there is a split of opinion on the Joint Committee concerning the matter of federal judicial discipline, the standards are designed chiefly with a view to the state's needs. (Appendix I is a Committee statement regarding federal judicial discipline and disability retirement).

A note concerning style. For ease of drafting the Joint Committee has adhered to generic use throughout the standards so that male and female persons are intended.

Finally the Joint Committee invited individuals and committees, judicial conferences and councils, citizen committees and bar associations, and members of the bench and bar to read, analyze and discuss these standards. All comments, suggestions and criticisms along with requests for additional copies should be addressed to the Project Director, Howard S. Primer, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.
It is essential to have a method for imposing judicial discipline for the following reasons: to protect the public; to preserve the integrity of the judicial process; to maintain public confidence in the judiciary; and to create a greater awareness of proper judicial behavior on the part of the judges themselves. Therefore, in those states where there is no constitutional provision for a commission on judicial discipline and disability retirement to handle matters of judicial misconduct and disability, the court should exercise its inherent power. In those states where a commission has been established, the court may still exercise its inherent power along with the commission; although the court can, and in many cases should, rely on the commission because of its special expertise in processing these matters.

1.2 Persons Subject to Discipline. At any level of government, anyone exercising judicial powers and performing judicial functions, including judges assigned to administrative duties within the judicial branch, should be subject to judicial discipline and disability retirement.

Commentary
A judge's conduct on or off the bench should be subject to judicial discipline and disability retirement when it brings discredit to the judiciary. This is true whether the judge is full-time, or part-time, or recalled to service after retirement; whether the judge is a city magistrate, justice of the peace, commissioner, referee or any other person at any level of government acting under the authority of the judiciary and performing judicial functions. If a commission exists, it should have jurisdiction over all judicial officers.

Administrative procedures other than judicial discipline should be used for the discipline and removal of officials acting as members of boards and commissions performing quasi-judicial functions.

1.3 Constitutional Authority for Removing a Judge. The Constitution should authorize the court to remove a judge from office for discipline or disability.

Commentary
While the court has the inherent power to discipline judges (see Standard 1.1) it lacks the inherent power to remove them from office. That power is essential to an effective disciplinary system, and a constitutional provision is needed to give the court the authority to remove judges for misconduct or disability.

1.4 Establishment of Commission. A commission on judicial discipline and disability retirement should be established by the constitution in each jurisdiction.

Commentary
A permanent commission should be established in each jurisdiction. A constitutional provision provides permanency and emphasizes the importance of the commission's work.

In 1960, by constitutional amendment, California created a permanent commission to receive and investigate complaints against judges, hold hearings, and make recommendations to the supreme court regarding misconduct or disability of judges. Since then, similar bodies have been established in 46 states, the District of Columbia, Guam and Puerto Rico.
1.5 *Discipline.* The commission should have authority to receive information, investigate, conduct hearings, and make recommendations to the court concerning allegations of judicial misconduct.

**Commentary**

This approach combines all the following functions in a single commission: receiving complaints, investigating, determining probable cause, conducting formal hearings, making findings of fact, and making recommendations to the court regarding discipline and disability. The court then reviews the record and imposes discipline as warranted.

This approach is substantially followed in a majority of the jurisdictions with commissions: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin, Wyoming and Puerto Rico.

This system avoids multiple investigations, makes possible more prompt determinations, and gives final disposition to the court in every case. The constitutionality of a system of this type has been upheld in *Withrow v. Larkin*, 95 S. Ct. 1456 (1975).

Some jurisdictions presently use a board to find probable cause and a second independent body to hear and determine the charges and impose discipline. Included in this approach are those states using a "Court on the Judiciary" to impose discipline independently of the court, but occasionally subject to review by the highest court. States currently using a bifurcated approach are: Alabama, Delaware, Illinois, Oklahoma, New York, and West Virginia. As this Standard indicates, the use of multiple bodies to handle matters of judicial misconduct or disability is not recommended.

1.6 *Disability.* The commission should have authority to receive information, investigate, conduct hearings, and make recommendations to the court concerning allegations of the mental or physical disability of judges.

**Commentary**

Inability of a judge to perform his duties because of mental or physical disability affects the administration of justice just as much as does judicial misconduct. Therefore, the commission should have jurisdiction over these matters as well. Most presently existing commissions have the power to deal with allegations relating both to judicial misconduct and disability. See Section 8 of these standards.

1.7 *Voluntary Retirement for Disability.* The commission should have authority to investigate, conduct hearings, and make recommendations with reference to voluntary retirement for disability.

**Commentary**

In some jurisdictions a judge can apply for disability retirement under a statutory provision. Eligibility for pension benefits under disability retirement is determined by a factfinder. The commission established for discipline and disability retirement is well suited for this fact finding task. The request for disability retirement may be made by the judge, by the chief justice, or by the commission.
The rule prescribing commission duties with regard to disability retirement should be in accord with the applicable statutes of the jurisdiction.

1.8 Impeachment. Removal by impeachment should be retained.

Commentary

Impeachment is the least desirable method of judicial discipline. It is an all-or-nothing approach and ordinarily is effective only for egregious and spectacular instances of misconduct. The impeachment process is subject to political considerations; experience has shown it is expensive, cumbersome, and ineffective. If the judicial discipline commission and the court are functioning properly in judicial disciplinary enforcement, there will be no need for impeachment proceedings. Impeachment should be retained, however, as a check not only upon the judiciary, but upon the judicial discipline and disability retirement process as well. No other method of judicial removal is justified or recommended.

2 Organization, Composition and Staffing of Commission

2.1 Need for Independence. The commission should be independent of and free from interference from the executive or legislative branches and although operating within the judicial branch should report only to the supreme court.

Commentary

Separation of powers requires that the disciplinary proceeding operate wholly within the judicial branch of government. It should, however, be free from interference by the judiciary if it is to function effectively and maintain public confidence.

2.2 Funding. The commission should be adequately funded to assure its independence and effectiveness. Its necessary expenses should be provided for in a separate and distinct budget.

Commentary

Adequate funding is essential to effective functioning of the commission. It should not have to rely upon donated services from other branches of government.

Although the support of the commission will, in most jurisdictions, be provided for in the judiciary budget, the commission should not be under its control. This protects the integrity of the judiciary, so no one can charge that the judiciary is withholding funds and thereby hampering the commission in investigating the conduct of one of its members.

2.3 Composition. The commission should be made up of judges other than those on the state’s highest court, lawyers, and public members. Its members should serve for fixed terms that are staggered within each classification and there should be a limitation on the length of service by any one individual.

Commentary

The method of selecting the membership of the commission is left up to each jurisdiction. It should be emphasized, however, that political and
ideological considerations should not enter into the naming of commission members. The commission's independence must be protected from the appearance of impropriety and outside interference.

Since members of the court will be called upon to review the findings of the commission and to impose final dispositions, they should not serve on the commission. The judicial members on the commission may be appointed by the court; the lawyer members may be appointed by the governing body of the organized bar association, and, the public members may be appointed by the governor.

Each of the classifications should be equally represented on the commission. In addition, each classification member should serve for a fixed term that is staggered within that classification. In that way there will always be continuity, and by limiting the length of service by one member there will constantly be fresh perspectives as well. For example, a nine-member commission would be composed of three judges, three lawyers, and three public members. Each member would serve for six years with one in each classification being replaced every second year.

A commission member should be secure in knowing that he can only be removed by a showing of good cause and then only by the chairman of the commission.

2.4 Chairman. The chairman should be selected by the members of the commission.

Commentary

The independence of the commission will be enhanced if the commission chooses its own leadership. The selection should occur with a change in commission membership.

2.5 Alternate Members. Alternate members, to take the place of those disqualified or absent, should be selected at the time and in the manner prescribed for initial appointments in each representative class, and should serve at the call of the chairman.

Commentary

An alternate should be used any time a member is either disqualified or unable to attend a commission meeting. Alternates should be called from the same representative group as the absent or disqualified member. If a vacancy occurs that should be filled by an alternate during the pendency of a hearing, it should be treated as would the replacement of a juror in a regular civil trial. The alternates may sit with the commission to gain familiarity with procedures and practices.

2.6 Rules of Procedure and Forms. The commission should have authority to submit rules of procedure for the approval of the court, and to develop appropriate forms for its proceedings.

