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## A Study of the Colorado Commission on Judicial Qualifications

# A STUDY OF THE COLORADO COMMISSION ON JUDICIAL QUALIFICATIONS

## INTRODUCTION

IN recent years, as the demand for more efficient administration of justice has reached unprecedented proportions,<sup>1</sup> the traditional methods of judicial selection and awards of tenure have fallen into sharp disrepute. Initial reaction to this situation was expressed in the adoption by several states of improved methods of selection designed to overcome the defects of the traditional elective systems.<sup>2</sup> However, it soon became apparent that while new methods proved effective in elevating well-qualified individuals to the bench, they were no guarantee that those selected would remain competent throughout their tenure. Thus, attention was turned toward the development of methods by which judicial officers who were found incompetent or guilty of misconduct could be disciplined and/or removed from office without resort to the cumbersome procedures of a bygone era.<sup>3</sup>

In 1959, a national conference on court administration was held in Chicago for the purpose of discussing various proposals for the reform of the judiciary. Out of that conference came the following recommendations:

Disability should be determined by a standing commission on which the judiciary is represented. . . . There is a need for a less cumbersome method to bring about the discipline or removal of a judge . . . whose conduct has subjected or is likely to subject the court to public censure or reproach or is prejudicial to the administration of justice.

The ultimate responsibility for disciplinary action or removal should rest in the highest court of the state [and] [p]rovisions should be made for the initiation and investigation of complaints before

<sup>1</sup> Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 68 WASH. U.L.Q. 378 (1968); Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166 (1963); *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149 (1966).

<sup>2</sup> See generally Garwood, *Judicial Selection and Tenure — the Model Article Provisions*, 47 J. AM. JUD. SOC'Y 21 (1963).

<sup>3</sup> Colorado serves as a good example for illustrating some of the outmoded methods of disciplining judges. The first of these methods — and one which is still available — is recall of a judge as provided for in COLO. CONST. art. XXI, § 1. This process involves large amounts of time, extensive publicity, and numerous people; it can also overshadow any real issue of competency. The second of these procedures (replaced by the commission plan) was the old COLO. CONST. art. VI, § 31 provision which dealt with retirement of judges. When questions of age and physical or mental infirmity or disability arose, an investigation could be initiated only by a motion from the Colorado attorney general to the Colorado Supreme Court. Thereafter, the court would appoint a referee to conduct the investigation and submit his report thereon to the court. The court then decided if mandatory retirement of the judge was fitting. It seems clear that both of these procedures were difficult to work with effectively. Therefore, the need for more competent and streamlined procedures was definitely felt in Colorado.

presentation of formal charges, and precautions should be taken for the protection of all persons involved.<sup>4</sup>

In 1960, California adopted the essential features of this recommendation by constitutional amendment and became the first state to make use of the "commission plan" for the retirement, removal, and discipline of judges.<sup>5</sup>

The administrative and procedural advantages of the commission plan over traditional methods of judicial discipline and removal and the success of the California experiment prompted other states to follow suit.<sup>6</sup> In Colorado, the plan was adopted by constitutional amendment in the fall of 1966 and became effective in April 1967.<sup>7</sup> The purpose of this article is to present the results of an in-depth study of the performance of the Colorado commission from its inception to the present. More specifically, this article will set forth the statistical information gathered from the study, describe the working procedures of the commission, and evaluate its operational effectiveness.

## I. METHODOLOGY

Anyone undertaking a study of the Colorado Judicial Qualifications Commission will immediately find himself faced with what appears to be an almost insurmountable obstacle: the constitutional requirement that "[a]ll papers filed with and proceedings before the commission on judicial qualifications . . . shall be confidential, and the filing of papers with and the giving of testimony before the commission . . . shall be privileged . . . ."<sup>8</sup> In effect, this means that a researcher is constitutionally denied access to a rich source of information—the files of the commission. As a result, the primary sources of information were interviews with the commission membership, the executive secretary of the commission, and the president of the Colorado Bar Association.<sup>9</sup>

The interviews began with very general questions designed primarily to put the respondent at ease and to give him some assurance that the researchers' intent was purely academic. For example, the respondent was usually asked to present his views concerning the rationale of the commission plan and the factors accounting for its

<sup>4</sup> 45 J. AM. JUD. SOC'Y 12 (1959).

<sup>5</sup> CALIF. CONST. art. 6, § 6.

<sup>6</sup> For a state-by-state comparison of modern discipline and removal plans adopted in recent years, see the report prepared for the National Conference of Judicial Retirement and Disability Commission held at the University of Denver College of Law in August, 1969.

<sup>7</sup> COLO. CONST. art. VI, § 23. For a complete text of the rules of procedure of the Commission on Judicial Qualifications, adopted by the Colorado Supreme Court on May 18, 1967, see the APPENDIX *infra*.

