

THE COMMONWEALTH OF MASSACHUSETTS



**Commission on Judicial Conduct
Annual Report
1998**

14 Beacon Street
Suite 102
Boston, Massachusetts
02108

Phone: (617) 725-8050

Fax: (617) 248-9938

TABLE OF CONTENTS

I. INTRODUCTION	1
II. THE MASSACHUSETTS COMMISSION ON JUDICIAL CONDUCT	1
1. The Commission's Jurisdiction	1
2. The Complaint Process	2
3. Confidentiality	5
III. SUMMARY OF COMMISSION ACTIVITY IN 1998	6
IV. GENERAL INFORMATION ABOUT THE COMMISSION	10
1. Membership	10
2. Budget	11
3. Staff	11
4. Meetings	12
V. APPENDICES	
A. Massachusetts General Laws Chapter 211C	15
B. Rules of the Commission on Judicial Conduct	25
C. Code of Judicial Conduct	35
D. Flow Chart of Commission Procedures	43
E. In the Matter of Frederick L. Brown	45
F. In the Matter of John A. Markey	53
G. Complaint Form	63

I. INTRODUCTION

The role of judicial conduct agencies throughout the country is to help enforce the standards of judicial conduct. These agencies, established by the fifty states and the District of Columbia to oversee judges' conduct both on and off the bench, play a vital role in maintaining public confidence in the judiciary and preserving the integrity of the judicial process. As a forum for citizens with complaints against judges, judicial conduct agencies help maintain the balance between judicial independence and public accountability. They also serve to improve and strengthen the judiciary by creating a greater awareness of proper judicial conduct on the part of judges themselves.

Judicial conduct agencies act only on complaints involving judicial misconduct and disability. They do not serve as appellate courts, nor do they deal with complaints involving a judge's decisions or rulings unless there is an accompanying allegation of fraud, corrupt motive or other misconduct.

II. THE MASSACHUSETTS COMMISSION ON JUDICIAL CONDUCT

The Massachusetts Commission on Judicial Conduct (Commission) was established in 1978 with the enactment of the Court Reorganization Act. Before April 1, 1988, Commission activity was governed by the provisions of Massachusetts General Laws c.211C, as inserted by St. 1978, c.478, §114. In 1987, c.211C was substantially amended, effective April 1, 1988. See St. 1987, c.656. Since 1988, the Commission has been operating under the amended version of c.211C (see Appendix A) and procedural rules (see Appendix B).

This annual report covers the Commission's activities from January 1, 1998 through December 31, 1998.

1. THE COMMISSION'S JURISDICTION

The Commission is authorized to accept complaints only against state court judges. The Commission's jurisdiction includes the conduct of judges prior to assuming judicial office, and retired judges who are assigned to perform the duties of a judge for a temporary period, as well as the conduct of lawyers who used to be judges, while they held judicial office.

The Code of Judicial Conduct, promulgated by the Supreme Judicial Court (Rule 3:09; see Appendix C), sets forth eight canons which govern a judge's behavior. The Commission's grounds for discipline include violations of these canons, as well as the following:

- (1) conviction of a felony;
- (2) willful misconduct in office;
- (3) willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute;
- (4) 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; or
- (5) any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.

The Commission may not investigate complaints of misconduct which occurred more than one year prior to the date the complaint is received unless the Commission finds "good cause" to consider them, or unless there is an alleged pattern of recurring judicial misconduct, the last episode of which arose during the one-year period. Some factors which may determine "good cause" include the seriousness of the allegations, whether evidence still exists, and whether witnesses are still available.

The Commission does not have the power to review the record of a case to determine whether a judge made the correct decisions; that is for appellate courts. The Commission does not have the power to change the decisions of any court or to intervene in any case. The filing of a complaint with the Commission does not automatically require the disqualification of the judge from a pending case.

2. THE COMPLAINT PROCESS

a. Initiation of Proceedings

A complaint may be filed by any person. In order to make sure a complaint contains all the information necessary for screening, the Commission provides a complaint form. (See Appendix E.) However, a letter to the Commission which contains all the necessary information may suffice. If there is a reason preventing the complainant from filing in writing, a complaint may be filed orally. Any complaint may be filed anonymously. In order for a complaint to be docketed, it must allege specific facts which, if true, would constitute judicial misconduct or disability. The Commission may initiate its own complaint when it receives reasonable information about judicial misconduct.

b. Screening

When the Commission receives a complaint, the staff screens it to determine whether the complaint falls within the Commission's jurisdiction. If the complaint does not allege judicial misconduct, it is not accepted. If it does, it is docketed and assigned a complaint number.

c. Notice to the Judge

After a complaint is docketed, the judge is usually notified of the complaint before the staff begins its confidential investigation. The judge is invited to make a response, if he or she wishes.

If there is a danger of reprisal against the complainant or a danger of the destruction of evidence, notice to the judge may be partially or fully withheld.

d. Investigation

The staff member assigned the complaint conducts a prompt, confidential investigation, which may include listening to tape recordings or reviewing transcripts of court proceedings, interviewing witnesses, reviewing documents, and observing in court. At the conclusion of the investigation (within ninety days, whenever possible), the Commission reviews the report of the investigation, the judge's response, if any, and any other relevant materials. The Commission votes whether to dismiss the matter or to proceed to a Sworn Complaint or Statement of Allegations. At any stage of the proceedings, the Commission may decide to dispose of a complaint by dismissal, Informal Adjustment, or Private Reprimand.

e. Informal Adjustment

If the Commission decides to dispose of a complaint by Informal Adjustment, it develops a list of conditions designed to prevent a repetition of the misconduct. This form of disposition requires agreement by the judge to the terms of the Informal Adjustment. The terms may include counseling, education, assignment of a mentor judge, monitoring by the Commission for a specified period of time, voluntary retirement, or other appropriate conditions. An Informal Adjustment may take the form of an information or admonition to the judge that certain conduct is or may be cause for discipline.

f. Private Reprimand

The Commission may issue a Private Reprimand to a judge, as part or all of the disposition of a complaint, if the judge consents. A Private Reprimand is considered to be a more severe discipline than the information or admonition mentioned in the paragraph above.

g. Sworn Complaint or Statement of Allegations

After considering the investigation of a complaint, if the Commission votes to proceed to the next level of charging, either the complainant signs a Sworn Complaint or the Commission staff prepares a Statement of Allegations. The Sworn Complaint or Statement of Allegations is sent to the judge. The judge then has twenty-one days in which to respond in writing and to request an appearance before the Commission. The judge may be accompanied by counsel.

After the twenty-one days allowed for a judge's response to the Sworn Complaint or Statement of Allegations, and after the judge's appearance, if any, the Commission votes to dispose of the matter in one of the following four ways: 1) dismissal; 2) Informal Adjustment; 3) Private Reprimand; or 4) issuing Formal Charges.

h. Formal Charges

When Formal Charges are issued, they are sent to the judge, who has ten days to respond. After reviewing the judge's response, if the Commission decides to continue with the formal proceedings, it files the Formal Charges and the judge's response with the Supreme Judicial Court. Upon that filing, both documents become public.

i. Hearing

When Formal Charges are filed with the Supreme Judicial Court, the Commission requests that the Court appoint a hearing officer. The Commission schedules a hearing, which is open to the public. The rules of evidence applicable to civil proceedings in Massachusetts apply at the hearing. The Commission has the burden of proving the charges by clear and convincing evidence. Within thirty days after the conclusion of the hearing, the hearing officer submits a report to the Commission containing proposed findings and recommendations.

j. Commission Recommendations

Before the Commission reaches its final decision, the judge and the complainant have the right to be heard regarding the Commission's recommendation for discipline. That hearing is open to the public; the Commission deliberations which follow are closed. The Commission must then make a report to the Supreme Judicial Court within ninety days. The Commission's conclusions and recommendations may differ from those of the hearing officer.

k. Disposition

The Supreme Judicial Court, usually after hearing, acts on the Commission's report. The Court may adopt the Commission's recommendations concerning discipline or impose greater or lesser discipline.

As a general matter, the Commission's authority to dispose of a complaint is limited to dismissal, Private Reprimand, or Informal Adjustment. The Commission does not have the power to impose disciplinary sanctions without the consent of the judge; only the Supreme Judicial Court has that power. The Commission may recommend that the Supreme Judicial Court impose a greater variety of sanctions upon a judge than is available to the Commission, including public censure. Neither the Commission nor the Court has the power to remove a judge from the bench. (The Legislature must act in order to remove a judge for misconduct. The Governor and Governor's Council may retire a judge for mental or physical disability, before the mandatory retirement age of seventy.) The complainant and the judge are always notified of the final disposition of a complaint.

l. Physical or Mental Disabilities

The Commission follows the same procedures as above in dealing with complaints about physical or mental disabilities that affect a judge's performance.

3. CONFIDENTIALITY

The statute and the rules which govern the Commission on Judicial Conduct require that the complaint and all Commission proceedings remain confidential, unless and until the Commission files Formal Charges with the Supreme Judicial Court. (There are certain limited exceptions to this requirement.) This strict confidentiality includes all communications made to and by the Commission or its staff; it protects complainants, witnesses, and judges.

III. SUMMARY OF COMMISSION ACTIVITY IN 1998

One hundred sixty complaints were docketed in 1998. Almost all of the complaints were filed against judges from the following courts: District Court, 42 percent; Probate and Family Court, 31 percent; and Superior Court, 21 percent. Chart 3 presents the distribution of complaints by court.