Commentary

The commission is unique in its operation and will develop the expertise necessary to propose its own rules. Since administrative procedures and civil rules may not uniformly apply to these proceedings it is essential that the commission have this authority. Since rule-making authority is only with
the court, the commission should submit its proposed rules to it for approval. In the absence of an applicable commission rule, the rules of civil procedure should apply.

The commission should prepare forms to facilitate transaction of its business, including, subpoenas, notices, complaints, waivers of confidentiality, and requests for voluntary retirement. These may be submitted to the court for its approval.

2.7 **Executive Officer.** The commission should appoint an executive officer and establish a permanent office.

**Commentary**

There should be a permanent office to which all inquiries are sent and to which the public may be referred when inquiries or complaints are made to other members of the judicial branch, the organized bar, or any other agency. The existence, address and telephone number of the commission should be made known to the public. All complaints should be acknowledged by the commission as quickly as possible.

The permanent office can process and receive all inquiries, consolidate multiple complaints, keep uniform records, and provide informed disposition of frivolous or unfounded complaints.

There should always be an executive officer directing the activities of the permanent office. In jurisdictions where the workload is insufficient to warrant hiring a person full-time for this position, someone not engaged in active practice of law should be retained or designated to hold this position on a part-time basis. The administrative director of the courts, the clerk of the court or a member of the court's central staff, a law teacher or a retired judge or lawyer may be appointed. If it is necessary to use other personnel within the court system to perform these duties, it should be stressed that the designated person is acting as an independent officer of the commission and his independence from other court functions should be carefully protected.

2.8 **Duties and Responsibilities of Executive Officer.** The executive officer should have duties and responsibilities as prescribed by the commission, including the authority to:

(a) Receive information, allegations, and complaints;
(b) Make preliminary evaluations;
(c) Screen complaints;
(d) Conduct investigations;
(e) Recommend disposition;
(f) Maintain the commission's records;
(g) Maintain statistics concerning the operation of the commission and make them available to the commission, and to the court;
(h) Prepare the commission's budget for approval by the commission, and administer its funds;
(i) Employ and supervise other members of the commission's staff;
(j) Prepare an annual report of the commission's activities for presentation to the commission, to the court, and to the public.
(k) Employ, with the approval of the commission, special counsel, private investigators, or other experts as necessary to investigate and process matters before the commission and before the court.
The use of the attorney general's staff prosecutor's or law enforcement officers for this purpose should be avoided.

Commentary

The executive officer, or in a busy office someone under the executive officer's direction, should receive all complaints, information, and allegations, whether written or oral. That person should immediately consider and evaluate these complaints to determine whether on its face a cause within the jurisdiction of the commission has been stated. (Standard 4.4). For instance, when a complaint is only an attempted substitute for an appeal, the complainant should be informed that the matter raised is outside the commission's jurisdiction. Commission members should not respond to complaints or inquiries received by them.

Once the complaint has been evaluated and jurisdiction is found to exist, the complaint should be reviewed by the executive officer in an effort to determine if it is based upon frivolous grounds. This screening should be conducted in accordance with commission guidelines. If necessary to properly undertake the screening, the executive officer should be empowered to conduct investigations. After concluding that the complaint states frivolous grounds, it should be dismissed and, in accordance with Standard 4.14, a report should be prepared for submission to the commission at its next regular meeting. The executive officer should notify the complainant, if any, that the complaint has been dismissed after the commission has reviewed the executive officer's report. See Standard 4.12.

If the complaint is not dismissed by the executive officer and the commission following preliminary screening, the executive officer should conduct further necessary investigations; this may include interviewing the judge whose conduct is in question as well as other witnesses. Standard 4 prescribes the procedure to be followed.

The hiring and supervising of all office staff authorized by the commission should be the responsibility of the executive officer.

The executive officer, with the approval of the commission, should also have the authority to employ counsel, private investigators, or other experts as necessary to investigate and process matters before the commission and when necessary before the court. The use of law enforcement officials, district attorneys, or members of the attorney general's staff is not recommended. Since matters of judicial misconduct and disability is not their regular responsibility, they may lack the expertise or fail to devote the attention required due to the existence of other priorities among their primary responsibilities. Their use may also interfere with the independence of the judiciary. As Standard 2.1 states, the commission should be completely independent and separate from the other branches of government.

The executive officer should maintain all the commission files in a secure place. These files should contain copies of complaints, acknowledgements of receipt of complaints, news clippings and other material that may form the basis for initiating an inquiry, memoranda to the commission with staff recommendations to dismiss complaints, records of contacts with potential witnesses, summaries of witnesses' testimony if they are to be called, all formal complaints, transcripts, budget records, meeting agendas, and other material that would be useful for preparing the annual report.

Annual reports are published by many commissions. They are helpful in acquainting judges with the practices of the commission. They acquaint
lawyers and the public with the fact that procedures exist for judicial discipline and disability. Public reporting also fulfills the function of impelling commission members to evaluate their procedures and practices.

Insofar as practicable, statistics should be compiled in a manner that would facilitate their use by other jurisdictions and by the National Clearinghouse designated in Standard 9.4. These statistics may be released to the public at the discretion of the commission. It will be the executive officer's responsibility to maintain all information necessary to compile the statistics.

The executive officer should maintain all budgetary information for the commission, prepare a proposed budget for commission approval, approve all expense forms of commission members, authorize the purchase of necessary equipment, books and materials, and represent the commission at budget hearings.

2.9 Absolute Immunity. Members of the commission, masters or referees, commission counsel, and staff should be absolutely immune from suit for all conduct in the course of their official duties.

Commentary

Commission members and staff must be free from harassment. Immunity assures the independence of the commission and eliminates a major deterrent to service.

3 JURISDICTION AND GROUNDS FOR DISCIPLINE

3.1 Jurisdiction Over Sitting Judge. Other than jurisdiction through impeachment, the commission should have exclusive jurisdiction over the conduct of all sitting judges, including part-time judges. This jurisdiction should include conduct that occurred prior to a judge assuming judicial office.

Commentary

It is to the benefit of the public and necessary for the independence of the judicial office that questions regarding the conduct of a sitting judge should be within the exclusive jurisdiction of the commission. This is true whether the conduct occurred prior to or while holding the judicial office.

Jurisdictional uncertainties between the commission and a lawyer disciplinary board about the conduct of judges who are also lawyers impede the judicial and the lawyer disciplinary processes. Judicial and lawyer disciplinary processes differ as to tribunal, standards of conduct, and the public office involved. Rules specifying which body has jurisdiction and when that jurisdiction attaches should be promulgated by the court. Failure to resolve these conflicts will leave both disciplinary processes open to the uncertainties of res judicata and collateral estoppel, and may subject the judge, whose conduct is in question, to multiple proceedings. The public should be aware that both agencies exist and of the function of each. See Standard 7.12.

3.2 Jurisdiction Over Former Judge. The lawyer disciplinary agency should have jurisdiction over a lawyer who is no longer a judge with reference to allegedly unethical conduct that occurred during or prior to the time when the lawyer held judicial office, provided such con-
duct has not been the subject of judicial disciplinary proceedings as to which a final determination has been made by the court.

Commentary

The Supreme Court of Florida held in *Florida Bar v. McCain*, 330 So.2d 712 (Fla. 1976), that a sitting judge is still an attorney at law and may be subject to discipline by the bar after his tenure as judge ends. In contrast, a lawyer in California who becomes a judge is thereby excluded from membership in the State Bar. Cal. Bus. and Prof. Code Section 6002. The interrelationship of lawyer and judge discipline presents a different problem in such a state.

Action by the commission or the court resulting in voluntary resignation or retirement should not be a bar to further action by the lawyer disciplinary agency for the same conduct. This is true unless, on motion of the court or application of the judge, and after notice and opportunity to be heard is given to the lawyer disciplinary board, the court orders that the lawyer disciplinary board not proceed further.

3.3 **Grounds.** Grounds for discipline should include:

(a) Conviction of a felony;
(b) Willful misconduct in office;
(c) Willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute;
(d) Conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the judicial office into disrepute;
(e) Any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.

Commentary

These grounds establish jurisdiction for the commission to investigate and to hold hearings. A function of the commission is to enforce the codes of judicial conduct and professional responsibility. The grounds outlined in the standards are a compilation of the various grounds relied upon in most of the states. They include conduct related to judicial duties in violation of a statute, rule, ordinance, or the codes of judicial conduct or professional responsibility.

Standard 6.1 states that a conviction of a felony should be automatic grounds for the court to suspend from office. Other crimes are covered under Standards 3.3(d) and 6.2.