<sup>8</sup> COLO. CONST. art. VI, § 23(3)(d). See also Rules of Procedure of the Commission on Judicial Qualifications, Rule 4.

<sup>9</sup> Inasmuch as the Bar Association was the primary instrumentality in securing the adoption of the amendment creating the commission, it was considered to be a valuable source for background material.

success. Thereafter, he was asked to evaluate the work of the Colorado commission, always being assured that the study was not interested in, nor concerned with, specific names. While this approach may seem a bit too cautious, it was found that following this short exchange, the respondent was usually more willing to entertain probing questions concerning the commission's work.<sup>10</sup>

Once the necessary rapport had been established, it was easier to probe for the substance of the commission's work; and inasmuch as the bulk of the commission's work is accomplished without resort to formal procedures,<sup>11</sup> the primary concern was with the informal structures and processes, which constitute the functional nucleus of the Colorado commission plan. To facilitate the research in this area, questions were directed to the various steps taken by the commission in its consideration of an individual complaint. Hence, it was first necessary to consider the procedure by which complaints are brought to the attention of the commission; and the questions employed were designed to elicit information on the number, source, and nature of the complaints as well as the processes by which they are received and screened.

Once a complaint is received, the next step is to institute a preliminary investigation to determine whether or not the complaint has merit.<sup>12</sup> Thus, the next line of questioning dealt with the mechanics of this investigation as well as its effect on the subsequent disposition of complaints.

If it is determined that a complaint has merit, the judge is notified and an informal hearing is scheduled.<sup>13</sup> It is at this stage that the commission has demonstrated its worth; and, for this reason, a major part of the interview was devoted to this subject. Of particular interest was the process by which a judge is informally disciplined and either agrees to correct his conduct or is forced to retire. It was also thought important to ascertain the extent of input into the informal hearing by the respective groups that make up the commission: judges, lawyers, and laymen; therefore, the researchers attempted to get an idea of the interaction among the members, including any manifest disagreement or dissension.

All but one of the complaints brought before the commission have been disposed of by informal hearings or in some manner other than a formal hearing. Consequently, this stage of the commission's procedures was of somewhat less interest. However, inasmuch as the formal

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<sup>10</sup> In one instance, however, the respondent, a county judge, was so reluctant to talk about the commission that only general answers were elicited from him in response to the questions asked.

<sup>11</sup> Rules of Procedure of the Commission on Judicial Qualifications, Rules 6-20.

<sup>12</sup> *Id.* Rule 5.

<sup>13</sup> *Id.* Rule 5(b).

hearing does represent the ultimate weapon of the commission, some attention was given to the procedures involved in its employment.

In addition to the structured approach outlined above, impromptu questioning was also employed. This was often necessitated by the introduction of unanticipated information into the interview by the respondent. Needless to say, this type of questioning yielded extremely useful data.

By employing the methods herein described, the constitutional obstacle, which in the beginning appeared so threatening to the viability of the study, was effectively bypassed. As a result, sufficient data was obtained to permit a description in fairly precise terms of the functional elements of the Colorado commission.

## II. STRUCTURE AND PURPOSE OF THE COMMISSION: STATISTICAL INFORMATION

The official title of the Colorado commission — the Commission on Judicial Qualifications — is a misnomer, since the commission deals not with qualifying judges to sit on the bench but with disciplining and removing them. Five of the commission's nine members are judges chosen by the supreme court: three from the district courts and two from the county courts.<sup>14</sup> Of the four remaining members, two are attorneys chosen by majority action of a committee consisting of the Governor, the attorney general, and the chief justice of the Colorado Supreme Court;<sup>15</sup> and two are laymen chosen by the Governor.<sup>16</sup> All members of the commission serve four-year terms.<sup>17</sup> Once constituted, the commission itself selects an executive secretary who handles the administrative work of the commission.<sup>18</sup> In addition, investigators are hired to do the commission's "leg work."

On a purely conceptual level, the primary purpose of the commission is to recommend to the supreme court the removal or formal censure of any judge found by the commission to be guilty of willful misconduct in office, of willful or persistent failure to perform his duties, or of intemperance.<sup>19</sup> Likewise, the commission is to recommend the retirement of any judge having any disability which seriously interferes with the performance of his duties.<sup>20</sup> To effect this purpose, the commission

<sup>14</sup> COLO. CONST. art. VI, § 23(3)(a)(i).

<sup>15</sup> *Id.* § 23(3)(a)(ii).

<sup>16</sup> *Id.* § 23(3)(a)(iii).

<sup>17</sup> *Id.* §§ 23(3)(a)(i)-(iii).

<sup>18</sup> Because of a low working budget, the commission has appointed as its acting executive secretary the Colorado court administrator. Yet, the dual role played by the executive secretary has had a significant impact on the development of commission procedures. See § IV *infra*.

<sup>19</sup> COLO. CONST. art. VI, § 23(3)(b).