In 1998, litigants filed 77 percent of the complaints. Of the litigants who filed complaints, 39 percent were *pro se* litigants. Relatives of litigants filed an additional seven complaints. Seventeen complaints, or 9.8 percent, were filed by lawyers; four complaints, or 2.3 percent, were filed anonymously; and ten complaints, or almost 6 percent, were filed by concerned citizens. Of the four complaints filed anonymously, the Commission voted not to investigate any of them. In 1998 the Commission did not initiate any complaints. Chart 5 presents the distribution of complaints by source.

Most of the complaints filed in 1998 contained multiple allegations of misconduct. The subject matter of the allegations is presented in Chart 6. Although disagreement with the judge's rulings was the primary allegation in many of the complaints, the most frequent allegation was bias and prejudice. Gender bias was the subject matter of 16 percent of the bias complaints; of those alleging gender bias, 82 percent alleged bias against men, and 18 percent alleged bias against women. Racial bias was alleged in 6.6 percent of the bias complaints; bias against *pro se* litigants in 7.6 percent; bias against the disabled or elderly in 4.8 percent; and bias toward prosecutors in 1.9 percent. Following bias, the next most frequent allegations were inappropriate demeanor on the part of the judge, failure to be fully heard by the judge, and denial of constitutional rights. Other frequent allegations were administrative problems, corruption, abuse of the judge's authority, incompetence, improper *ex parte* communications, conflict of interest, and conspiracy.

Chart 1 presents the status of the Commission's 1998 docket. The Commission disposed of 134 complaints in 1998, including some which were carried over from previous years. One hundred thirty-four cases were pending at the end of 1998, including five cases in which Informal Adjustments were pending. The status of those 134 cases is shown in Chart 1.

As shown in Chart 2, the Commission dismissed 127 complaints, or almost 95 percent of the complaints dealt with by the Commission during 1998. The number of dismissals is large because most complaints result from a litigant's dissatisfaction with findings, rulings, or other discretionary acts of a judge, or are based upon unfounded allegations.

Chart 2 also indicates that seven complaints, or 5 percent of the complaints dealt with by the Commission in 1998, were informally adjusted. In 1998, no public hearings were held.

CHART 1
Status of Commission Docket
1998

Complaints Pending January 1, 1998		108
C Investigations in Process	107	
C Informal Adjustments in Progress	1	
Complaints Filed in 1998		160
Complaints Disposed of in 1998		134
Complaints Pending December 31, 1998		134
C Investigations in Progress	129	
C Informal Adjustments in Progress	5	

CHART 2
Commission Action on Complaints
1998

Complaints Before the Commission in 1998		268
C Complaints Pending from Previous Year	108	
C Complaints Filed in 1998	160	
Complaints Under Investigation During 1998		196
Complaints Disposed of in 1998		134
C Dismissed After Preliminary Investigation	55	
C Dismissed After Investigation	72	
C Informally Resolved/Dismissed with Admonition	2	
C Informally Resolved/Other	6	
• Closed in 1998	1	
• Still Pending on December 31, 1998	5	

CHART 3
Complaints by Court
1998

	N = 160
Supreme Judicial Court (7)*	0
Appeals Court (14)	1
Superior Court (80)	34
Land Court (4)	1
Probate and Family Court (49)	49
Housing Court (9)	2
District Court (172)	67
Boston Municipal Court (11)	0
Juvenile Court (37)	6

* Numbers in parentheses represent the number of judges in each court as authorized by statute in 1998

CHART 4
Type of Case Involved
1998

	N = 160
Civil	61
Divorce, Custody	43
Criminal	42
(Off-Bench Conduct)	6
Estate or Other Probate Matter	6
Small Claims	2

CHART 5
Type of Complainant
1998

		N = 173
Litigant		133
•Pro Se	52	
Lawyer		17
Commission on Judicial Conduct		0
Anonymous*		4
Other		19
•Litigant's Relative	7	
•Juror, Witness, Victim, Spectator	1	
•Concerned Citizen	10	
•Judge	1	

*Anonymous complainants may identify themselves as lawyers, court employees, or concerned citizens.

CHART 6
Subject Matter of Complaints*
1998

Bias, Prejudice			105
Gender		17	
Against Men	14		
Against Women	3		
Racial		7	
Against <i>Pro Se</i> Litigants		8	
Against Disabled or Elderly		5	
Toward Prosecutors		2	
Disagreement with Decisions and Rulings			80
Inappropriate Demeanor			59
No Full Opportunity to be Heard			31
Denial of Constitutional Rights			31
Administrative Problems			21
Delay	16		
Other than Delay	5		
Corruption, Bribe, Extortion			20
Abuse of Authority			19
Failure to Follow the Law, Incompetence			19
<i>Ex Parte</i> Communication			18
Conflict of Interest			13
Conspiracy, Collusion			10
Favoritism, Nepotism			8
Cover-up			8
Fraud, Deception, Dishonesty, Lack of Integrity			8
Off-Bench Misconduct			5
Retaliation			3
Obstruction of Justice			3
Unprofessional Conduct			3
Improper Comment about Pending Case			2
Lobbying			2
Sleeping on the Bench			2
Failure to Maintain Order			2
Allowing Photographs of Hearings of Motions to Suppress			1
Giving Legal Advice			1
Failure to Report Misconduct			1
Mental Disability			1
Other			3

* Many complaints contain more than one allegation.

CHART 7
Summary of Commission Activity, 1994-1998

	1994	1995	1996	1997	1998
Complaints Pending from Previous Year	75	74	57	92	108
New Complaints Filed	169	187	167	167	160
Complaints Investigated	196	180	173	188	196
Complaints Dismissed	165	185	129	147	126
Complaints Informally Resolved and Closed	1	1	0	4	3
Complaints Informally Resolved and Still Pending at End of Year	14	5	3	1	5
Total of Complaints Informally Resolved	15	6	3	5	8
Public Hearings Held	0	0	0	2	0
Reports Filed with the Supreme Judicial Court	0	0	0	2	0

IV. GENERAL INFORMATION ABOUT THE COMMISSION

1. MEMBERSHIP

The Commission is composed of nine members who serve without pay. Three lay persons are appointed by the Governor, three lawyers are appointed by the Chief Justice for Administration and Management of the Trial Court, and three judges are appointed by the Justices of the Supreme Judicial Court. The Commission annually elects one of its members to serve as Chairman and one to serve as Vice Chairman. Commissioners are eligible for only one six-year term, except when appointed to fill a vacancy for the

remainder of an unexpired term.

The Commission members who served during the period covered by this report are:

Harry T. Daniels, Esquire, Chairman (through February 26, 1998)
Honorable Robert A. Barton, Vice Chairman (through February 26, 1998)
Chairman (as of February 27, 1998 until term ended November, 1998)
Honorable Catherine P. Sabaitis, Vice Chairman (as of February 27, 1998)
Acting Chairman (as of November, 1998)
Honorable Sally A. Kelly
Honorable Margot G. Botsford (term began December, 1998)
Patricia A. Webber, Esquire
Gerald C. J. Cook, Esquire
Michael McKay Murphy
John G. Gallup
Sally Livingston

Alternate members are appointed in each category by the same appointing authorities, to serve at the call of the Chairman in place of Commission members who are disqualified from or unable to participate in a Commission proceeding. Those appointed to serve during 1998 were:

Honorable Elizabeth Butler
Honorable Daniel J. Klubock
Honorable Joseph Lian, Jr.

2. BUDGET

The Commission is an independent agency in the Judicial Branch, funded through a line-item in the budget of the Supreme Judicial Court. The Commission received a total appropriation of \$314,370 for fiscal year 1998.

3. STAFF

Barbara Morgan Fauth, Esquire, has served as the Commission's Executive Director since September, 1987. Gillian E. Pearson has served as Staff Attorney since January, 1988. Mark Signore has served as Executive Assistant since January, 1996. Alice K. Carli has served as Administrative Secretary since April,

1988.

4. MEETINGS

The Commission generally meets monthly, on the second Tuesday of the month. The Commission met eleven times in 1998.

APPENDICES

APPENDIX A

Massachusetts General Laws c.211C, as amended by St. 1987, c.656

SECTION 1. Establishment; membership; expenses; term; chairman

There shall be a commission on judicial conduct consisting of nine members. Three judges shall be appointed by the justices of the supreme judicial court, none of whom shall be justices of said court and no two of whom shall be from the same department of the trial court. Three members of the bar shall be appointed by the chief administrative justice of the trial court, none of whom shall be judges. Three members shall be appointed by the governor, none of whom shall be members of the bar. The members of the commission shall serve without compensation, but shall be reimbursed for all expenses reasonably incurred by them in the performance of their duties. Members of the commission shall serve for six year terms. Commission membership shall terminate if a member ceases to be qualified for the appointment. A vacancy shall be filled by the appointing authority for the remainder of the term. Upon the expiration of the term of office of a member, his successor shall be appointed in the manner aforesaid. No person shall succeed himself as a member of the commission except when his membership is due to an appointment to fill a vacancy for the remainder of an unexpired term. One or more alternate members, as necessary, shall be elected in the manner prescribed for initial appointments in each representative class, and shall serve at the call of the chairman to take the place of those who are disqualified from participating in a commission proceeding pursuant to commission rules.

SECTION 2. Investigations; hearings; recommendations

(1) All judges of the trial court, the appeals court and the supreme judicial court shall be subject to discipline pursuant to this chapter. The commission on judicial conduct shall have the authority to receive information, investigate, conduct hearings, and make recommendations to the supreme judicial court concerning allegations of judicial misconduct and allegations of mental or physical disability affecting a judge's performance.