This standard provides that not only impropriety but also the appearance of impropriety that brings the judicial office into disrepute may be a basis for commission action. Willful misconduct has been construed to be more serious than conduct prejudicial to the administration of justice. See *Geiler v. Commission on Judicial Qualifications*, 10 Cal.3d 270, 110 Cal. Rptr. 201, 515 P.2d 1 (1973), regarding the handling of this type of lesser included offense. Conduct outside judicial duties may also reflect upon the integrity of the judicial process.
3.4 Proceedings Not Substitute for Appeal. In the absence of fraud, corrupt motive, or bad faith, the commission should not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. Claims of error should be left to the appellate process.

Commentary

The disciplinary process is not a substitute for an appeal. To allow the disciplinary function to be confused with the decision-making function of the judge would undermine judicial independence. Judges would be as concerned with what is proper in the eyes of the disciplinary commission as with what is justice in the cause. Many present practices and procedures are the result of an innovative judge trying to do justice in the cause and improve the administration of justice.

4 Procedures Prior to Finding of Probable Cause

4.1 Initiation of Procedure. An inquiry relating to conduct of a judge may be initiated upon any reasonable basis.

Commentary

Oral or written complaints may be made by judges, lawyers, litigants, court personnel, or members of the general public. They need not be made in any specific form, nor need they be made under oath, but they must state facts that, if true, would be grounds for discipline. Upon good cause and upon its own motion, the commission may initiate an inquiry concerning any judge.

Complaints submitted anonymously should not be disregarded. Lawyers, court personnel, or litigants may fear retaliation of a kind not insulated against in the immunity provision (Standard 4.2), and therefore refrain from bringing misconduct to the attention of the commission unless it is possible to do so anonymously. If the complainant is unknown or is unwilling or unable to sign a sworn complaint pursuant to Standard 4.15, the statement of allegations should be prepared as if the commission had proceeded on its own motion.

Reports in the news media relating to the conduct of a judge may form the basis for an inquiry by the commission. Reports or records required by law or court rule to be filed or kept by a judge may form the basis for inquiry by the commission.

4.2 Absolute Privilege. A complaint submitted to the commission or its staff or testimony related to the complaint should be absolutely privileged, and no civil action predicated on the complaint may be instituted against any complainant or witness, or their counsel.

Commentary

It is crucial to the proper and effective functioning of the commission that persons with information about judicial misconduct cooperate with the investigations into those matters, and that persons feel free to bring matters to the attention of the commission for further action. Cooperation will not be forthcoming unless some protection is afforded the complainants and witnesses.
Complaints should be granted an absolute privilege (Weiner v. Weintraub, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968); Ramstead v. Morgan, 219 Or. 383, 347 P.2d 594 (1959)), rather than the less protective “qualified privilege” adopted by some jurisdictions, waving immunity when the complaint is filed with malice.

Immunity from civil action attaches only to communications made to the commission or its staff. If the complainant or witness publicly discloses the information, this immunity does not apply. Therefore, the complainant or witness remains liable in a civil action if he publicly makes a false allegation about a judge. In addition, a false allegation in a sworn complaint will be subject to charges of criminal perjury whether made publicly or to the commission or its staff.

The privilege granted is immunity from suit, and not privilege from disclosure. See Standards 4.6 and 4.9, for standards relating to confidentiality and disclosure.

4.3 Unfounded Complaint. The commission should not encourage frivolous or unfounded complaints.

4.4 Screening, Preliminary Investigation, and Evaluation. Upon receipt of a complaint, report, or other information as to conduct that might constitute grounds for discipline, the executive officer should conduct a prompt, discreet, and confidential investigation and evaluation.

Commentary

As noted in the commentary to Standard 2.8, the executive officer should immediately consider each complaint to determine whether it describes a matter within the jurisdiction of the commission. If the matter is within commission jurisdiction, the preliminary investigation should be conducted with dispatch and inconspicuously, to avoid unnecessary embarrassment to the judge and precipitous publicity. Persons contacted for information should be asked to maintain confidentiality.

4.5 Discretionary Notice. Notice that a complaint has been made may be given to the judge.

Commentary

The judge may be given notice at any time during the preliminary proceedings when deemed appropriate, even before a preliminary evaluation is initiated. As a matter of fact, in over 90 percent of the cases, this notice should be given. In addition, under Standard 4.16, the commission must notify the judge after a finding of sufficient cause to proceed.

Notice that a complaint has been made should be delayed if the complaint does not allege facts within the jurisdiction of the commission, or if the identity of the complainant could be readily determined by the judge from the nature of the complaint, causing possible reprisals. Notice should be delayed if the nature of the complaint is such that notice to the judge may enable him to destroy evidence. If the complaint is determined to be frivolous or unfounded, the judge need not be notified.

The identity of complainants, where known, need not be disclosed pending preliminary evaluation. It is possible that the identity of the person or persons who brought the alleged misconduct to the attention of the
commission might never be disclosed, if the matter is disposed of before probable cause has been determined, or if a statement of allegations is prepared as if the commission proceeded on its own motion and the person is not a witness.

4.6 Confidentiality. All proceedings should be confidential until there has been a determination of probable cause and formal charges have been filed.

Commentary

In the initial stages of the disciplinary case confidentiality is of paramount concern. The judge has an interest in confidentiality to protect his reputation from unfounded charges. The complainant's interest is to be protected from possible recriminations for filing his complaint. The responsibility of the commission is to protect the reputation of the judge and the integrity of the judicial process from frivolous or unfounded charges, and to be able to investigate fully charges of misconduct with the full cooperation of others.

After the commission determines there is probable cause and formal charges have been filed, the policy emphasis shifts from confidentiality to the public's right to know. The integrity of the judicial system is better protected by an open public hearing than by a closed hearing which may raise questions concerning the credibility of the proceedings. This is particularly true in those instances where the conduct is publicly known and the commission proceedings are subject to rumor and speculation. Once a finding of probable cause has been made, there is no longer a danger that the charges are frivolous. It is no longer necessary to protect the identity of the witnesses since the judge is entitled to that information through discovery. (See Standard 5.7). Furthermore, evidence received at the public hearing is subject to public inspection as in any other court proceeding.

4.7 Enforcement of Confidentiality. A procedure for enforcing confidentiality should be established.

Commentary

Either the commission or the court should investigate allegations of breach of confidentiality and decide whether sanctions should be imposed. Sanctions are appropriate since Standard 2.9 prohibits resort to private law suits for breaches of confidentiality. Jurisdictions can provide for contempt of court as a sanction for breach of confidentiality. Kansas Rule 607 (1973); Minn. Rule 5 (2) (1973); N. Mex. Rule 7 (c) (1968, as amended 1975); Penn. Rule 1 (c) (1969); Wyo. Rule 7 (a) (1973).

4.8 Judge's Waiver. The judge may waive his right to confidentiality prior to a finding of probable cause.

Commentary

The judge may waive confidentiality voluntarily. If he is aware of an investigation, or if information about the matter becomes publicly known from outside sources, the judge may wish to have certain issues clarified by authorizing the commission to reveal information about the case. The commission's power is described in Standard 4.9.
4.9 *Public Statements by Commission.* 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.

**Commentary**

Occasionally, the news media will be the first to uncover alleged judicial misconduct and will publicize it widely. In other cases, a complainant or the judge himself may make disclosures. Under these circumstances the commission on its own motion or at the request of the judge may issue a clarifying statement. The statement should explain that the commission is aware of the allegations, that it is carrying out its responsibilities for investigating the complaint, that the judge is entitled to due process, and that, if probable cause is found, a public hearing will be conducted.

4.10 *Disclosure for Judicial Selection, Appointment or Assignment.* If in connection with the selection or appointment of judges, any state or federal agency seeks information or written materials from the commission concerning that judge, information may be divulged in accordance with procedures prescribed by the court, including reasonable notice to the judge affected, unless the judge signs a waiver. If in connection with the assignment of a retired judge to judicial duties, any appropriate authority seeks information or written materials from the commission about that judge, information may be divulged in accordance with procedures prescribed by the court, including reasonable notice to the judge affected, unless the judge signs a waiver.

**Commentary**

Judicial nominating commissions are charged with the important function of recruiting, investigating, and interviewing candidates for judicial office. Other authorities have the ability to assign a retired judge to judicial duties. In order to be effective, they must acquire as much relevant information about potential judicial officers as possible. Certainly, information about a judge's behavior is important. For those situations in which the information is requested without the knowledge of the affected judge, the judge should be given notice of the request and the intended disclosure, before the information is released. Such a provision is in keeping with the principle that data pertaining to an individual should not be disseminated without his knowledge, and without providing him an opportunity to respond to the notice of disclosure. To protect this right of the judge, the nominating or appointing authorities should comply with rules established by the court to receive access to information in the possession of the commission.