<sup>20</sup> *Id.*

is empowered to investigate complaints,<sup>21</sup> subpoena witnesses,<sup>22</sup> and take evidence;<sup>23</sup> and the commission's jurisdiction extends to all courts in the state with the single exception of the county court of the City and County of Denver.<sup>24</sup>

It should be emphasized that the formal powers outlined above are almost never used. Instead, the real success of the commission has been its ability to induce problem judges to resign or retire prior to formal proceedings. It is for this reason that the primary concern in this study is directed toward informal procedures which account for this result. However, before turning to a consideration of those procedures, it will be useful to review statistically the work of the commission during its first 3 years of operation.<sup>25</sup>

As of January 1970, the commission had received 39 complaints against the state's judges.<sup>26</sup> Of these, 12 were disposed of as frivolous on their face or as not within the jurisdiction of the commission. In each of the 27 remaining cases, files were prepared and at least cursory investigations made.

The vast majority of the complaints were from unhappy litigants and represented what one respondent referred to as "cheap appeals." However, at least two complaints have come from the bar association,<sup>27</sup> the highway patrol, the United States Attorney, and the executive secretary; one has come from a juror; and a few have been initiated on the commission's own motion.

The majority of complaints were concerned with the treatment of litigants and lawyers and can be placed in the "cheap appeal" category. Other complaints include three for excessive use of alcohol, two for physical or mental disability, one for conflict of interest with a party to a proceeding before the judge, and several for the mishandling of probate cases. Two additional complaints which involved felonious activities

<sup>21</sup> Rules of Procedure of the Commission on Judicial Qualifications, Rule 5.

<sup>22</sup> *Id.* Rule 11.

<sup>23</sup> *Id.* Rule 10.

<sup>24</sup> COLO. CONST. art. VI, § 26. Discipline of Denver County Court judges is under the jurisdiction of the Denver County Judicial Commission.

<sup>25</sup> All of the statistical information herein referred to was acquired from the executive secretary of the commission.

<sup>26</sup> This figure represents the number of judges against whom complaints were received and is somewhat lower than the actual number of complaints, since several complaints against a particular judge are treated by the commission as one complaint. There are well over 100 judges in Colorado subject to the jurisdiction of the commission. This figure includes seven supreme court justices; seven appeals court justices; 22 district court presiding judges; 54 district court judges; one superior court judge; one probate judge and two juvenile court judges for the second judicial district; and all county court judges, except Denver County.

<sup>27</sup> In talking with the president of the Colorado Bar Association, it was learned that complainants often contact the Association for information on how to proceed with their complaints. Of particular interest here is the fact that the president often advises the complainant as to whether or not he has a valid complaint. Thus, to some extent the Bar Association is an informal screening mechanism for the complaints against judges.

and which were thus outside of the commission's jurisdiction<sup>28</sup> were filed pending the outcome of the criminal procedures against the judges involved.

The vast majority of complaints were found to be unwarranted or frivolous in the course of the preliminary investigation. However, in several cases the charges were found to be substantial enough to warrant the notification of the judge and the initiation of a formal investigation. Of these, two cases were disposed of after the receipt of a satisfactory explanation by the judge involved. In several of the more serious cases, however, the judges were asked to appear before the commission for an informal hearing;<sup>29</sup> and in all but one instance this appearance proved to be the final step in the proceedings. The single exception went on to the formal hearing stage but was disposed of before recommendations to the supreme court became necessary.

The final disposition of the rather serious complaints received by the commission demonstrates the commission's value: Under commission pressure three judges have retired and two have resigned.<sup>30</sup> Of these five, two were found physically incapable of carrying on with their duties, and three were found guilty of some form of misconduct. In two additional cases in which the behavior in question did not warrant removal, the judges were subjected to an informal censure by the commission.<sup>31</sup>

These figures represent the work of the commission as far as it can be reflected in statistical data. Of course, the more important question for the purposes of this study concerns the procedures which produce the data.

### III. PROCEDURAL ELEMENTS

In order to determine the extent to which the commission makes use of the formal procedures and powers made available to it and the extent to which it resorts to informal procedures of its own development, it is necessary to pinpoint the precise procedural elements which the commission uses in considering and disposing of a particular complaint. Concurrently, it is important to consider the roles played in this process by the various members of the commission and its staff.

#### *A. Setting the Machinery into Motion*

In order for a complaint to receive commission consideration it must be in writing, and sufficient details must be included to permit a *prima*

<sup>28</sup> COLO. CONST. art. VI § 23(2).

<sup>29</sup> The informal hearing is a procedural step invented by the commission and is not specifically provided for either by the amendment or the rules of procedure.

<sup>30</sup> In addition, two judges — who no doubt would have retired — died before they had a chance to do so.