(2) The commission shall have jurisdiction over investigations and recommendations regarding discipline arising from the conduct of all judges, including any retired judge who is assigned to perform the duties of a judge for a temporary period. This jurisdiction shall include all conduct that occurred prior to a judge's assuming judicial office, and conduct of a lawyer who is no longer a judge that occurred while he held judicial office; provided, however, that in evaluating such conduct, the commission shall give substantial weight to relevant decisions of the supreme judicial court and the board of bar overseers regarding bar discipline. The foregoing shall not be construed to derogate the inherent authority of the supreme judicial court to supervise and discipline judges, the authority of the governor with the consent of the council to remove a judge upon the address of both houses of the legislature or to retire a judge involuntarily because of advanced age or mental or physical disability, the authority of the legislature to remove a judge through impeachment, or the supervisory authority of the chief justices of the appeals and supreme judicial courts or of the chief and department administrative justices of the trial court.

(3) Except where the commission determines otherwise for good cause, the commission shall not deal with complaints arising out of acts or omissions occurring more than one year prior to the date commission proceedings are initiated pursuant to section five; provided, however, that, when the last episode of an alleged pattern of recurring judicial conduct arises within the one year period, the commission may consider all prior acts or omissions related to such alleged pattern of conduct.

(4) In the absence of fraud, corrupt motive, bad faith, or clear indication that the judge's conduct violates the code of judicial conduct, the commission shall not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. Commission proceedings shall not be a substitute for an appeal.

(5) Grounds for discipline shall 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; or

(e) any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.

SECTION 3. Report; appropriations; offices; rules; immunity; executive director; proceedings

(1) The commission shall report only to the supreme judicial court. The commission shall be allowed for its purposes annually such amount as shall be appropriated for it by the general court. The commission shall be provided with adequate offices. The commission may adopt rules of procedure, without compliance with the provisions of chapter thirty A, but subject to the approval of the supreme judicial court, and may develop appropriate forms for its proceedings. Such rules shall establish reasonable time limits for all stages of commission proceedings and standards for extending time limits applicable to commission proceedings.

(2) Members of the commission, hearing officers, commission counsel, and staff shall be absolutely immune from suit for all conduct in the course of their official duties. A complaint submitted to the commission or its staff and communications related to the complaint shall be absolutely privileged, and no civil action predicated on the complaint or on such a communication may be instituted against any complainant or witness or his counsel; provided, however, such immunity from suit shall apply only to communications to the commission or its staff and shall not apply to public disclosure of information contained in or relating to the complaint.

(3) The commission shall appoint an executive director who shall serve at the pleasure of the commission. The executive director shall be a member of the Massachusetts bar, shall serve full time, and shall not engage in the practice of law. The executive director shall receive an annual salary, subject to appropriation, which is fixed by the commission consistent with classification and compensation policies of the supreme judicial court, and such expenses as are approved by the commission and incurred in the

discharge of the executive director's duties.

(4) The executive director shall 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 dispositions;
- (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 supreme judicial 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 the annual report of the commission's activities required pursuant to section four; and
- (k) employ, with the approval of the commission and subject to appropriation, special counsel, private investigators, or other experts, and clerical assistants, as necessary to investigate and process matters before the commission and before the supreme judicial court. Neither the attorney general's staff nor law enforcement officers shall be employed for this purpose.

(5) The supreme judicial court may delegate the power to enforce process in commission proceedings to another appropriate court. A witness at any stage of commission proceedings may rely on any privilege applicable to civil proceedings.

SECTION 4. Annual report

The commission shall submit annually to the general court and the supreme judicial court a report of its activities together with recommendations. This report shall be a matter of public record and shall be printed as a public document.

SECTION 5. Initiation of proceedings; inquiry, investigation and evaluation; detailed complaint or statement of allegations; formal charges

(1) Commission proceedings relating to the conduct of a judge may be initiated by an oral or written complaint stating facts that, if true, would be grounds for discipline, or by the commission's own motion when the commission receives reasonable information, including reports in the news media, as to conduct that appears to constitute grounds for discipline. Upon receipt of such complaint or adoption of such motion, the commission shall promptly notify the judge, except as provided in subdivision (2), and shall conduct a prompt, discreet and confidential inquiry, investigation and evaluation.

(2) The commission shall notify the judge of the proceedings and their subject matter before commencing any inquiry, investigation or evaluation in all cases except as follows:

(a) where, because of the nature of the complaint, delay is necessary in order to preserve evidence, notice may be delayed until such evidence is obtained, until the matter is dismissed, or until the sworn complaint or statement of allegations is served pursuant to subdivision (6), whichever occurs first;

(b) where the identity of the complainant could be readily determined by the judge from the nature of the complaint and there is a danger of reprisal against the complainant, notice may be delayed until the danger of reprisal ends, until the matter is dismissed, or until the sworn complaint or statement of allegations is served pursuant to subdivision (6), whichever occurs first; provided, however, that in any such case where there is an ongoing danger of reprisal, the notice and the statement of allegations may be drafted so as to conceal the complainant's identity.

(3) The commission shall discourage and shall promptly dismiss complaints which are frivolous, unfounded or outside commission jurisdiction. The commission shall notify the judge and the complainant, if any, of such dismissal in accordance with the provisions of subdivisions (1), (2) and (10).

(4) At any stage of the proceeding, the commission shall be entitled within the time limits established by commission rule to compel by subpoena the attendance and testimony of witnesses, including the judge, and to provide for the inspection of documents, books, accounts, and other records.

(5) After a thorough inquiry, investigation and evaluation, the executive director shall recommend to the commission, and the commission shall determine, by majority vote, whether there is adequate reason to proceed to the preparation of a detailed complaint or statement of allegations. If so, the commission shall request that the complainant file a detailed sworn complaint against the judge. When a sworn complaint is not obtained, the executive director shall prepare a clear statement of the allegations against the judge and the alleged facts forming their basis. Said complaint or statement of allegations shall clearly set forth each act of misconduct where more than one act of misconduct is alleged, and shall state clearly the provision of statute, code of judicial conduct or code of professional responsibility alleged to have been violated by each alleged act of misconduct.

(6) The judge shall be served promptly with a copy of the sworn complaint or statement of allegations.

(7) The judge shall have twenty-one days after receipt of the sworn complaint or statement of allegations to respond in writing to the charges and, if he wishes, to file a written request for a personal appearance before the commission.

(8) The judge shall be entitled to counsel of his own choice. After the judge is served with the sworn complaint or statement of allegations, he shall be entitled before the issuance of formal charges and within the time limits established by commission rule to compel by subpoena the attendance and testimony of witnesses, through depositions, and to provide for the inspection of documents, books, accounts, written or electronically recorded statements, and other records. The judge may file written material for commission consideration before the issuance of formal charges.

(9) If the judge requests a personal appearance before the commission, he may be accompanied

by counsel, his statement and that of his counsel shall be recorded, and the commission shall not issue formal charges until after such personal appearance.

(10) If at any time prior to the issuance of formal charges the commission determines that it does not have sufficient cause to proceed, the commission shall terminate the proceedings by closing the investigation or dismissing the complaint or the statement of allegations. In that event, the commission shall give notice to the complainant, if any, and to the judge that it has found insufficient cause to proceed. The file in any matter so terminated shall be closed.

(11) The commission may not refer subsequently to a file closed before the issuance of formal charges except in the following circumstances:

- (a) in a subsequent proceeding that raises similar allegations against the judge and indicates a pattern of recurring judicial misconduct;
- (b) in a subsequent proceeding alleging conduct in violation of conditions imposed as part of an informal adjustment pursuant to subdivision (1) of section eight;
- (c) in connection with a decision as to the recommended sanction to be imposed in a subsequent proceeding.

(12) The commission may, upon notice to the judge, amend the allegations prior to a finding of sufficient cause to issue formal charges. The judge may amend his written response or submit additional written material for commission consideration before such finding.

(13) After the judge's personal appearance pursuant to subdivision (9), if any, and after the expiration of any time limit upon written submissions by the judge pursuant to subdivisions (8) and (12), the commission shall determine whether there is sufficient cause to issue formal charges. A finding of sufficient cause to issue formal charges shall require the concurrence of the majority of all commission members that there is a preponderance of credible evidence that the judge's conduct constitutes grounds for discipline.

(14) When sufficient cause is found, the commission shall issue formal charges stating those allegations as to which sufficient cause is found. A copy of the formal statement of charges shall be served promptly upon the judge and the judge shall have ten days to respond. Immediately thereafter, a copy of such formal statement of charges and of the judge's written response shall be filed with the supreme judicial court, which shall promptly appoint a hearing officer. Confidentiality shall cease upon this filing, as provided in section six, and after this filing the proceedings shall be governed by the provisions of section seven.

SECTION 6. Confidentiality

(1) Except as provided in this section, all proceedings of the commission shall be confidential until there has been a determination of sufficient cause and formal charges have been filed with the supreme judicial court. The commission shall ensure that a procedure applicable to commission members, counsel and staff is established for enforcing confidentiality.

(2) Notwithstanding the provisions of subdivision (1), the judge may waive his right to confidentiality prior to a finding of sufficient cause. In addition, 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 such 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, or to state that the judge denies the allegations.

(3) If the inquiry was initiated as a result of notoriety or because of conduct that is a matter of public record, and is subsequently terminated because there is insufficient cause to proceed, information concerning the insufficiency of cause to proceed may be released by the commission.

(4) Notwithstanding any other provision of this chapter to the contrary, proceedings pursuant to this chapter may remain confidential, even after a finding of sufficient cause, if the judge, the commission, and the complainant, if any, all concur.