This disclosure is also authorized whenever the affected judge signs a waiver.
4.11 Information Concerning Insufficient Cause. If the inquiry was initiated as a result of notoriety or because of conduct that is a matter of public record, information concerning the insufficient cause to proceed should be released by the commission.

Commentary

A judge that has been subjected to public scrutiny for conduct that is a matter of public record and has had an inquiry by the commission started as a result of it, should be relieved of the burden that this causes if the commission concludes that it lacks probable cause to proceed further. The public shares the judge's interest in being given this information. Therefore, this is a sufficient reason to make an exception to the confidentiality rule.

4.12 Notice of Insufficient Cause to Proceed. Upon determination that there is insufficient cause to proceed, the complainant, if any, should be notified. If the judge has been informed of the proceeding, he should also be notified of its termination, and the file should be closed.

Commentary

The complainant who has filed a complaint with the commission but is unaware of the disposition of that complaint may conclude that the commission's silence after receipt of the complaint is evidence of its desire to protect the judge. It is in the best interests of the commission to reveal that it has investigated and reviewed the information and has determined that there is insufficient cause to proceed.

Since the matter did not go to a probable cause hearing, the information contained in the file remains confidential, but is retained by the commission. As discussed in Standard 4.13, the information contained in the closed file may be used for limited purposes in subsequent disciplinary and disability retirement proceedings against the judge.

4.13 Use of Closed File. A closed file may be referred to by the commission in subsequent proceedings.

Commentary

Standard 6.6 outlines the types of dispositions that the commission may make after a complaint has been filed and prior to a public hearing. With any of those dispositions the file will be closed. That file may be referred to again in limited circumstances.

1) Where there has been a finding of insufficient cause to proceed, the file may be referred to at a subsequent proceeding that raises the similar allegations against the judge. The file would be used to exonerate the judge where the complaint is based upon the same factual situation, and it would be made a part of a new investigation where the complaint is based upon a similar occurrence.

2) The file may be referred to after an informal adjustment if the judge fails to refrain from acting in the manner that caused the prior complaint to be filed. For example, the judge charged with failure to maintain judicial temperament may have been admonished by the commission prior to a filing of formal charges that his conduct is or may be cause for discipline. If, after
being admonished, another complaint is filed stating the same charge based upon other facts that are proven true at the public hearing, the prior file may be used as evidence to show that the problem is a continuing one and not just a rare occurrence.

3) The file may be referred to in connection with a decision as to the recommended sanction to be imposed, whether the sanction is imposed following a subsequent related or unrelated complaint.

4.14 Determination of Sufficient Cause. After a thorough investigation and evaluation, the executive officer should determine whether there is sufficient cause to proceed to a probable cause hearing.

Commentary

The decision to proceed to a probable cause hearing is made by the executive officer. It is made after a full confidential investigation has been conducted and an evaluation is made of all facts, information, and material collected. It should be noted that a determination of insufficient cause to proceed by the executive officer is reviewed by the full commission periodically. Standard 2.8 requires the executive officer to regularly report to the full commission the disposition of information received. Any matter dismissed that the commission determines should be further investigated may be reopened at that time by direction of the commission. The likelihood of a revival of a case on this basis is minimal.

4.15 Sworn Complaint. After investigation and evaluation, if it appears that there is sufficient cause to proceed, the commission should ask the complainant to file a detailed sworn complaint against the judge. When a sworn complaint is not obtained, a clear statement of the allegations against the judge and the alleged facts forming their basis should be prepared by the executive officer. Where more than one act of misconduct is alleged, each should be clearly set forth.

Commentary

Occasionally, a complainant is unwilling or unable to cooperate with the commission, or, indeed, may be the media. In those instances, the commission may authorize its executive officer to serve as the complainant by filing a statement of the allegations against the judge. Whether the complaint is sworn to a statement of allegations by the complainant or is filed by the executive officer, the judge should be able to ascertain quickly the constitutional, statutory, or disciplinary code provisions alleged to have been violated; although failure to cite the particular provision is not necessarily a violation of due process. In re Dindoide, 337 A.2d 885 (Pa. 1975).

4.16 Service of Sworn Complaint. The judge should be served promptly with a copy of the sworn complaint or statement of allegations.

4.17 Right to Counsel. The judge should be entitled to counsel of his own choice.

Commentary

While the judge has an absolute right to counsel of his own choice at all stages of the proceeding, it is inappropriate for the judge, thereafter, to hear matters in which his counsel appears; at least until considerable time has
passed between the commission proceedings and the appearance. When it happens, the judge should disqualify himself.

If the attorney is an active trial lawyer, or if the size of the bar in areas served by the court is limited, the court calendar can be seriously affected. Further, whenever the judge hears a case in which his counsel appears, whether or not recusal is expected, opposing counsel and his clients are likely to have understandable doubts regarding the judge's impartiality. It is desirable, where arrangements can be made, for counsel to be chosen from among attorneys whose practice is not in the same locale as the court over which the judge presides. Where possible, bar associations should exchange information with judges in neighboring districts about the availability of their members for service in commission proceedings.

4.18 Subpoenas and Discovery. The judge and the commission should each be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge as witness, and to provide for the inspection of documents, books, accounts, and other records.

Commentary

At any stage in a proceeding, the commission, its individual members, or authorized staff should, in the conduct of investigations and hearings, have the power of subpoena.

4.19 Power to Enforce Process. The power to enforce process may be delegated by the court.

Commentary

The inherent power of the court is complete in this area, but it may designate other courts to assist in the administration of certain functions without any limitation on its own power. It also determines the place for contesting process.

4.20 Response to Sworn Complaint. The commission should specify a reasonable time within which the judge should respond in writing to the charges. A personal appearance before the factfinder should be permitted in lieu of or in addition to a written response. In the event that the judge elects to appear personally, his statement should be recorded.

Commentary

The commission should notify the judge promptly as to the time within which he should respond. A copy of the rules of the commission should be furnished to him at the same time. See Standard 2.6 for authority to promulgate rules.

The commission should cooperate with the judge as much as possible. If the original notice to the judge is insufficient to enable him to prepare his response, the commission should provide him with such additional information as he requests, in as much detail as possible.

4.21 Termination after Response. The commission may terminate the proceeding and dismiss the complaint following the response by the
judge, or at any time thereafter, and should in that event give notice to each complainant and to the judge that it has found insufficient cause to proceed.

4.22 Amendment of Allegations. Amendment of the allegations prior to a finding of probable cause may be permitted upon notice to the judge.

Commentary

Upon notice to the judge and provision of adequate time to prepare a response, the commission should permit amendment of the allegations against the judge at any time prior to a finding of probable cause.

4.23 Finding of Probable Cause. A finding of probable cause should require the concurrence of a majority of commission members present.

Commentary

The finding of probable cause by a majority of commission members present is in contrast to Standard 5.23 where a majority concurrence by all members of the commission is required for it to recommend discipline or disability retirement to the court. This is, also, in contrast with the present requirement in some states that a 2/3 vote of the entire commission is required to find probable cause.

5 Procedure After Finding of Probable Cause

5.1 Filing of Formal Statement of Charges. When probable cause is found, the commission should file with the executive officer a formal statement of charges. Confidentiality ceases upon this filing.

Commentary

The formal statement of charges is a public document. It should be drawn with clarity and specificity. From it the judge should be able to ascertain the allegations and provision of the applicable codes alleged to be violated. The formal statement of charges need not be identical to the sworn complaint or statement of allegations obtained under Standard 4.15. The allegations may have been amended under Standard 4.22, or the commission may have determined insufficient cause to proceed on certain allegations.

5.2 Service of Formal Charges. The judge should be served promptly with a copy of the formal statement of charges.

5.3 Judge's Response. The judge should respond to the formal statement of charges within the time specified.

Commentary

The judge should be required to answer the formal charges as a part of his duty as a public official. The answer may be in any form recognized by the rules of civil procedure of the jurisdiction. Commission rules should prescribe the time for response and other time intervals. Lack of an answer by the judge does not relieve the commission of the responsibility to establish its case by clear and convincing evidence (Standard 5.17), but may be
taken into account by the commission in the formulation of its findings. Admissions may be obtained from the judge, who may be deposed (Standard 4.18) prior to the filing of formal charges.