<sup>31</sup> The informal censure is another procedural invention not provided for in the amendment. It will be more fully discussed at a later point in the paper.



facie evaluation of the allegations. Complaints that are received by telephone never receive commission consideration, and in such cases the complainant is advised to put the complaint in writing.<sup>32</sup> Further, when an anonymous complaint is received, the commission may or may not act upon it, depending upon the seriousness of the charge and upon whether or not the complaint appears valid on its face; at least one anonymous complaint has been acted upon by the commission.

A related problem involves those instances in which the complainant wishes to remain anonymous. Attorneys, for instance, are often reluctant to complain for fear of retribution from the judge against whom the charge is made. Hence, the commission has honored requests for anonymity by initiating the action on its own motion, recognizing that to do otherwise might stifle valid complaints. Of course, this protection can only extend up to the time of the formal hearing; for at that point, the complainant must be identified in order to provide the accused with the opportunity for rebuttal and cross-examination. However, since a formal hearing is almost never held, this problem is minimal.

In any event, not all complaints are of sufficient substance to warrant commission consideration, and there appears to be a two-step screening process designed to eliminate obviously frivolous or un-

32

REQUEST FOR INVESTIGATION OF

\_\_\_\_\_  
A member of the judiciary of the State of Colorado

TO THE COMMISSION ON JUDICIAL QUALIFICATIONS:

I, \_\_\_\_\_, complain about the above-named (justice)(judge) of the \_\_\_\_\_ court in \_\_\_\_\_

\_\_\_\_\_, Colorado, and that, as set forth in the statement below: he has committed acts of willful misconduct in office; or he has willfully and persistently failed to perform his duties; or he is, or has been, habitually intemperate; or his conduct is prejudicial to the administration of justice, so as to bring the judicial office into disrepute; or he has a disability that seriously interferes with the performance of his duties and such disability is or is likely to become permanent.

STATEMENT

I therefore request that such misconduct be investigated and that appropriate action be taken by the Commission on Judicial Qualifications and the Supreme Court of the State of Colorado.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_, 19\_\_\_\_ Address: \_\_\_\_\_

Phone: \_\_\_\_\_

\_\_\_\_\_, being duly sworn on oath deposes and says that he has read the foregoing request for investigation, knows the contents thereof, and that the same is true to the best of his knowledge and belief.

\_\_\_\_\_

founded complaints. First, the chairman of the commission, in consultation with the executive secretary, reviews the complaint and decides whether or not it should be docketed. The second step is the presentation of all complaints — including those deemed to be frivolous — to the entire commission for their determination as to disposition.<sup>33</sup> This second step, however, is a mere formality, since the opinion of the chairman is almost never challenged.

An interesting sidelight in this initiating process is the role of the executive secretary who, in addition to being the executive secretary of the commission, is also the Colorado court administrator. As such he is kept apprised of the conditions in the state's courts and is in a position to evaluate the competency of the judges. The indication that he takes advantage of his dual role is evidenced by the fact that the two judges who were forced to retire for ill health were brought to the attention of the commission by the executive secretary. Even more important than his observation of the state courts is the contribution he makes to the screening process of the commission; for there can be little doubt that the chairman, in making his initial evaluation of complaints, relies heavily on the executive secretary for information. It should be noted that this contribution does not end with the evaluation of complaints but is relevant throughout the proceedings.

### B. *The Investigation*

Once a complaint is determined to be of sufficient substance on its face to warrant some form of commission action, the investigative procedures are set into motion. The first step is a preliminary investigation which is usually conducted by a member of the commission and which often involves no more than a phone call.<sup>34</sup> The judge himself is not notified, and, in order to protect his reputation, the persons contacted are cautioned that the investigation is confidential. A significant number of complaints are disposed of at this stage, particularly those lodged by unhappy litigants.

If the results of the preliminary investigation do not negate the assertions made in the complaint, a formal investigation is launched.<sup>35</sup> The first step in this process is notification of the offending judge.<sup>36</sup> Notification may take the form of a mild, informal letter which recites

<sup>33</sup> Rules of Procedure of the Commission on Judicial Qualifications, Rule 5(a). It should be noted that this was not always the case. During the early months of the commission's existence, obviously frivolous complaints were disposed of by the chairman and the executive secretary without the consideration of the commission as a whole.

<sup>34</sup> This stage of the investigation should not be confused with the "preliminary investigation" referred to in Rule 5 of the Rules of Procedure of the Commission on Judicial Qualifications. In practice the latter is better termed the formal investigation.

<sup>35</sup> Rules of Procedure of the Commission on Judicial Qualifications, Rules 6(a)-(b).

<sup>36</sup> *Id.* Rule 6(c).

the charges against the judge and invites an explanation.<sup>37</sup> However, in some cases a formal, registered letter is used,<sup>38</sup> the force of which is calculated either to bring about the required change in the judge's behavior or prompt him to begin thinking about resignation or retirement.