(5) If any federal agency, the judicial nominating council, or any like agency for screening candidates for judicial appointment which succeeds the judicial nominating council, seeks information or written materials from the commission concerning a judge, in connection with his selection or appointment as a judge, information may be divulged in accordance with procedures prescribed by commission rule, including reasonable notice to the judge affected, unless the judge signs a waiver of the right to such notice. If, in connection with the assignment of a retired judge to judicial duties, the chief justice of the supreme judicial court or the appeals court or the chief administrative justice of the trial court seeks information or written materials from the commission about the judge, information may be divulged in accordance with procedures prescribed by commission rule, including reasonable notice to the judge affected, unless the judge signs a waiver of the right to such notice.

SECTION 7. Hearing; recommendation for discipline; attorneys' fees

(1) The commission shall schedule a hearing without undue delay after the appointment of the hearing officer by the supreme judicial court. The commission shall schedule the time and place of the hearing, and shall notify the judge and all counsel of the hearing. The judge shall be afforded ample opportunity to prepare for the hearing and may amend his written response to the charges.

(2) The judge and the commission shall each be entitled to discovery to the extent available in civil proceedings, within the time limits provided by commission rules. The judge and the commission shall each be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge, and to provide for the inspection of documents, books, accounts, and other records.

(3) The formal hearing shall be public and shall be conducted before the hearing officer appointed by the supreme judicial court. At the hearing, all testimony shall be under oath, the rules of evidence applicable to civil proceedings shall apply, and the judge shall be accorded due process of law.

(4) An attorney or attorneys of the commission staff, or special counsel retained for the purpose, shall present the matter to the hearing officer. The commission shall have the burden of proving the charges by clear and convincing evidence. The judge and the commission shall be permitted to present evidence and cross-examine witnesses, subject to the rules of evidence applicable to civil proceedings.

(5) The raising of mental or physical condition as a defense constitutes a waiver of medical privilege.

(6) By leave of the commission or with the 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.

(7) Every hearing shall be transcribed.

(8) The hearing officer shall submit to the commission and to the judge a report containing proposed findings and recommendations, the transcripts of testimony and all exhibits. Counsel for the judge and commission shall have twenty days after receipt of such report to submit written objections to the findings and recommendations, and said objections shall become part of the record.

(9) Before the commission reaches its decision, the judge and the complainant, if any, shall have the right to be heard before the commission regarding its recommendation for discipline, and their statements shall be transcribed. Such hearing shall be public, but commission deliberations regarding such recommendation shall be conducted in executive session. The commission shall reach a decision on the basis of the full record within ninety days after such hearing, unless there is good cause for delay. Its conclusions may differ from those proposed by the hearing officer. Its decision shall state specific reasons for all conclusions and recommendations.

(10) A recommendation for discipline shall be reported to the supreme judicial court only if a majority of all members of the commission concur that discipline should be recommended. Any dissent as to the need for or the form of discipline shall be transmitted with the majority decision. A copy of said recommendation and dissent shall be given to the judge and shall become part of the public record. The entire record, including transcripts, exhibits and the hearing officer's report, shall be transmitted to the supreme judicial court.

(11) If a majority of the members of the commission concur that discipline should not be recommended, the matter shall be dismissed, and the judge and complainant, if any, shall be notified of such dismissal.

(12) The provisions of subdivisions (10) and (11) shall not be construed to prohibit the commission from disposing of the matter by informal adjustment pursuant to section eight as a result of commission deliberations regarding a recommendation for discipline.

(13) The expense of witnesses shall be borne by the party that calls them unless:

(a) physical or mental disability of the judge is in issue, in which case the commission shall reimburse the judge for the reasonable expenses of the witnesses whose testimony related to the disability; or

(b) the supreme judicial court determines that the imposition of costs and expert witness fees will work a financial hardship or injustice upon him and orders that those fees be reimbursed.

(14) All witnesses shall receive fees and expenses in the same manner as witnesses in civil actions before the courts. A transcript of all proceedings shall be provided to the judge without cost. Except as provided in subdivision (13), costs of all proceedings shall be at public expense.

(15) With the approval of the supreme judicial court, a judge shall be entitled to the payment of reasonable attorneys' fees by the commonwealth in any case where the matter is dismissed by the commission at any stage after the filing of a sworn complaint or statement of charges, where the supreme judicial court determines despite a commission recommendation for discipline that no sanction is justified, or where the supreme judicial court determines that justice will be served by the payment of such fees.

SECTION 8. Informal adjustment; sanctions

(1) With the agreement of the judge, the commission may by informal adjustment dispose of a complaint at any stage of the proceedings by:

- (a) informing or admonishing the judge that his conduct is or may be cause for discipline;
- (b) directing professional counseling and assistance for the judge;
- (c) imposing conditions on the judge's conduct; or
- (d) persuading a judge to retire voluntarily.

(2) The commission may dismiss a sworn complaint, a statement of allegations or a formal statement of charges as unjustified or unfounded at any stage during the proceedings.

(3) The commission may issue a private reprimand with the consent of the judge.

(4) The commission may recommend to the supreme judicial court one or more of the following sanctions:

- (a) removal;
- (b) retirement;
- (c) imposition of discipline as an attorney;
- (d) imposition of limitations or conditions on the performance of judicial duties;
- (e) public or private reprimand or censure;
- (f) imposition of a fine;
- (g) assessment of costs and expenses;
- (h) imposition of any other sanction which is reasonable and lawful.

SECTION 9. Charges against supreme judicial court member

The chief justice and the six most senior justices of the appeals court other than the chief justice shall serve in the place of the supreme judicial court when charges are brought against a member of the supreme judicial court.

SECTION 10. Physical or mental disabilities

(1) The commission shall have authority to receive information, investigate, conduct hearings, and make recommendations to the court relating to mental or physical disability affecting a judge's performance.

(2) In carrying out its responsibilities regarding physical or mental disabilities, the commission shall follow the same procedures that it employs with respect to discipline for misconduct.

(3) If the judge in a matter relating to physical or mental disability is not represented by counsel, the commission shall appoint an attorney to represent him at public expense.

(4) If a complaint involves the physical or mental condition of the judge, a denial of the alleged condition shall constitute a waiver of medical privilege and the judge shall be required to produce his medical records.

(5) If medical privilege is waived, the judge shall be 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 shall be furnished to the commission and the judge.

SECTION 11. Advisory committee

The supreme judicial court may establish an advisory committee on the code of judicial conduct, which may render advisory opinions to judges at their request or on its own motion.

APPENDIX B

RULES OF THE COMMISSION ON JUDICIAL CONDUCT

Effective April 1, 1988

SCOPE AND TITLE

These rules govern the procedures of the Commission on Judicial Conduct in the exercise of its jurisdiction pursuant to Chapter 211C of the General Laws as appearing in St. 1987, c. 656, and apply to proceedings which are initiated on or after April 1, 1988. These rules shall be known and may be cited as the Rules of the Commission on Judicial Conduct (R.C.J.C.). (Any proceedings initiated prior to April 1, 1988, shall be governed by the rules which were in effect under Chapter 211C before April 1, 1988.)

RULE 1. DEFINITIONS

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

A. "Chairman" and "Vice Chairman" refer to members of the Commission elected as such by vote of the Commission. Whenever used in these rules, the word "Chairman" shall include, in the absence of the Chairman, the Vice Chairman or other member acting as Chairman.

B. "Commission" means the Commission on Judicial Conduct.

C. "Complainant" means a person or entity who has communicated to the Commission a complaint against a judge.

D. "Complaint" means any oral or written statement which alleges judicial misconduct or physical or mental disability.

E. "Judge" means a judge or justice of any court of this Commonwealth.

F. "Notoriety" means broad public knowledge.

G. "Reasonable Information" means any information, including reports in the news media, which comes to the attention of the Commission and which contains credible allegations about a judge that, if true, would constitute misconduct or disability under Chapter 211C.

H. "Screener" means a member of the Commission staff assigned by the Executive Director to screen complaints in accordance with Rule 6B.

I. "Shall" is mandatory; "may" is permissive.

J. "Special Counsel" means an attorney, appointed by the Supreme Judicial Court at the request of the Commission, to conduct investigations, to make recommendations to the Commission, and/or to present evidence at a hearing, with respect to a complaint or charges against a judge, and to take any other action related thereto which the Commission may direct.

K. "Sworn Complaint" means a detailed written complaint which the complainant signs under oath and files, at the request of the Commission.

RULE 2. COMPOSITION OF COMMISSION

A. The composition of the Commission and terms of its members are as provided in Chapter 211C.

B. A member of the Commission shall not participate in any proceeding in which the impartiality of that member might reasonably be questioned. Disqualification pursuant to this section shall be by the member involved or by affirmative vote of at least five (5) members of the Commission.

(1) Upon the call of the Chairman, an alternate member shall serve in place of a member of the Commission who has been disqualified from participating in a Commission proceeding or is otherwise unable to serve. Whenever an alternate member is called to serve in the place of a member of the Commission, the judge in question and the complainant shall be so notified.

C. If a Commission member ceases to be qualified for the appointment to represent the category for which he was appointed, resigns, or becomes permanently unable to serve for any reason, a vacancy shall occur. An appointment to fill a vacancy for the duration of the unexpired term shall be made by the appropriate appointing authority forthwith.

RULE 3. ORGANIZATION OF COMMISSION

A. A Chairman and Vice Chairman shall be elected annually by the members of the Commission.

B. Meetings of the Commission shall be held upon the call of the Chairman or the written request of at least three members of the Commission. Meetings shall not be held on less than three days notice; but this requirement may be waived by consent of all the members. The Chairman shall preside at meetings of the Commission, and the Vice Chairman shall act in the absence or disqualification of the Chairman. In the absence or disqualification of both the Chairman and the Vice Chairman, the members shall select one among them as acting Chairman.