5.4 Preparation for Hearing. The judge should be afforded ample opportunity to prepare for the hearing.

5.5 Scheduling and Notice. A hearing should be held without undue delay, and the judge and all counsel should be notified of the scheduled time and place.

Commentary

Where the rules for judicial disciplinary proceedings do not otherwise specify, the type and form of notice, and the determination of the hearing date should be governed by the rules of civil procedure of the jurisdiction. Commission rules should prescribe time for response, and other time intervals.

5.6 Time Limit on Discovery. The commission should provide by rule for time limits on discovery.

5.7 Discovery. The judge and the commission should be entitled to discovery to the extent available in civil or criminal proceedings, whichever is broader.

Commentary

Counsel for the commission should disclose to the judge all material including, but not limited to, relevant medical and other reports, books, accounts and records in the possession of the commission, without need for discovery. Names and addresses of persons known by the commission to have relevant information should be disclosed. If the judge seeks disclosure of names and addresses of persons which the commission believes is unwarranted, a motion to compel disclosure may be made in the court or in such court as it may designate. The court may grant, deny, limit or defer the disclosure sought. If, at any time during the pendency of the proceedings, the commission becomes aware of additional material or witnesses subject to discovery or inspection, the judge should be informed promptly and given adequate opportunity for preparation.

Discovery is a two-way street. Both the judge and the commission should be allowed wide discovery in order to prepare the case. Formal hearings can be expedited through broad discovery. Errant judges may retire or resign rather than proceed to formal hearings when they know what can and will be proved at the hearing.

5.8 Subpoena and Inspection. The judge and the commission should each be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge as witness, and to provide for the inspection of documents, books, accounts, and other records.

Commentary

The power of subpoena should be available at all stages of the proceedings (See Standard 4.18). The judge and the commission should be able to
gather evidence from a variety of sources in order to prepare and present the matter thoroughly.

5.9 **Public Hearing.** The formal hearing should be public and conducted before the factfinder, which may be the whole commission, three-member hearing panels appointed by the chairman, or a master or referee appointed by the court.

**Commentary**

In jurisdictions where there are too many hearings to be handled by the full commission, the use of three-member hearing panels is recommended. The composition of the hearing panel should reflect the composition of the commission, i.e., a judge, a lawyer, and a public member. No commission member who conducts the investigation of the matter should serve on the hearing panel, or with the commission in considering this matter. He should be replaced by an alternate. In the more populous states, conducting hearings by a referee or master may be the only way the commission can keep up with the number of formal charges. This is not recommended, but is recognized as a necessity upon occasion. Retired judges may be used for this purpose. Appointment of full-time active judges as referees or masters is not recommended as it will interfere with the performance of judicial duties and cause delays in the administration of justice. See In re Hanson, 532 P.2d 303 (Alas. 1975), where use of a master was acceptable.

5.10 **Presiding Officer.** The person designated to preside at a hearing should be either a judge or a lawyer who is familiar with ruling on motions and admission of evidence.

5.11 **Rules of Evidence and Due Process.** In the hearing all testimony should be under oath, the rules of evidence applicable to civil proceedings in the jurisdiction should apply, and the judge should be accorded due process of law.

**Commentary**

The proceeding should be conducted in a dignified manner and in accordance with usual courtroom decorum. The rules of civil procedure adopted in that jurisdiction apply in the absence of a commission rule.

5.12 **Presentation of Matter.** An attorney or attorneys of the commission staff, or special counsel retained for the purpose, should present the matter to the factfinder.

**Commentary**

Presentation should be by an attorney so that the requirements of compliance with the rules of evidence and the rules of procedure of the commission can be met.

5.13 **Burden of Proof.** The commission has the burden of proving by clear and convincing evidence the facts justifying action.
The judge is not required to present affirmative evidence in his own defense, but he has the burden of proof with respect to affirmative defenses. The judge may claim the Fifth Amendment right to refuse to testify. Courts, however, have held that he may be removed from judicial office for failing to explain the conduct in question. Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972); In re Melvin H. Osterman, 13 N.Y.2d (a-r) (Ct. on Jud., 1963).

5.14 Cross-examination and Evidence. The judge should be permitted to adduce evidence and produce and cross-examine witnesses, subject to the rules of evidence applicable to civil proceedings in the state.

Commentary
The judge responding to a statement of charges at a hearing should have all of the rights accorded to parties in a civil proceeding. The attorney representing the judge should have the right to call witnesses in behalf of the judge, to examine adverse witnesses, and to present all relevant arguments.

5.15 Medical Privilege. The raising of mental or physical condition as a defense constitutes a waiver of medical privilege.

Commentary
The commission may order a mental or physical examination for the judge at any time the judge raises mental or physical condition as a defense. Standard 8.6. If the judge claims present inability to assist in the preparation of his defense, interim suspension pursuant to Standard 6.2 is warranted.

5.16 Amending Allegations. By leave of the commission or by consent of the judge, the statement of charges may be amended after commencement of the hearing only if the amendment is technical in nature and the judge and his counsel are given adequate time to prepare a response.

Commentary

5.17 Standard of Proof. Formal charges should be established by clear and convincing evidence.

Commentary
Most jurisdictions already follow the “clear and convincing evidence” test, e.g., In re Rome, 542 P.2d 676 (Kan. 1975); Geiler v. Commission on Judicial Qualifications, 10 Cal.3d 270, 110 Cal. Rptr. 201, 515 P.2d 1 (1973); In re Hanson, 532 P.2d 303 (Alas. 1975); In re Haggerty, 257 La. 1, 241 So. 2d 469 (1970); In re Diener, 268 Md. 659, 304 A.2d 587 (1973). Most have done so by judicial decision rather than through constitutional or statutory

*In Matter of Formal Inquiry Concerning Heuerman*, 240 N.W.2d 603 (S.D. 1976) the court said:

"The first issue we consider is appropriate standard of proof in proceedings under the Act. We note that it would be inapposite to require proof 'beyond a reasonable doubt' as this is not a criminal prosecution. Proof by a mere preponderance of the evidence is also inapposite because of the severity of the sanction which can be imposed. We conclude that the proper standard of proof is by 'clear and convincing evidence.' Such a standard provides adequate protection for the party subject to charges, but at the same time does not demand so much evidence that the ability of the Commission and this court to effectively oversee the judiciary is impaired."

5.18 *Record of Proceedings.* Every hearing should be reported verbatim.

Commentary

If the commission makes a recommendation to the court, the court will need the transcript in order to make its decision. If the hearing is before a panel or before a referee or master, the commission will need the complete record in order for it to make its report and recommendation to the court. Any method for court recording approved in the state may be employed.

5.19 *Submission by Factfinder.* The factfinder should submit to the commission the record, the report, and the transcripts of testimony, and the commission may act thereon as if the hearing had been before the whole commission.

Commentary


5.20 *Objections to Findings.* Counsel for the judge and commission may submit written objections to the findings and recommendations.

Commentary

A time limit should be established by court rule affecting the ability of counsel to object to the findings and recommendations of the factfinder. As elsewhere in these standards, the rules of civil procedure should be followed absent a more specific rule by the court.

5.21 *Scope of Commission Review.* The commission should reach a decision on the basis of the record.

Commentary

The decision should be based solely on evidence presented to the commission at the hearing. The commission should exclude from its con-
sideration any information acquired in the preliminary stages of investiga-

tion.

5.22 Prompt Action. The commission should render its decision prompt-

ly after the hearing. It has the right to substitute its findings for that of

the factfinder.

Commentary

The judge and the public have the right to a prompt determination of all

matters before the commission. The commission should have its hearing and

make its recommendation within 90 days from the finding of probable cause,

or 90 days from the interim suspension, whichever is earlier.

5.23 Recommendation for Discipline. A recommendation for discipline

should be reported to the court only if concurred in by a majority of

all members of the commission.

Commentary

Any recommendation for discipline should be concurred in not only by

a majority of those present, but by a majority of all commission members.

This is a different requirement than that which is recommended for deter-

mining probable cause pursuant to Standard 4.23. Alternate members should

serve with the commission any time a member is either disqualified or

cannot attend the commission meeting. Standard 7.1 requires that a notice of

this determination should be given to the judge prior to filing the recom-

mendation with the court.

5.24 Dissent. Any dissent should be transmitted with the majority deci-

sion.