After notifying the judges, the commission appoints an investigator to ferret out the pertinent facts. In most states the executive secretary heads up the investigation, but in Colorado special efforts are made to keep the secretary out of the formal investigative procedures in order to enable him to maintain the integrity of each of his two positions.<sup>39</sup> In less serious cases, a member of the commission may be called upon to conduct the investigation, especially if the member is from the same area of the state as the judge against whom the complaint is filed. In more serious cases, an investigator may be hired by the commission.

Often the formal investigation reveals the invalidity of the allegations made in the complaint, and the matter is closed. However, when the results of the investigation tend to confirm the charges, the commission may choose one of two alternate courses of action depending on the nature of the offense. First, if the offense is not particularly serious — for example, a case involving mistreatment of counsel — a personal contact may be in order. In such a situation the judge is asked by a member of the commission, often one with whom he is acquainted, to

<sup>37</sup> *Id.* Rule 5(b). Also presented here is a sample of such a letter:

STATE OF COLORADO  
BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS NO.  
INQUIRY CONCERNING NOTICE OF PRELIMINARY  
INVESTIGATION

NOTICE is hereby given to you, \_\_\_\_\_, that the Commission on Judicial Qualifications of the State of Colorado has decided to conduct a preliminary investigation of your conduct as County Judge pursuant to Rule 5 of the Commission's Rules of Procedure.

This investigation is on the Commission's own motion and is based upon unverified information submitted to the Commission indicating willful misconduct in that:

The Commission has appointed \_\_\_\_\_ to investigate the aforementioned matters and report back to the Commission.

You are further notified that under the rules of the Commission you may present such matters as you may choose to the Commission for its consideration. The next meeting of the Commission will be on \_\_\_\_\_ in Denver, at which time you are welcome to appear and to be represented by counsel should you choose to be so represented. If you elect to appear, please contact the undersigned Chairman for the time and place.

Your attention is called to the fact that this is not a formal proceedings for discipline or removal, but only a preliminary investigation to enable the Commission to determine whether formal proceedings are warranted.

Dated this \_\_\_\_\_ 1971.

\_\_\_\_\_  
Chairman  
Commission on Judicial Qualifications  
of the State of Colorado  
323 State Capitol Building

<sup>38</sup> *Id.* Rule 5(b).

<sup>39</sup> Interestingly, however, the investigator who has done the bulk of the work for the commission is a former court administrator.

mend his ways. He is then kept under observation for a time in order to assure compliance. If he fails to bring his behavior into line with commission wishes, further action may be taken. The members of the commission all seem satisfied that this is an effective means of bringing about conformity in cases involving minor complaints. The second alternative is utilized in the case of a more serious offense and involves asking the judge to appear at an informal hearing which may be scheduled for the same day as the commission's regular quarterly meeting or, in the case of a more urgent matter, on any day of the commission's choosing.

### C. *The Informal Hearing*

Technically, the informal hearing is part of the investigative procedures, but because of the importance it has assumed, it warrants separate treatment. While no specific provision is made for an informal hearing in the commission's rules of procedure, the commission's power to employ it can certainly be implied from the provision of the rules that the judge "shall be afforded reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose. . . ."<sup>40</sup>

At the informal hearing the judge is confronted with the evidence against him and is asked to present any facts tending to negate the charges.<sup>41</sup> The judge accused of physical or mental incompetence may also be asked to submit the results of a medical examination. While the commission does not have the power to compel a judge to submit to such an examination, it can consider a refusal to do so as a factor tending to prove the truth of the allegations.<sup>42</sup>

While the ostensible purpose of the hearing is to weigh the evidence and make a preliminary evaluation as to the guilt or innocence of the judge, it appears that the real purpose is to overwhelm the judge with the incriminating evidence collected during the course of the investigation and thereby induce him to resign or retire. By the very nature of the screening and investigative procedures, if a hearing is held there is little doubt that the commission believes the allegations against the judge to be true. Furthermore, all of the respondents indicated that they would do all they could to see the matter disposed of short of formal proceedings. This attitude is clearly attributable to a desire to protect the judge and the judiciary as a whole from the prying eye of the public.

In matters which are not serious enough to warrant a judge stepping down from the bench, the commission may, on its own motion,

<sup>40</sup> Rules of Procedure of the Commission on Judicial Qualifications, Rule 5(b).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* Rule 9(b).

censure the offender. While the power to informally censure a judge is not provided for in either the amendment or the rules of procedure, it is a power assumed by the commission to fill a specific need. Just as the commission, by applying informal pressure, has relieved the supreme court of the burden of removing offending judges, so too has it developed a means of disciplining problem judges in a way comparable to formal censure.