C. A quorum of the Commission shall consist of five members, including at least one judge, one member of the bar who is not a judge, and one lay person who is not a member of the bar. An affirmative vote of at least five members of the Commission is required to dismiss, informally adjust, or otherwise dispose of a proceeding; to issue formal charges against a judge; or to make recommendations to the Supreme Judicial Court regarding disciplinary action. A vote may be taken by telephone when a decision is required sooner than a meeting could be held, unless any member objects.

RULE 4. JURISDICTION OF THE COMMISSION

A. The Commission shall have the authority to receive information, conduct investigations and hearings, and make recommendations to the Supreme Judicial Court concerning allegations of judicial misconduct or disability.

B. The Commission's jurisdiction shall include the conduct of all active judges prior to, as well as during, their service in judicial office and shall also include the conduct of a retired judge who has been

recalled.

RULE 5. CONFIDENTIALITY

A. All proceedings prior to a determination of sufficient cause and the filing of formal charges shall be confidential.

B. Records, files, and reports of the Commission shall be confidential, and no disclosure shall be made, except as follows:

- (1) Upon waiver in writing by the judge at any stage of the proceedings;
- (2) Upon inquiry by an appointing authority or by a state or federal agency conducting investigations on behalf of such authority in connection with the selection or appointment of judges; or upon inquiry in connection with the assignment or recall of a retired judge to judicial duties, by or on behalf of the assigning authority, in which case the Commission may:
 - (a) divulge whatever information is a matter of public record; and
 - (b) after obtaining the judge's signed waiver, divulge other relevant information; or
 - (c) divulge other relevant information after giving written notice to the judge affected of its intention to do so and allowing the judge seven (7) days to respond.
- (3) In cases in which the subject matter has become public, the Commission may issue such statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, or to state that the judge denies the allegations;
- (4) Upon filing of formal charges, in which case only the formal charges, the answer thereto, the evidentiary hearings thereon, and the final recommendation by the Commission as to disposition shall become public, except as provided in paragraph D below.

C. Where the circumstances necessitating the initiation of an inquiry include notoriety, or where the conduct in question is a matter of public record, information concerning the lack of cause to proceed may be released by the Commission.

D. Proceedings may remain confidential, even after a finding of sufficient cause, if the judge, the Commission, and the complainant, if any, all concur.

E. If, in the course of its proceedings, the Commission becomes aware of credible evidence that any person has committed a crime, the Commission may report such evidence to the appropriate law enforcement agency.

RULE 6. PROCEDURES OF COMMISSION

A. A proceeding is initiated when the Commission receives a written or oral complaint, or when the Commission by motion creates its own complaint, on the basis of reasonable information.

B. A screener shall screen each complaint immediately upon its receipt. If it is determined that a complaint does not set forth facts which, if true, would constitute misconduct or disability as defined by Chapter 211C, the complaint shall be dismissed forthwith and the complainant shall be so notified.

(1) If it is determined that a complaint does set forth facts which, if true, would constitute misconduct or disability as defined by Chapter 211C, the Executive Director shall make a prompt, discreet, and confidential investigation and evaluation. The Executive Director shall recommend dismissal of all complaints for which sufficient cause to proceed is not found. The complainant, if any, and the judge, if he has been given notice thereof, shall be informed in writing of any dismissal.

C. Upon the initiation of proceedings, the Executive Director shall promptly notify the judge concerned, unless delay in notification is necessary in order to preserve evidence or to avoid a danger of reprisal against the complainant. The notice shall be sent by certified or registered mail to the judge's last known place of residence.

D. If in the course of an investigation the Executive Director concludes that Special Counsel is required, the Executive Director shall recommend that the Commission request the appointment of a Special Counsel by the Supreme Judicial Court. The Commission may also take such action upon its own motion.

E. Within ninety (90) days after the initiation of proceedings, the Executive Director shall recommend to the Commission whether there is adequate reason to proceed to the preparation of a sworn complaint or statement of allegations.

(a) The Commission shall so decide by majority vote.

(b) If the Executive Director recommends that further investigation is necessary before making this determination, the Commission may vote to continue the investigation on a month-to-month basis.

(c) If the Commission finds that there is sufficient cause to proceed, the complainant, if any, shall be asked to file a detailed, signed, sworn complaint against the judge. The sworn complaint shall state the facts constituting the alleged misconduct. Immediately upon receipt of the sworn complaint, the Executive Director shall make written acknowledgment thereof to the complainant.

(d) When a sworn complaint is not obtained, a clear statement of the allegations against the judge and the alleged facts forming their basis shall be prepared by the Executive Director. Where more than one act of misconduct is alleged, each act should be clearly set forth in the sworn complaint, or in the statement of allegations, as the case may be.

F. The judge shall immediately be served with a copy of the sworn complaint or statement of allegations.

G. Within twenty-one (21) days after the service of the sworn complaint or the statement of allegations, the judge may file a written answer with the Executive Director and may request a personal appearance before the Commission, in lieu of or in addition to a written response. If the judge elects to appear personally, his statement shall be recorded.

H. After the judge's answer and personal appearance, if any, the Commission may terminate the

proceeding and dismiss the complaint and, in that event, shall give notice to the judge and the complainant that it has found insufficient cause to proceed.

I. Amendment of the allegations regarding the misconduct of a judge, whether presented to the Commission in a sworn complaint or in a statement of allegations, shall be permitted prior to a finding of sufficient cause, provided that notice thereof and an opportunity further to respond within twenty-one (21) days is given to the judge.

J. The judge shall be entitled to counsel of his own choice.

K. At any stage of the proceeding, the Commission or its designee may administer oaths or affirmations and shall be entitled to compel the attendance and testimony of witnesses, including the judge himself, and the production of papers, books, accounts, documents, electronic recordings, other tangible things, or any other relevant evidence or testimony.

(1) Upon receiving the sworn complaint or statement of allegations, the judge shall become entitled to compel by subpoena the attendance and testimony of witnesses through depositions, and to provide for the inspection of documents, books, accounts, written or electronically-recorded statements, and other records.

(2) Witnesses may be interviewed, whether or not under oath and whether or not their statements are memorialized, without the presence of other participants. In other circumstances, statements may be taken as depositions, in accordance with Rule 9.

L. A complaint submitted to the Commission or its staff, or testimony with respect thereto, shall be absolutely privileged. No civil action predicated on the complaint shall be instituted against a complainant or a witness, or against counsel to either of them.

M. At any time the Commission may recommend to the Supreme Judicial Court, or to the Chief Administrative Justice and the appropriate Chief Justice, the non-assignment or special assignment of a judge, pending the final disposition of a proceeding. The Commission shall state the reasons for its recommendation. A copy of any such recommendation shall be sent by the Commission to the judge.

N. In the course of a proceeding, the Commission may consult with the Chief Administrative Justice and the appropriate Chief Justice about administrative matters.

O. The Commission shall keep a record of all proceedings concerning a judge. The Commission's findings, conclusions and recommendations shall be entered in the record.

P. The Chairman of the Commission may for good cause extend the time for the filing of an answer, discovery, commencement of a hearing, or transmittal of the Hearing Officer's report, and any other time limit set herein.

RULE 7. SUFFICIENT CAUSE FOR FORMAL CHARGES

A. Following the expiration of the twenty-one (21) days allowed for the judge's response, for any proceeding not dismissed, the Commission shall thereafter hold a formal meeting which shall be conducted in private, at which the rules of evidence need not be observed. The judge shall have the right to make a personal appearance with his attorney, but not to be present during the Commission deliberations.

B. At this meeting the Commission shall vote to dispose of the case in one of the following ways:

- (1) If it finds that there has been no misconduct, the Executive Director shall be instructed to send the judge and the complainant notice of dismissal.
- (2) If it finds that there has been misconduct for which a private reprimand constitutes adequate discipline, and if the judge consents, it shall issue the reprimand. The complainant shall be notified that the matter has been so resolved.
- (3) If it finds that there has been conduct that is or might be cause for discipline but for which an informal adjustment is appropriate, it may, with the agreement of the judge, so inform or admonish the judge, direct professional counseling or assistance for the judge, or impose conditions on the judge's future conduct. The complainant shall be notified that the matter has been so resolved. When either conditions or treatment is prescribed, the Commission shall provide for supervision, enforcement thereof, or both.
- (4) If it finds by a preponderance of the credible evidence that there is sufficient cause to believe that there has been misconduct of a nature requiring a formal disciplinary proceeding, the Commission shall issue formal charges against the judge. A copy of the formal charges shall be served promptly upon the judge, and the judge shall have ten (10) days to respond.

RULE 8. SCHEDULING OF FORMAL HEARING

A. Upon the filing of the judge's written response to the formal charges or the expiration of the time for its filing, a copy of the formal charges and of the judge's written response shall be filed with the Supreme Judicial Court, which shall promptly appoint a Hearing Officer.

B. Immediately upon the appointment of a Hearing Officer by the Supreme Judicial Court, the Commission shall schedule a hearing to take place in not less than thirty (30) nor more than sixty (60) days. The Commission shall immediately notify the judge and all counsel of the time and place for the hearing.

RULE 9. DISCOVERY DURING THE FORMAL PROCEEDING STAGE

A. Attached to the notice required by Rule 7B(4) shall be further notice that the Commission shall, within a reasonable time, make available for inspection upon the written request of the judge all books, papers, records, documents, electronic recordings, and other tangible things within the custody and control of the Commission which are relevant to the issues of the disciplinary proceeding, and any written or electronically recorded statements within the custody and control of the Commission which are relevant to the issues of the disciplinary proceeding. The failure of the Commission to furnish timely any such materials provided for herein shall not affect the validity of any proceedings before the Commission, provided that such failure is not substantially prejudicial to the judge.