Commentary

The court should receive any minority opinion at the same time it

receives the majority determination. This report should also be given to the

judge and his counsel and be made a part of the public record.

5.25 Dismissal by the Commission. If a majority of the members of the

commission fail to concur in a recommendation for discipline, the

matter is dismissed.

Commentary

All parties to the proceeding should receive notice when the comis-

sion dismisses an action before it. The complainant may appeal this decision

to the court if the rules of civil procedure in the jurisdiction permit it.

5.26 Awarding of Witness Expense. The expense of witnesses should be

borne by the party that calls them unless:

a) Physical or mental disability of the judge is in issue, then the

commission should reimburse the judge for the reasonable expense of

the witnesses whose testimony related to the disability; or

b) The judge has been exonerated of the charges against him, then the

court may determine that the imposition of costs and expert witness
fees will work a financial hardship or injustice upon him and order that those fees be reimbursed.

Commentary

The judge should be reimbursed for reasonable witness expenses in two situations: (1) when disability is an issue, and (2) when he is exonerated and has suffered substantial financial hardship. Reimbursement is for the full witness expense, i.e., the charge for the services rendered, and not merely fees. The "reasonable" criteria for the reimbursement applies both to the amount of the expense, and to the number of witnesses. Standard 6.7 allows costs to be assessed as a sanction; thus, reimbursing the judge who is exonerated is equitable when those costs will cause him to suffer financial hardship or injustice.

5.27 Witness Fees. All witnesses should receive fees and expenses in accordance with the standard procedure in effect in the state.

Commentary

There is no reason to distinguish the treatment of witnesses in matters of judicial discipline or disability retirement from that in any other kind of judicial proceeding.

5.28 Transcript Cost. A transcript of all proceedings should be provided to the judge without cost.

5.29 Costs of Proceedings. Costs of all proceedings should be at public expense.

Commentary

The expenses of the commission, including staff salaries, its expert witnesses, mental or physical examinations it requests or directs, preparation of its documents, and the service of process are all proper items for public expense. The judge's attorney's fees should not be at public expense. In addition, Standards 6.7 and 5.27 recognize that assessing costs is a possible sanction.

6 Dispositions and Sanctions

6.1 Suspension for Felony. A judge should be suspended immediately by the court without necessity of commission action, upon the filing of an indictment or information charging him with a felony under state or federal law. Such suspension should not preclude action by the commission with respect to the conduct which was the basis for the felony charge, before or after a conviction, acquittal, or other disposition of the felony charge.

Commentary

The integrity of the judicial system demands prompt action whenever a sitting judge has been formally charged with a felony. Consequently, it is recommended that the court bypass the normal commission procedure and act directly to suspend the judge, with pay, pending final determination of charges. Such action would occur only if the judge is charged with a felony
under federal statutes or under the statutes of the state in which he is serving. A judge charged with conduct which constitutes a felony in another state but does not constitute a felony in the state in which he is serving may be subjected to interim suspension upon petition of the commission.

The interim suspension should not be allowed to continue indefinitely, but should be brought to resolution by formal disciplinary action. The commission should promptly conduct a hearing at which the sole issue is the ultimate discipline to be imposed. The ultimate discipline imposed will not be adjusted even if the criminal court judgment is reversed in an appellate proceeding. In fact, if a judgment of conviction is reversed in an appellate proceeding, the disciplinary proceeding should not be reopened. In re Haggerty, supra.

If a judge is subsequently found not guilty of the charges, or a guilty finding is reversed and dismissed on appeal, the order of interim suspension, if still in effect, should be vacated. This should not preclude independent proceedings by the commission since the standard of proof for judicial discipline requires only clear and convincing evidence. Thus, conduct which may not be established beyond a reasonable doubt to prove criminal charges may be sustainable and proved under the clear and convincing evidence test and may serve as a basis for imposing discipline against the judge.

6.2 Suspension for Misdemeanor. Conduct resulting in the filing of misdemeanor charges against a judge, if it adversely affects his ability to perform the duties of his office, may be grounds for immediate suspension with pay by the court, without necessity of commission action. A conviction, acquittal or other disposition on a misdemeanor charge, should not preclude action by the commission with reference to the conduct upon which the charge was based.

Commentary

Conduct that brings the judicial office into disrepute may have such a harmful effect on the integrity of the judicial system as to require immediate interim suspension of the judge. This standard is permissive rather than directive; it allows greater discretion to the court in imposing the suspension. Interim suspension will be vacated and ultimate discipline will be determined as described in the commentary to Standard 6.1.

6.3 Misdemeanor Suspension Review. Any judge suspended under the provision of Standard 6.2 should be given a prompt hearing and determination by the court upon his application to review the interim suspension order.

Commentary

Since interim suspension is discretionary for misdemeanors, the judge is given the opportunity to seek review of the interim suspension, a remedy not provided in cases of interim suspension where felony charges are involved.

6.4 Interim Suspension. Interim suspension, with pay, pending final decision as to ultimate discipline, may be ordered by the court.
Commentary

There are instances when a judge’s conduct does not violate a statute but does bring the judicial office into disrepute. If that conduct becomes notorious through mention in the press or by other public exposure it becomes necessary for the court to act to maintain public confidence in the judiciary. At those times it may be appropriate for the court to order an interim suspension, with pay, pending a final decision as to ultimate discipline. This action must be weighed against the fact that if the judge has been suspended on an interim basis, the efficient operation of courts will suffer from the judge’s prolonged absence from official duties.

6.5 Disability Suspension. A judge who claims that a physical or mental disability prevents his assisting in the preparation of his defense to the charges should be placed on interim suspension, with pay. Once an interim suspension has been imposed, there should be a determination of whether in fact there is such a disability. If there is such a disability, the judge should be retired. If there is a finding of no disability, the disciplinary proceeding should then continue.

Commentary

When a judge raises physical or mental disability as an affirmative defense to charges that, if proved, would result in his being disciplined, it is important that he not remain on the bench. This would serve to damage public confidence in the judiciary. It would be better to suspend that judge, with pay, until it could be determined that his claim of disability is factual. If it is, the judge should be retired. If it is not, the disciplinary proceeding should be recommenced.

6.6 Dispositions. The commission may make any of the following dispositions:
(a) An unjustified or unfounded complaint may be privately dismissed by the commission without giving notice to the judge;
(b) The commission may issue a private reprimand;
(c) The commission may by informal adjustment dispose of a complaint by:
   (1) Informing or admonishing the judge that his conduct is or may be cause for discipline;
   (2) Directing professional counseling and assistance for the judge; or
   (3) Imposing conditions on a judge’s conduct.

Commentary

Unfounded and unjustified complaints represent a large portion of those received by judicial discipline and disability retirement commissions. There is no need to burden the records or the judge with such complaints. Each complaint, even though unjustified or unfounded, should be acknowledged by the commission.

The sanctions include a variety of methods for dealing with improper judicial conduct by informal adjustment. The type of conduct for which these would be appropriate would not ordinarily merit full and formal
hearings. A listing of these sanctions is not meant to be exclusive but rather to establish guidelines for informal procedures when appropriate.

These informal adjustments, except for private reprimand, may be employed even after a hearing, though they are primarily intended for use prior to a formal hearing.

Occasionally a judge will be guilty of misconduct through inadvertence or a lack of understanding as to the high ethical demands of the code of judicial conduct. Sometimes the fact that the commission has brought a judge's behavior to his attention will be sufficient to induce him to avoid such conduct in the future.

Occasionally the conduct complained of is of an involuntary nature, unlike that referred to in Standard 3.3, and the judge may need professional counseling or other assistance in order to regain effective control over his behavior. On other occasions, further guidance in how to carry out his judicial duties more effectively may be called for.

The commission may recommend that the judge avoid certain conduct that appears to be questionable. If, for example, the judge is having a drinking problem the commission may impose a condition that the judge attend an alcohol treatment program, or that he refrain from the use of alcoholic beverages during the day, or altogether.

When an informal adjustment or private reprimand is used, it should be conditioned upon the judge acknowledging that he is aware that he is waiving his right to a hearing. The informal adjustment or private reprimand should not serve as a bar to further proceedings based on similar misconduct or conduct of a different nature that together with the prior conduct would have a negative cumulative effect upon the judge's integrity or the appearance of fair and impartial behavior. By consenting to the informal adjustment or private reprimand the judge is making a knowing waiver of his right to object to the findings that are the basis for this disposition being used against him at a subsequent hearing and in subsequent impositions of discipline. The judge should be fully advised by the commission that the result of the acceptance of private dispositions is the waiving of these rights. Therefore, the judge should be required to accept an informal adjustment or private reprimand in writing.