The informal censure has been used twice by the commission — once with success and once without. The case in which the procedure has proved to be unsuccessful has been a particularly troublesome one for the commission. It is a case which involves a judge whose obnoxious behavior in the courtroom has prompted a great many complaints and has resulted in several informal hearings. The difficulty appears to be that despite commission pressure, the judge in question is unable to alter his personality. This situation raises a question which has troubled the commission since its inception: To what extent is the commission to discipline judges who are guilty only of possessing a cranky disposition and a tendency to badger counsel and litigants? This problem of "judicial temperament," as one commission member called it, appears to be the only issue of discipline upon which the commission members persistently disagree, and because of inconsistencies in some of the interviewee's remarks, it was not possible to determine whether or not the judges on the commission were more apt to excuse such behavior than the other members. However, it appears that the disagreement does not necessarily parallel the laymen, lawyer, judge division of commission membership.<sup>43</sup>

Despite the disagreement over the problem of judicial temperament, the commission membership is usually able to present a united front at the informal hearing, and the results have been more than satisfactory. However, whether or not the informal hearing results in a retirement or censure depends entirely upon the judge's willingness to force his right to a formal hearing. As has been noted, only one formal hearing has been held, but this fact does not mean that other judges will not pursue this course in the future. Nevertheless, it seems safe to say that for the present the key element in the commission's procedural arsenal is the informal hearing.

#### IV. RETROSPECT AND PROSPECT

If the performance of the Colorado commission during its first 3 years of operation is any indication of what can be expected in the future, it seems safe to conclude that the commission plan is a viable

<sup>43</sup> One of the laymen disagrees with this conclusion, charging that the judges often attempt to whitewash the offensive behavior. Not surprisingly, this particular member considers the role of layman on the commission to be that of a "watchdog" charged with keeping the commission from becoming a vehicle for the unwarranted protection of the judiciary.

solution to the problem of judicial discipline in Colorado. This is not to say, however, that there is no room for improvement.

As has been noted, one of the major problems facing the commission is that of determining the standards by which judicial behavior can be evaluated. In the past, the other commission members have looked to the judges for guidance in this regard. However, opinions differ even among judges as to what constitutes judicial misconduct. Furthermore, there appears to be a growing reluctance on the part of some members to defer to the judges on the commission. For example, in a recent meeting of the commission one of the laymen defied the consensus and demanded that the commission look into a matter involving somewhat questionable behavior. It is clear that such dissension over standards can only hamper the effectiveness of the commission's work; therefore the commission, as a matter of top priority, should establish for itself clear-cut guidelines as to what constitutes actionable misconduct.

Another area in which improvement is needed involves the commission's policy on publicity. Unlike its counterparts in other states, the Colorado commission has not published yearly reports summarizing its performance. As a result, very few people are aware of the commission's existence, and those who are aware of its existence are not sure of its function. It is obvious that the commission's effectiveness will be adversely affected if persons with valid complaints either fail to complain or complain to the wrong officials who, out of ignorance of the commission's existence, do not pass the complaint along. What is needed then is an extensive publicity campaign designed to make the commission's existence and effectiveness known to the lay public, the practicing bar, and the public officials likely to receive complaints. Not only would such a campaign tend to increase the number of valid complaints, it would also enhance the commission's role as a forum for the airing of frivolous complaints and thereby further protect the judge from unwarranted publicity. Finally, public awareness of an effective disciplinary mechanism would probably serve to increase public confidence in the judiciary as a whole.

Another practice which could prove to be troublesome in the future concerns the two hats worn by the present executive secretary. While the fact that the secretary is also the court administrator has been a help to the commission, commission members have come to depend on him for information and have put considerable stock in his evaluation of the validity of complaints. This could prove to be dangerously misplaced reliance; for as the business of the courts increases, the two positions will have to be severed, and the commission will be deprived of what has come to be a significant functional input. It will then be forced to fill the void with hastily contrived ad hoc measures which will impede

its effectiveness. Furthermore, there is always the present danger that the secretary will come to be looked upon as a bird dog for the commission, a contingency which could seriously undermine his effectiveness as court administrator. In order to avoid these possibilities, it is suggested that the two positions be severed and that a full-time executive secretary be hired by the commission. If this severance is not feasible for lack of funds, then someone whose full-time position is not in any way related to the administration of the courts should fill the position.

A final criticism (and one which was suggested by a respondent and seems to have some validity) is that the commission is not aggressive enough in prosecuting complaints. From what has been delineated, it is safe to conclude that the commission will seldom proceed with a complaint unless the allegations contained therein are supported *overwhelmingly* by the evidence. Consequently, those judges whose guilt is subject only to a minimal degree of doubt are exonerated without any attempt to actually weigh the evidence and come up with a true decision on the merits. Of course, this hesitancy on the part of the commission can be explained by reference to the facts that new ground is being broken and that the members are reluctant to establish precedents which may prove undesirable. For this reason, one cannot be too critical of the commission for its past caution. However, failure of the commission to assume a more forceful stance in the future could be an important factor in undermining its effectiveness.