B. Within thirty (30) days after service of the formal charges, the Commission or the judge

- (1) May upon written request to the appropriate party prior to the hearing:

- (a) Have made available to him for inspection and copying within a reasonable period of time all books, papers, records, documents, electronic recordings, or other tangible things which that party intends to present at a hearing.
- (b) Obtain the names and addresses of witnesses to the extent known to a party in the proceeding, including an identification of those intended to be called to testify at the hearing.
- (c) Have made available to him for inspection and copying within a reasonable period of time any written or electronically recorded statements made by witnesses who will be called to give testimony at the hearing.

(2) May, upon written application to the Commission, upon such terms and conditions as the Commission may impose:

(a) Depose within or without the Commonwealth persons having relevant testimony. The complete record of the testimony so taken shall be made and preserved by stenographic record or electronic recording.

(i) The written application to the Commission shall state the name and post office address of the witness, the subject matter concerning which the witness is expected to testify, the time and place of taking the deposition, and the reason why such deposition should be taken.

(ii) Unless notice is waived, no deposition shall be taken except after at least seven (7) days notice to the other parties.

(iii) Unless otherwise directed by the Commission, the deponent may be examined regarding any matter not privileged which is relevant to the subject matter of the proceedings. Parties shall have the right of cross-examination, and objection. In making objections to questions or evidence, the grounds relied upon shall be stated briefly, but no transcript filed by the notarial officer shall include argument or debate. Objections to questions or evidence shall be noted by the notarial officer upon the deposition, but he shall not have the power to decide on the competency, materiality, or relevancy of evidence. Objections to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition.

(b) Subpoena relevant witnesses and documents.

(c) Seek any limitation or protection for any discovery permitted by this rule.

C. Nothing in these rules shall be construed to require the discovery of any report made to the Commission by Special Counsel or other person conducting an investigation for the Commission. Furthermore, in granting discovery the Commission shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a witness or party in these proceedings.

D. Other issues relative to discovery which are not covered in these rules shall be addressed or resolved in accordance with the comparable provisions of the Massachusetts Rules of Civil Procedure.

RULE 10. FORMAL HEARING

A. The formal hearing shall be conducted before the Hearing Officer appointed by the Supreme Judicial Court.

B. The hearing shall be open to the public. The rules of evidence applicable to civil proceedings in Massachusetts shall apply, and all testimony shall be under oath. Commission attorneys, or Special Counsel retained for the purpose, shall present the case. The judge whose conduct is in question shall be permitted to adduce evidence and produce and cross-examine witnesses. The Commission shall have the burden of proving the charges by clear and convincing evidence. Every hearing shall be transcribed.

C. The formal charges may be amended after commencement of the public hearing only if the amendment is technical in nature and if the judge and his counsel are given adequate time to prepare a response.

RULE 11. POST-HEARING PROCEDURE

A. Within thirty (30) days after the conclusion of the hearing, the Hearing Officer shall submit to the Commission and to the judge a report which shall contain proposed findings and recommendations, the transcripts of testimony, and all exhibits.

B. Upon receipt of the report of the Hearing Officer, the Commission shall send a copy of the report to the complainant forthwith.

C. Within twenty (20) days after receipt of such report, counsel for the judge and for the Commission shall each be allowed to submit to the Commission written objections to the proposed findings and recommendations. Any such objections shall become part of the record.

D. Within the same twenty (20) day period the judge and the complainant, if any, may file a written request to be heard before the Commission regarding its recommendation for discipline.

E. If either participant does so request, notice shall be given to both as to the scheduled time and place for such hearing, at least seven (7) days in advance. Such hearing shall be public, but Commission deliberations regarding such recommendation shall be conducted in executive session.

F. Unless there is good cause for delay, the Commission shall reach a decision on the basis of the full record within ninety (90) days after the hearing concerning recommendation for discipline, if there is such a hearing, or otherwise within ninety (90) days after receipt of the Hearing Officer's report. Its conclusions may differ from those proposed by the Hearing Officer. Its decision shall state specific reasons for all conclusions and recommendations.

RULE 12. CASES INVOLVING ALLEGATIONS OF MENTAL OR PHYSICAL DISABILITY

In considering allegations of mental or physical disability, the Commission shall, insofar as

applicable and except as provided below pursuant to Chapter 211C, section 10, follow procedures established by these rules.

A. If in a matter relating to mental or physical disability the judge is not represented by counsel, the Commission shall appoint an attorney to represent him at public expense.

B. If a complaint or statement of allegations involves the mental or physical health of a judge, a denial of the alleged disability or condition shall constitute a waiver of medical privilege and the judge shall be required to produce his medical records.

C. In the event of a waiver of medical privilege, the judge shall be deemed to have consented to an examination by a qualified medical practitioner designated by the Commission. The report of the medical practitioner shall be furnished to the Commission and the judge.

APPENDIX C

CODE OF JUDICIAL CONDUCT (Supreme Judicial Court Rule 3:09)

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective without any limitation upon the Supreme Judicial Court in the exercise of its power of general superintendence, whether statutory or inherent, in areas not delineated in the Code.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

(A) A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

(C) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Amended effective Jan. 1, 1992.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards

apply:

(A) Adjudicative Responsibilities.

- (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should maintain order and decorum in proceedings before him.
- (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.
- (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law. He should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application.
- (5) A judge should dispose promptly of the business of the court.
- (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(B) Administrative Responsibilities.

- (1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
- (2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.
- (3) If a judge shall become aware of unprofessional conduct by a judge or a lawyer
 - (a) he shall, in the instance of a judge, report his knowledge to the Chief Justices of this court and of the court of which the judge in question is a member, and
 - (b) in the instance of a lawyer, he shall initiate appropriate investigative or disciplinary measures.
- (4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of service rendered.
- (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or similar factors, are issues in the proceeding.

(C) Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter of controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial or other property interest in the subject matter in controversy or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceedings;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a substantial legal or equitable interest, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic

organization is not a "financial interest" in securities held by the organization.

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities or of less than one-hundredth of one percent of the total shares issued and outstanding of any corporation or of its parent or subsidiary corporations is a "financial interest" in the issuer of such securities or its parent or subsidiaries only if the outcome of the proceeding could substantially affect the value of the securities.

(D) Remittal of Disqualification.

A judge disqualified by the terms of Canon 3(C)(1)(c) or Canon 3(C)(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the lawyers, after consultation with their clients independently of the judge's participation, agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding.

Amended Nov.10, 1982, effective Jan. 1, 1983; amended effective Jan.1, 1992; Feb.11, 1992; amended October 1, 1998, effective November 2, 1998.

CANON 4

**A Judge May Engage in Activities to Improve the Law,
the Legal System, and the Administration of Justice**

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

(A) He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(B) He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

(C) He may serve as member, officer, or director of an organization devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

(A) Avocational Activities.

A judge may write, lecture, teach, and speak on nonlegal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

(B) Civic and Charitable Activities.

A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.
- (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events.
- (3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

(C) Financial Activities.

- (1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.
- (2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity permitted by Canon 4, but should not serve as an officer, director, manager, advisor, or employee of any business.
- (3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.
- (4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:
 - (a) A judge may accept a gift of nominal value incident to public recognition of

him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a wedding, engagement, confirmation, or like traditional ceremonial occasion; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds \$350, the judge reports it in the same manner as he reports compensation in Canon 6(C).

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

(D) Fiduciary Activities.

A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not then interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

(E) Arbitration.

A judge should not act as an arbitrator or mediator.

(F) Practice of Law.

A judge should not practice law.

(G) Extra-Judicial Appointments.

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. The foregoing is subject to any limitations imposed by the Constitution of the Commonwealth with respect to any such appointment. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Amended March 26, 1997, effective April 16, 1997; amended effective May 26, 1998.

CANON 6

**A Judge Should Regularly File Reports of Compensation
Received for Quasi-Judicial and Extra-Judicial Activities**

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(A) Compensation.

Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

(B) Expense Reimbursement.

Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

(C) Public Reports.

A judge should report on or before April 15 of each year, with respect to the previous calendar year, the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made and should be filed as a public document in the office of the Administrative Assistant to the Supreme Judicial Court (G.L. c. 211, §3A).

CANON 7
A Judge Should Refrain from Political Activity

(A) Political Conduct in General.

(1) A judge should not:

- (a) act as a leader or hold any office in a political organization;
- (b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
- (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, for functions conducted to raise money for incumbents of or for candidates for election to any political office, or for any other type of political function.

(2) A judge should resign his office when he becomes a candidate either in a primary or in a general election for elective office. On assuming his judicial position, a judge shall resign any elective public office he then holds.

(3) A judge may engage in activity in support or on behalf of measures to improve the law, the legal system, or the administration of justice.

Amended June 7, 1985, effective July 1, 1985.

CANON 8
Compliance with the Code of Judicial Conduct

(A) Retired Judges.

(1) A judge whose name has been placed upon the list of retired judges eligible to perform judicial duties, pursuant to G.L. c. 32, §§ 65E-65G, should comply with all provisions of this Code of Judicial Conduct during the term of such eligibility.

(2) A judge who has retired or resigned from judicial office should not perform court-connected dispute resolution services except on a pro bono publico basis, enter an appearance, nor accept an appointment to represent any party in any court of the Commonwealth for a period of six months following the date of retirement, resignation or most recent service as a retired judge pursuant to G.L. c. 32, §§ 65E-65G.