6.7 Sanctions. The commission may recommend to the court the following sanctions:
(a) Removal;
(b) Retirement;
(c) Imposing discipline as an attorney;
(d) Imposing limitations or conditions on the performance of judicial duties;
(e) Reprimand or censure;
(f) Imposing a fine;
(g) Assessment of costs and expenses;
(h) Imposing any combination of the above sanctions.

Commentary

Removal is the most serious sanction available under judicial discipline. Its use represents the decision that the conduct which resulted in this discipline was of a nature that it seriously damaged the judge's ability to
It should be treated as an exceptional sanction used only on rare occasions. The court should also have the authority to retire a judge involuntarily if the judge refuses to retire voluntarily. The difference between removal and involuntary retirement is that the judge might retain pension rights through involuntary retirement. Involuntary retirement should not be used as a substitute for removal. It should be used for conduct that is not willful, but caused by physical or mental disability.

Some misconduct is so serious that the judge should not only be removed from judicial office but also be disbarred or suspended from the practice of law. These standards do not recommend automatic disbarment every time a judge is removed from office. Standard 7.12 establishes a system to allow the lawyer disciplinary board to intervene before the court in those cases which might result in removal.

The commission may recommend that the court control the assignment of the judge’s judicial duties and the kinds of cases he be assigned, or put conditions upon his continuance in office. This is an application of the court’s inherent power in judicial administration. See In re Kelly, 238 So. 2d 565 (Fla. 1970); and In Re Lee, 336 So. 2d 1175 (Fla. 1976).

The commission may recommend that the court issue a public reprimand or censure. A reprimand or censure can deter not only the judge in the immediate case, but also other judges, encouraging them to avoid similar conduct.

An appropriate intermediate sanction between reprimand or censure and removal is the imposition of a fine. Apart from interim suspension, the standards do not recommend suspension of a judge without pay. Suspension punishes the judge’s colleagues because they must carry an extra burden during the suspension. The imposition of a fine should take the place of that sanction. A fine has the same financially punitive effect upon the judge, but does not create backlog problems. Like removal, the imposition of a fine will require constitutional authority.

Whenever a judge is found guilty of misconduct, the commission may recommend that the court tax the costs and expenses of the proceedings to the judge. This might include actual costs of the proceedings. As in Standard 5.20, “expense” means the actual charge for services, not merely fees.

7 PROCEEDINGS BEFORE THE COURT

7.1 Filing and Service. The commission should, at the same time it files its record, findings, and recommendations with the court, serve copies upon the respondent judge. Proof of service should be filed.

7.2 Briefs. The court’s appellate procedure with respect to filing of briefs and the presentation of oral argument should be followed.

Commentary

The court’s review of a commission recommendation for discipline should be given priority. To expedite the submission of documents to the court, it should, by rule, establish a strict timetable for the filing of the commission’s recommendations, findings of fact, and record, the respondent’s brief, if any, the commission’s reply brief, if any, and, in accordance
with Standard 7.12, the brief of the lawyer disciplinary agency. In the absence of a specific rule, the rules of appellate procedure used in appeals by right should be followed. The court should grant motions for extensions of time only sparingly, and never as of right.

7.3 **Prompt Consideration.** Upon the filing of a recommendation for discipline or disability retirement, the court should promptly docket the matter for consideration.

**Commentary**

Prompt resolution of charges against judges is essential to the effective administration of justice as well as to the integrity of the judiciary. These cases should be given priority in scheduling by the court.

7.4 **Obtaining Additional Findings.** If the court desires an expansion of the record or additional findings with respect either to the recommendations for discipline or to the sanctions to be imposed, it should remand the matter to the commission with appropriate directions, retaining jurisdiction, and should hold the matter pending receipt of the commission's filing of the additional record.

7.5 **Supplementing the Record.** The court without remand and prior to the imposition of discipline may accept or solicit supplementary filings with respect to medical or other information, provided that the parties have notice and an opportunity to be heard.

7.6 **Additional Filings.** The court may order additional filings or oral argument as to specified issues or the entire matter.

**Commentary**

The court should not be limited in its ability to obtain all information that would assist it in properly disposing of matters regarding judicial discipline and disability retirement. It should have full authority to remand or obtain supplementary filings by order or petition.

7.7 **Delay for Further Proceedings.** The court, on receipt of notice of an additional proceeding before the commission involving the same judge, may delay decision and hold the matter pending the commission's termination of this additional proceeding. In the event that additional recommendations for discipline of the judge are filed, the court may impose a single sanction covering all recommendations.

**Commentary**

On occasion more than one disciplinary proceeding may be pending against the judge. The conduct being thus investigated may be related as well as unrelated. It is more efficient for the court to consider all matters pending when it considers imposing discipline upon a judge. In order to do this the court should request that the commission advise the court if anything else is pending. If so, the court should, on its own motion, delay hearing the matter until all disciplinary proceedings have been concluded.
7.8 Determination of Facts. The court should reach its own conclusion as to the facts found by the commission and as to the recommendation that discipline be imposed.

Commentary
The court should conduct an independent review of the facts found by the commission, its conclusion that the facts constitute a violation of the constitution, statute, ordinance, court rule, or codes of judicial conduct, or professional responsibility, and its recommendation of a sanction to be imposed.

7.9 Review on the Record. The court should make an independent evaluation of the findings and recommendations of the commission.

Commentary
The court’s power and discretion are final and absolute, as in matters of attorney discipline.
The court does not serve as an appellate court in this kind of case. The decision of the court should be upon the record made before the commission.

7.10 Standard of Proof. In issuing a reprimand or ordering discipline or retirement of a judge, the court should rely only on facts that have been established by clear and convincing evidence.

7.11 Imposition of Discipline. If the court determines that the imposition of discipline is appropriate, it may impose the sanction recommended by the commission or any other sanction it deems proper.

Commentary
The court determines the appropriate sanction to be imposed upon a judge. Deference should be shown to the recommendations of the commission, but the court should not be bound by the recommendations. The court’s discretion is complete. It may impose a less severe (McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 526 P.2d 268 (1974)), or a more severe sanction (In re Diener and Brocolino, 268 Md. 659, 304 A.2d 587 (1973); In re Robson, 500 P.2d 657 (Alas. 1972)) than that recommended.

7.12 Interim Suspension. Upon a determination by the commission of a judge’s incompetence there should be an immediate interim suspension, with pay, pending a final disposition by the court.

Commentary
Effectiveness of the administration of justice and respect for the judiciary require that when a judge is found to be mentally incompetent, there be an immediate interim suspension with pay. This interim suspension should be ordered by the court without need for commission recommendation. See Standard 6.5 for a discussion of the sanction of interim suspension when physical or mental disability is raised as an affirmative defense.
7.13 Consideration of Lawyer Discipline. The court, when considering removal of a judge, should determine whether discipline as a lawyer also is warranted. If removal is deemed appropriate by the court, it should notify the judge and the lawyer disciplinary board and give them an opportunity to be heard on the issue of the lawyer discipline, if any, to be imposed.

Commentary

Misconduct by a judge which requires removal is so serious that the lawyer disciplinary board should have the opportunity to recommend disbarment or other discipline against the judge as a lawyer. When a judge is removed from the bench, the lawyer disciplinary board should have the opportunity to be heard on the issue of lawyer discipline before he is restored to practice. The judge should be aware of the possibility of this further sanction, and be heard on the matter.

7.14 Charge Against Member of Court. A method should be established for the designation of a substitute judicial panel to serve in the place of the court when charges are brought against one of its members.

Commentary

The method may include the impaneling of judges of the intermediate appellate court or senior trial judges or combinations thereof, to constitute a court of the same number of members as comprise the court. This recommendation is to protect against any appearance of favoritism that might arise due to personal ties between the responding judge and his colleagues on the court.

Such substitute review panels are authorized by constitutional amendments in California (Cal. Const. art. VI, Sec. 18 (1976)), and Florida (Fla. Const. art. V (1976)).

8 Mental or Physical Disability

8.1 Authority. The commission should have authority to receive information, investigate, conduct hearings, and make recommendations to the court relating to mental or physical disability of judges.

Commentary

The same commission that handles matters of judicial discipline should handle matters of judicial disability. The procedures should be similar. Both types of problems reflect upon the competence of the judiciary.