Despite these few criticisms, it is beyond dispute that the Colorado experience tends to support the widespread consensus regarding the effectiveness of the commission plan.<sup>44</sup> In its 3 short years, the Colorado commission has established itself as a viable and credible mechanism for effecting judicial discipline and removal and, in so doing, has moved the Colorado judicial system a step closer to effective administration of justice.

*Stanley D. Neeleman*  
*David C. Miller*

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<sup>44</sup> Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166 (1963); *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149 (1966).

## APPENDIX

# RULES OF PROCEDURE COMMISSION ON JUDICIAL QUALIFICATIONS

ADOPTED BY  
THE COLORADO SUPREME COURT  
MAY 18, 1967

## 1. Definitions

In these rules, unless the context or subject matter otherwise requires:

- (a) "Commission" means the commission on judicial qualifications.
- (b) "Judge" means a justice or judge of any court of record of this state, except county judges of the city and county of Denver.
- (c) "Chairman" includes the acting chairman.
- (d) "Masters" means special masters appointed by the supreme court upon request of the commission.
- (e) "Presiding master" means the master so designated by the supreme court or, in the absence of such designation, the judge first named in the order appointing masters.
- (f) "Examiner" means the counsel designated by the commission to gather and present evidence before the masters or commission on the charges against a judge.
- (g) "Shall" is mandatory and "may" is permissive.
- (h) "Mail" and "mailed" includes registered or certified mail.
- (i) The masculine gender includes the feminine gender.

## 2. Interested Party

A judge who is a member of the commission or of the supreme court may not participate as such in any proceedings involving his own censure, removal, or retirement.

## 3. Confidentiality of Proceedings

All papers filed with and proceedings before the commission, or before the masters appointed by the supreme court pursuant to rule 8, shall be confidential.

## 4. Defamatory Material

The filing of papers with or the giving of testimony before the commission, or before the masters appointed by the supreme court pursuant to rule 8, shall be privileged in any action for defamation. No other publication of such papers or proceedings shall be so privileged, except that the record filed by the commission in the supreme court continues to be privileged.

## 5. Preliminary Investigation

(a) The commission, upon receiving a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a judge is guilty of willful misconduct in office, willful and persistent failure



to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that he has a disability that seriously interferes with the performance of his duties and is or is likely to become permanent, shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. The commission, without receiving a verified statement, may make such a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the commission's own motion, and shall be afforded reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose. Such notice shall be given by prepaid registered or certified mail addressed to the judge at his chambers and at his last known residence.

(c) If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified.

## 6. Notice of Formal Proceedings

(a) After the preliminary investigation has been completed, if the commission concludes that formal proceedings should be instituted, the commission shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him. Such proceedings shall be entitled:

"BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS  
Inquiry Concerning a Judge, No. \_\_\_\_\_,"

(b) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his right to file a written answer to the charges against him within fifteen days after service of notice upon him.

(c) The notice shall be served by the personal service of a copy thereof upon the judge, but if it appears to the chairman of the commission upon affidavit that, after reasonable effort for a period of ten days, personal service could not be had, service may be made upon the judge by mailing, by prepaid registered or certified mail, copies of the notice addressed to the judge at his chambers and at his last known residence.

## 7. Answer

Within fifteen days after service of the notice of formal proceedings, the judge may file with the commission a legible answer which shall be verified.

## 8. Setting for Hearing before Commission or Masters

Upon the filing of an answer or upon expiration of the time for its filing, the commission shall order a hearing to be held before it concerning the censure, removal, or retirement of the judge, or the commission may request the supreme court to appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in such matter, and to report thereon to the commission. The commission shall set a time and place for hearing before itself or before the masters and shall give notice of such hearing by registered or certified mail to the judge at least twenty days prior to the date set.

## 9. Hearing

(a) At the time and place set for hearing, the commission, or the masters, when the hearing is before masters, shall proceed with the hearing whether or not the judge has filed an answer or appears at

the hearing. The examiner shall present the case in support of the charges in the notice of formal proceedings.

(b) The failure of the judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for censure, removal, or retirement. The failure of the judge to testify in his own behalf or to submit to a medical examination requested by the commission or the masters may be considered, unless it appears that such failure was due to circumstances beyond his control.

(c) A verbatim record shall be kept of the proceedings of the hearing.

(d) When the hearing is before the commission, not less than five members shall be present when the evidence is produced.

## 10. Evidence

At a hearing before the commission or masters, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

## 11. Procedural Rights of Judge

(a) In proceedings involving his censure, removal, or retirement, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter.

(b) When a transcript of the testimony has been prepared at the expense of the commission, a copy thereof shall, upon request, be available for use by the judge and his counsel in connection with the proceedings, or the judge may arrange to procure a copy at his expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at his expense.