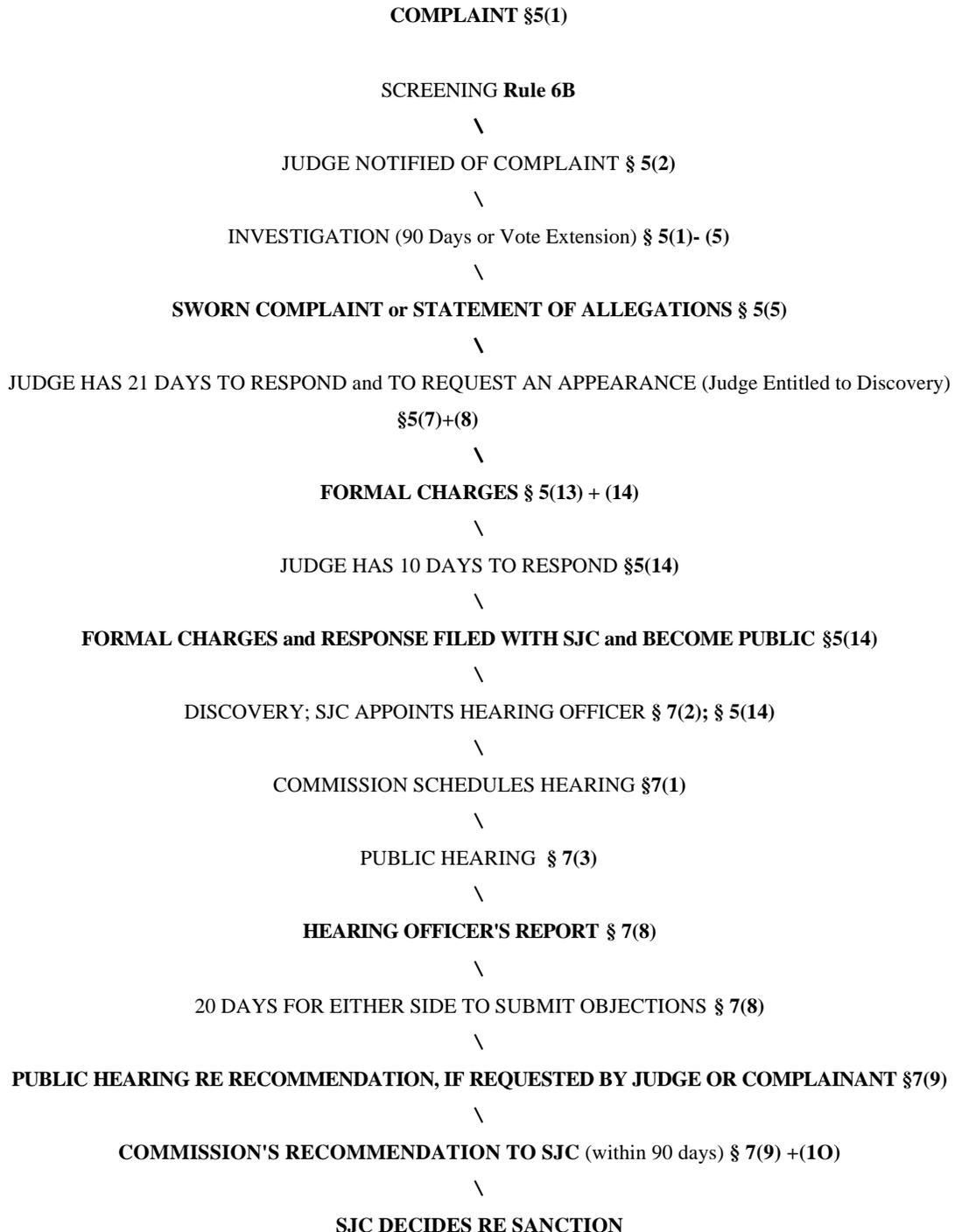
Amended Dec. 2, 1983, effective Jan. 1, 1984; Oct. 24, 1989, effective Jan. 1, 1990; May 1, 1998, effective June 1, 1998.

Effective Date of Compliance

The effective date of compliance of this Code is January 1, 1973.

APPENDIX D

FLOW CHART OF COMMISSION PROCEDURES



THE COMMISSION MAY, AT ANY STAGE OF THE PROCEEDINGS, **DISMISS** THE COMPLAINT OR, WITH THE AGREEMENT OF THE JUDGE, DISPOSE OF IT BY **INFORMAL ADJUSTMENT. § 8(1)**

*Simplified for purposes of explication. M.G.L. c.211C and Commission Rules govern.

APPENDIX E

In the Matter of Frederick L. Brown
Supreme Judicial Court of Massachusetts,
Suffolk
Argued Feb. 6, 1998
Decided March 24, 1998

427 Mass. 146 (1998)

BY THE COURT.

The Commission on Judicial Conduct (Commission) has issued a report and recommended a public reprimand in the matter of Justice Frederick L. Brown. We conclude that a public reprimand is appropriate.

1. The facts. George Edwards sued the National Association of Government Employees (NAGE), alleging that NAGE had breached its duty of fair representation by not representing him in an earlier bypass appeal. The Labor Relations Commission dismissed his complaint against NAGE, and Edwards appealed from that decision to the Appeals Court.¹ On December 4, 1995, an Appeals Court panel that included Justice Brown heard argument in the case of *Edwards v. Labor Relations Comm'n*, 39 Mass.App.Ct. 1123, 660 N.E.2d 395 (1996). During oral argument, at which Edwards represented himself, Justice Brown made a series of comments to counsel for the Labor Relations Commission. His comments, which we set out in full in the Appendix, criticized NAGE, its president, Kenneth T. Lyons, and members of his family. Justice Brown stated, among other things, that Lyons "had his whole family on the [NAGE] payroll," that "[t]his is a[] union gone amok," that "people in the courthouse here who pay their dues get absolutely nothing," that "Mr. Lyons and all his family are

1

Although before the Labor Relations Commission NAGE is the defendant, on appeal from its decision the Labor Relations Commission itself is the appellee. See generally G.L. c. 30A, § 14.

making \$200,000 a year, plus they have cars and expense accounts," and that "[t]hey [NAGE] don't represent anybody, as far as I can see. They just take the money and keep on stepping and buy more condos and have more expense accounts and have fancy banquets."²

On February 16, 1996, after learning of these statements, Lyons filed a complaint against Justice Brown with the Commission. The Commission initiated an investigation, and on November 15, 1996, this court, at the Commission's request, appointed special counsel. On February 10, 1997, the Commission issued a statement of allegations against Justice Brown, and on April 8, 1997, it filed formal charges against him. These charges alleged that Justice Brown's conduct in the *Edwards* case violated G.L. c. 211C, § 2(5)(c), which prohibits a judge from "willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute," as well as Canons 1, 2(A), 3(A)(3), and 3(C) of the Code of Judicial Conduct, S.J.C. Rule 3:09, as appearing in 382 Mass. 808 (1981). On April 30, 1997, this court appointed a retired judge of the Superior Court to hold formal hearings on these charges. These hearings were held in July and August, 1997, and on August 26, 1997, the hearing officer issued his report and recommendations, in which he concluded that the Commission had proven by clear and convincing evidence that Justice Brown violated Canons 2(A) and 3(A)(3). He found neither a violation of the statute nor of Canons 1 and 3(C). The hearing officer recommended the imposition of a private reprimand or censure and an order that Justice Brown recuse himself in future proceedings involving NAGE, Lyons, or any member of the Lyons family. Both the special counsel and Justice Brown objected to the hearing officer's final report, and on October 14, 1997, the Commission held a hearing regarding the recommendation for discipline. At Justice Brown's insistence, the hearing was public. On October 30, 1997, the Commission unanimously recommended to this court the imposition of a public reprimand in light of previous incidents of misconduct.

2. *The Canons.* Canon 2(A) provides that "[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3(A)(3) states, in relevant part, that "[a] judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity...." As we have said before, "The Code of Judicial Conduct requires judges in this Commonwealth to exhibit the highest standards of professional conduct." *Matter of Donohue*, 390 Mass. 514, 518, 458 N.E.2d 323 (1983).

Justice Brown insists that in this case he was entirely impartial and fair. Several of his fellow Justices on the Appeals Court, including those who were on the panel in this case, testified that integrity and impartiality characterize Justice Brown's work as a judge not only in this case but in general. We do not doubt that this is so. The two other Justices on the panel in this case had the opportunity to hear his discussion in the semble following the argument of the case. And Justice Brown and his fellow panel members point out that the Commission's judgment favorable to NAGE was unanimously affirmed by

2

We have listened to a tape recording of the oral argument. Although we would hesitate to amplify our reaction to the actual words spoken by noting their tone, we well might consider that tone as supplying a context in which the words would not be as offensive as they might appear in the written record. Suffice it to say that the recording offers no mollifying or mitigating nuance here.

the panel on which Justice Brown was a member. See *Edwards v. Labor Relations Comm'n*, 39 Mass.App.Ct. 1123, 660 N.E.2d 395 (1996). Canons 2 (A) and 3(A)(3) both, however, address matters of appearance. It is quite possible for a judge to uphold the highest standards of integrity and impartiality and yet violate these canons. That is not to say that these canons therefore address only superficial matters of etiquette and should count for little if the substance of integrity and impartiality has obtained.