8.2 Procedure. In carrying out its responsibilities regarding physical or mental disabilities, the commission should follow the same procedures that it employs with respect to discipline for misconduct.

Commentary

The commission should follow the same procedures in this area as are followed in the discipline of judges. Both types of cases will be initiated by receiving information regarding a judge's behavior. In some cases, what appears to be a matter for discipline will, upon investigation, turn out to be a matter of disability.
Attempts at informal resolution should also be made by the commission. Treatment, counseling, or other relevant arrangements should be suggested prior to the filing of formal charges. A judge who has served long and with distinction sometimes serves beyond his time. The commission should be very careful about such a judge’s reputation. The commission should try informally to convince him that voluntary retirement would be in his own best interests and that of the judiciary. The commission should attempt to have the judge’s family, friends or colleagues talk with him to help him make a decision to retire voluntarily. Where this fails, the commission will have to perform one of its most difficult functions.

8.3 Representation by Counsel. If the judge in a matter relating to physical or mental disability is not represented by counsel, the commission should appoint an attorney to represent him at public expense.

Commentary

The judge should be represented by counsel in order to protect his rights. A judge who is being proceeded against by the commission and who appears to be physically or mentally unable to prepare his defense should have counsel appointed by the commission.

8.4 Effect of Denial. If the complaint involves the physical or mental condition of the judge, a denial of the alleged condition should constitute a waiver of medical privilege and the judge should be required to produce his medical records.

8.5 Medical Examination. If medical privilege is waived, the judge is deemed to have consented to a physical or mental examination by a qualified medical practitioner designated by the commission. The report of the medical practitioner should be furnished to the commission and the judge.

8.6 Involuntary Retirement. A judge who refuses to retire voluntarily may be involuntarily retired by the court.

8.7 Procedure for Involuntary Retirement. If attempts to convince a judge to retire voluntarily fail, then the commission should proceed to file a formal complaint, hold a public hearing, make findings of fact, and present recommendations to the court.

8.8 Effect of Involuntary Retirement. A judge who is involuntarily retired should be ineligible to perform judicial duties pending further order of the court and may, upon order of the court, be transferred to inactive status or indefinitely suspended from practicing law in the jurisdiction.

Commentary

If a judge was involuntarily retired for a condition that subsequently improves, he may petition the court for reassignment to judicial duties.

A judge who is involuntarily retired may at the same time be transferred to inactive status or indefinitely suspended from the practice of law, if the
condition leading to the retirement is such as to impair his ability to practice law. The court has a responsibility to protect the public from incompetent lawyers as well as from incompetent judges.

The imposition of lawyer discipline is discretionary because there are situations in which an individual is no longer able to perform judicial duties, but is fully competent to continue in the practice of law. Where the disability is such that it would affect his ability to practice law, the court should ordinarily transfer him to inactive status or suspend him indefinitely from practicing law.

In states that have a unified bar, transfer to inactive status will be the appropriate disposition. In voluntary bar states, the disposition will be indefinite suspension from the practice of law. A disabled judge should not be designated by the same label as a disciplined judge.

9 ADVISORY AGENCIES

9.1 Establishment of Advisory Committee. The court should establish an advisory committee on the code of judicial conduct, which should render advisory opinions to judges at their request or on its own motion.

Commentary

The purpose of such a committee is to make judges aware of the scope and meaning of the code of judicial conduct and of its practical application to their activities.

9.2 Opinions Not Binding. Opinions of the advisory committee should not be binding on the commission or on the court, but the commission and the court should consider reliance by the judge upon the advisory committee’s opinion.

Commentary

The advisory committee should operate in a manner similar to the ethics committee of the bar, which renders opinions to lawyers who desire explanation of the code of professional responsibility.

Its opinions should be published and circulated to all judges. A judge’s good faith reliance upon an advisory committee opinion should be considered by the commission and by the court when the matter it addresses is the subject of the disciplinary proceeding. The opinion may be admitted into evidence in mitigation or, when appropriate, as a defense.

9.3 Composition. The advisory committee should be composed of judges from the various levels of courts and lawyers. No member of the advisory committee should serve on the commission.

Commentary

The advisory committee should be composed of persons knowledgeable regarding the code of judicial conduct. Judges and lawyers should serve together on this committee. There should not be any overlap of members between the committee and the commission matters.
9.4 National Clearinghouse. There should be a national clearinghouse to provide information to all jurisdictions regarding judicial discipline and disability retirement. The clearinghouse should be staffed by persons who are knowledgeable in matters relating to judicial discipline and disability and retirement, and are available to respond to inquiries. The clearinghouse should maintain a brief and opinion bank, along with other information concerning judicial discipline and disability and retirement, and the operation of the various commissions.

Commentary

In the growing and controversial field of judicial discipline, it is necessary for judicial discipline authorities in the various jurisdictions to maintain communication about their systems, problems, and progress. States should budget funds to support the cost of maintaining a central repository for matters relating to judicial discipline and disability and retirement, and a staff that can assist all commissions. The clearinghouse can collect, maintain, and organize statistics as required in Standards 2.8 (f) and (g), and perform consulting services. Copies of the promulgated rules of the various jurisdictions, opinions and briefs relating to the field of judicial discipline and disability, and other references can be collected and analyzed.

Historically, the American Judicature Society has done the most to provide services in the field of judicial discipline and disability just as the American Bar Association has provided a similar service regarding lawyer discipline through its National Center for Professional Discipline.

The American Judicature Society recently announced that it has established The Center for Judicial Conduct Organizations to serve the nation in this capacity. It is recommended that funds provided for the clearinghouse in each state be used to support the expanded work of the AJS. All opinions in the field of judicial discipline and disability retirement should be sent to the national clearinghouse and be made available to other jurisdictions upon request.

10 STATEMENT ON FEDERAL JUDICIARY

10.1 (Title) A means for discipline for the federal judiciary should be established.

Commentary

The federal judicial system should have an appropriate structure for the discipline of federal judges. This can be accomplished through (1) limited inherent power of the United States Supreme Court; (2) a constitutional amendment; or (3) a congressional act.

With regard to the first alternative, the United States Supreme Court does not have any constitutional authority to remove a judge from office but it may by administrative order provide procedures for the investigation and the discipline by reprimand and declination to assigned cases. This authority is derived from the court's inherent power. The United States Supreme Court also after investigation and due process recommends impeachment of a judge to the Congress of the United States although it is doubtful the Court would ever take this action. The view that the United States Supreme Court has the inherent and implied power to discipline the federal judiciary is not
widely accepted and particularly has not been indicated by those persons most able to exercise this power, namely, the Justices of the United States Supreme Court. Justices Douglas and Black, in a dissent, reflected what may well be a majority opinion of the United States Supreme court when they stated:

"An independent judiciary is one of this nation’s outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment . . . there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge . . . It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of 'hazing' having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance which other federal judges have over those aberrations . . . ." Chandler v. Judicial Council of Tenth Circuit of the United States, 398 U.S. 74, 136-37, 140-41 (1970) (Douglas, J., dissenting).

The Court, however, has stated in a matter involving the discipline of an attorney:

"The courts ought not to hesitate . . . to protect themselves from scandal and contempt and the public from prejudice by removing grossly improper persons from participation in the administration of the law." Ex parte Wall, 107 U.S. 265, 288 (OTTO 1882).

Some writers have gone further and stated that the United States Supreme Court, as part of its implied and inherent powers, has the right to discipline as well as remove federal judges. See Burke Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, 28 Mich.L.Rev. 723 (1930).

We suggest that the United States Supreme Court consider an appropriate disciplinary structure within its inherent powers to discipline the federal judiciary. Such a structure would provide accessible means to receive and process complaints from the public and the legal profession in accordance with these standards.

The second alternative for a federal judicial discipline would be the adoption of a constitutional amendment similar to that in effect in states. This means to obtain a disciplinary structure for the federal judiciary would be a cumbersome process which would take years to accomplish.

The third alternative would establish a disciplinary structure for the federal judiciary by congressional act. There have been and there are now before Congress congressional acts which would establish such a disciplinary structure. Such a congressional act is subject to possible constitutional attack on the authority of Congress to define "good behavior" for the judicial branch. See Powell v. McCormack, 395 U.S. 486 (1969) which spells
out the powers of Congress to expel one of its own members. We note, however, that the Federal Judicial Conference has approved in principle this approach.

In conclusion we emphatically recommend a disciplinary procedure be established for the federal judiciary and suggest that these standards be implemented in whatever method is adopted.