(c) Except as herein otherwise provided, whenever these rules provide for giving notice or sending any matter to the judge, such notice or matter shall be sent to the judge at his residence unless he requests otherwise, and a copy thereof shall be mailed to his counsel of record.

(d) If the judge is adjudged insane or incompetent, or if it appears to the commission at any time during the proceedings that he is not competent to act for himself, the commission shall appoint a guardian ad litem unless the judge has a guardian who will represent him. In the appointment of such guardian ad litem, consideration may be given to the wishes of the members of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent; and, whenever these rules provide for serving or giving notice or sending any matter to the judge, such notice or matter shall be served, given, or sent to the guardian or guardian ad litem.

## 12. Amendments to Notice or Answer

The masters, at any time prior to the conclusion of the hearing, or the commission, at any time prior to its determination may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or

after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

### **13. Report of Masters**

(a) After the conclusion of the hearing before masters, they shall promptly prepare and transmit to the commission a report which shall contain a brief statement of the proceedings had and their findings of fact on the issues presented by the notice of formal proceedings and the answer thereto, or if there be no answer, their findings of fact with respect to the allegations in the notice of formal proceedings. When the findings support the grounds alleged for censure, removal, or retirement, the report shall be accompanied by an original and four copies of a transcript of the proceedings before the masters.

(b) Upon receiving the report of the masters, the commission shall promptly mail a copy to the judge.

### **14. Objections to Report of Masters**

Within fifteen days after mailing of the copy of the masters' report to the judge, the examiner or the judge may file with the commission a statement of objections to the report of the masters, setting forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for censure, removal, or retirement. A copy of such statement, when filed by the examiner, shall be sent by registered or certified mail to the judge.

### **15. Appearance before Commission**

If no statement of objections to the report of the masters is filed within the time provided, the commission may adopt the findings of the masters without a hearing. If such statement is filed, or if the commission in the absence of such statement proposes to modify or reject the findings of the masters, the commission shall give the judge and the examiner an opportunity to be heard orally before the commission, and written notice of the time and place of such hearing shall be sent by registered or certified mail to the judge at least ten days prior thereto.

### **16. Extension of Time**

The chairman of the commission may extend for periods not to exceed thirty days in the aggregate the time for filing an answer, for the commencement of a hearing before the commission, and for filing a statement of objections to the report of the masters, and the presiding master may similarly extend the time for the commencement of a hearing before masters.

### **17. Hearing Additional Evidence**

(a) The commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of hearing and shall indicate the matters on which the evidence is to be taken. A copy of such order shall be sent by registered or certified mail to the judge at least ten days prior to the date of hearing.

(b) In any case in which masters have been appointed, the hearing of additional evidence shall be before such masters, and the proceedings therein shall be in conformance with the provisions of rules 9 to 15, inclusive.

### **18. Commission Recommendations**

(a) If the commission finds good cause, it shall recommend to the supreme court the censure, removal, or retirement of the judge. The affirmative vote of five members of the commission who have considered the record, and at least three of whom were present when the evidence was produced, is required for a recommendation of censure, removal, or retirement of a judge or for dismissal of the proceedings.

(b) The commission, with good cause, may also recommend to the supreme court that a judge be temporarily suspended from performing judicial duties without loss of compensation, pending final disposition by the supreme court of a commission recommendation for censure, removal, or retirement. A recommendation for temporary suspension shall require the affirmative vote of five members of the commission who have considered the record, at least three of whom were present when the evidence was produced.

### **19. Record of Commission Proceedings**

The commission shall keep a record of all proceedings concerning a judge. The commission's determination shall be entered in the record and notice thereof shall be sent by registered or certified mail to the judge. In all proceedings resulting in a recommendation to the supreme court for censure, removal, or retirement, the commission shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceedings.

### **20. Certification of Commission Recommendation to Supreme Court**

Upon making a determination recommending the censure, removal, or retirement of a judge, the commission shall promptly file a copy of the recommendation, certified by the chairman or secretary of the commission, together with the transcript and the findings and conclusions, with the clerk of the supreme court and shall immediately send by registered or certified mail to the judge notice of such filing together with a copy of such recommendation, findings, and conclusions.

### **21. Review of Commission Proceedings**

(a) A petition to the supreme court to modify or reject the recommendation of the commission for censure, removal, or retirement of a judge may be filed within thirty days after the filing with the clerk of the supreme court of a certified copy of the recommendation complained of. The petition shall be verified, shall be based on the record, shall specify the grounds relied on, and shall be accompanied by petitioner's brief and proof of service of three copies of the petition and of the brief on the commission. Within twenty days after service on the commission, the commission shall serve and file a respondent's brief. Within fifteen days after service of such brief, the petitioner may file a reply brief, of which three copies shall be served on the commission.

(b) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the commission.

(c) The Rules of Civil Procedure in appellate proceedings before the supreme court shall apply to proceedings in the supreme court for review of a recommendation of the commission, except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.