Judges wield an awesome and final power over the liberty and property of their fellow citizens. This power is the more awesome because in this Commonwealth, as in the Federal system, we are neither elected nor subject to recall or retention elections. This power is tolerable in a democracy because judges speak only for reason and the law. As stated in *The Federalist* No. 78 (Alexander Hamilton), we have "neither force nor will, but merely judgment." For every litigation at least one-half of those involved are likely to come away sorely dissatisfied, and every citizen has reason to apprehend that one day he might be on the losing side of our exercise of judgment. Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well. How else are ordinary citizens to have the faith in us that we have in ourselves and Justice Brown's colleagues testified that they have in him? An impartial manner, courtesy, and dignity are the outward sign of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. Surely it is arrogance for us to say to them that we may not seem impartial, but we know we are, and so they must submit. Precisely because the public cannot witness, but instead must trust, what happens when a judge retires to the privacy of his chambers, the judiciary must behave with circumspection when in the public eye.

Finally, patience and courtesy are required of a judge toward those he deals with in his official capacity for the additional reason that a judge in that official capacity is granted the power to command silence and respect in his presence. It is not punishable to interrupt or show disrespect to a legislator, the Governor, or even the President. But this unusual deference is granted the judge only to allow him to do his work. When a judge berates or acts discourteously to those before him--even if he cannot affect their interests as litigants--he abuses his power and humiliates those who are forbidden to speak back.³ Of course there are times when a judge must and should admonish and express harsh judgment to those before him, but they must be limited to the necessities of the occasion, being neither gratuitous nor irrelevant to it.

The remarks that are the subject of this complaint violate both Canons 2(A) and 3(A)(3). They express what appears to be a strong animus against the union and its leadership, accusing them of a general and persistent neglect of their obligations to the membership and of self-dealing that is disgraceful if not criminal. Such accusations go far beyond any comment appropriate to the circumstances of this particular dispute, although of course if Edwards's complaint were valid it might

3

As the Judicial Conference of the United States has stated, "[t]he robe a judge wears as he sits upon the bench is not a license to excoriate lawyers or anyone else." J.M. Shaman, S. Lubet & J.J. Alfini, *Judicial Conduct and Ethics* 61 (2d ed.1995).

stand as an example of the general situation Justice Brown described. In making these remarks Justice Brown did not conduct himself "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." It is if anything even clearer that these remarks were the very opposite of the "patient, dignified, and courteous" conduct required of a judge. They were intemperate, excessive, unjustified by anything properly before the court, and gratuitously insulting of persons directly and indirectly implicated in the case at bar.

Justice Brown argues that these canons do not forbid the comments that he made at the *Edwards* argument.⁴ First, he claims that Canon 3(A)(3) applies only to comments made about the parties and attorneys before a judge, and not about nonparties such as Lyons, his family, or NAGE. This is incorrect. The canon requires a judge to be patient and dignified generally, regardless of the context or content of a judge's speech. As to courtesy, the canon explicitly commands that it be shown to all with whom the judge deals in an official capacity. Justice Brown admits that his "comments were directed to the lawyer for the Labor Relations Commission," who clearly was before the court.⁵ Moreover, any discourtesy or impatience in Justice Brown's statements had implications for those in the courtroom; the justice spoke insultingly of persons directly affected by the outcome of the matter before him. In any event, the spirit and purpose of Canon 3(A)(3) would hardly be served by holding that a judge may act in an undignified manner while on the bench so long as he only chooses to berate persons not present before him. Any discourtesy to NAGE, Lyons, and Lyons's family was clearly within the scope of Canon 3(A)(3).

Second, Justice Brown argues that his comments are immunized from discipline because they derived from his knowledge of *National Ass'n of Gov't Employees v. Labor Relations Comm'n*, 38 Mass.App.Ct. 611 (1995) (*Moshkovitz* case), and *Rielly v. News Group Boston, Inc.*, 38 Mass.App.Ct. 909, cert. denied, 516 U.S. 866 (1995). Citing the "extrajudicial source" doctrine discussed in *Liteky v. United States*, 510 U.S. 540, 545 (1994), Justice Brown claims that, if a judge's statements are based on experience in a prior case or on judicial materials, they cannot be the basis of a disciplinary proceeding under Canon 3(A)(3). This misreads the canon and the *Liteky* case. A judge may, indeed sometimes must, form opinions concerning those appearing before him, *Liteky*,

4

Justice Brown points out that G.L. c. 211C, § 7(4), requires that the charges be proved by "clear and convincing evidence." There are no disputed issues of fact with respect to the two charges. They are based on comments that no one disputes were made. The dispute relates to whether these comments may properly be characterized as violating the canons, that is, to the application of a legal standard to undisputed facts. In that context the statutory burden is largely inapposite. In accord with its spirit, however, we ask ourselves whether we are quite certain of our conclusions on this question of application. We are.

5

Although the attorney in question has not filed a separate complaint about Justice Brown's conduct, that does not place discourtesy to that attorney beyond the reach of the Commission's disciplinary proceedings. Moreover, not only did NAGE have a substantive interest in the outcome of the *Edwards* case, it had filed a brief as an intervener in the matter.

supra at 551, and at times he may choose to share those opinions publicly. This does not, however, license a judge to violate Canon 3(A)(3)'s restriction on the *manner* in which a judge must conduct herself. For the purposes of Canon 3(A)(3), the foundation of a judge's comments are largely irrelevant.

Moreover, many of Justice Brown's comments at the *Edwards* argument were not based on a judicial source or on his prior judicial experience. Nothing in *Moshkovitz* or *Rielly* supports Justice Brown's assertions that NAGE is a union run "amok" or that Lyons and his family take members' money and buy condos or hold banquets. Nor do these cases support Justice Brown's comment that he knew of union members in the courthouse who "get absolutely nothing" for their union dues. These comments derived from personal opinion, not judicial sources.

Third, Justice Brown argues that Canon 3(A)(3) should only be applied to sanction behavior that is so discourteous that it raises sufficient doubts about a judge's impartiality to require recusal. The Justice again points to *Liteky v. United States*, *supra*, in which the Supreme Court interpreted the Federal statute addressing judicial recusal, 28 U.S.C. § 455(a) (1994), and held that "expressions of impatience, dissatisfaction, annoyance, and even anger," *id.* at 555-556, do not suffice to establish the bias or prejudice required for recusal of a Federal judge, unless "they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555. Although we have referred to *Liteky*'s reasoning in the recusal context, see *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 525 (1997), the case has little relevance in the context of Canon 3(A)(3). Impatience, a lack of dignity, or discourtesy--the stuff of Canon 3(A)(3)--may not suffice to demand recusal, but the bias and prejudice relevant in a recusal proceeding are not therefore necessary to find a violation of Canon 3(A)(3). We have not previously required a showing of bias or prejudice to find a violation of Canon 3(A)(3),⁶ and we do not now.

Fourth, Justice Brown argues that his conduct is somehow excused by his position as an appellate justice, rather than a trial judge. He argues that we should consider the "unique dynamics of the appellate process," which compel an appellate justice to question litigants closely and to press for the validity of the presented arguments. All judges must exhibit rigor in their work, and Justice Brown has done so admirably for many years. But this does not diminish the importance or scope of Canons 2(A) and 3(A)(3), which safeguard the public's confidence in the judiciary's impartiality without which a judge's search for truth and justice, both aims of rigorous questioning at oral argument, would be futile. There are differences between trial and appellate proceedings, but they do not excuse the behavior in this case. In many respects a trial judge labors in more difficult circumstances, seeking to control parties, witnesses and advocates, all of whom may have an interest in improperly swaying the minds of the jury. The appellate justice operates in a cooler atmosphere and has less excuse for the occasional display of temper. It is certainly appropriate for an appellate judge in oral argument to

6

See *Matter of Donohue*, 390 Mass. 514, 518, 458 N.E.2d 323 (1983). See also *Matter of Jenkins*, 503 N.W.2d 425, 426 (Iowa 1993) (finding violation of Canon 3[A][3] without requiring showing of bias or partiality); *Matter of Cox*, 532 A.2d 1017, 1019 (Me.1987) (shouting and swearing at police officer in chambers violated Canons 2[A] and 3[A][3] without requiring showing of bias or partiality).

probe counsel's arguments for weaknesses in reasoning or factual support. By no stretch can the remarks we have recounted be seen as serving that function.⁷ In any event, the canons in question do not distinguish between trial and appellate judging, nor do we see why they should. Although we certainly consider the context within which a judge's alleged misconduct takes place when applying the Code of Judicial Conduct, we are certain that the appearance of impartiality and courtesy are as important in appellate judging as at trial.

Finally, Justice Brown contends that the hearing officer erred in his application of Canon 2(A). The hearing officer's final report to the Commission found that Justice Brown's "remarks were of such a nature as to create the appearance of partiality in the minds of at least those persons against whom they were directed." The hearing officer thus concluded that, although Justice Brown was in fact impartial and did not lack integrity, Justice Brown's comments failed to maintain the *appearance* of impartiality required by the canon. Justice Brown argues that this conclusion was impermissibly focused on the subjective impression of those in the courtroom, rather than on an objective analysis of whether a reasonable person would have found his comments offensive to the appearance of impartiality.

The hearing officer's report did not misapply Canon 2(A). In context, the hearing officer's statement must be taken to mean these remarks would have created an appearance of partiality to a reasonable person in the situation of the person to whom they were directed. In any event, reading them for ourselves we firmly conclude that they create an appearance of partiality. No reasonable person could doubt that certain of Justice Brown's comments cast a shadow on the appearance of impartiality. Statements that NAGE was "an outfit that's always in trouble" and a "union gone amok" give an appearance of bias. Comments that "[t]hey don't represent anybody, as far as I can see. They just take the money and keep ... buy[ing] more condos and hav[ing] more expense accounts" were groundless, irrelevant, and inappropriate, and would make an objective observer question the judge's neutrality.

3. Reprimand. Several of Justice Brown's colleagues on the Appeals Court have testified warmly on his behalf. They paint a picture of a judge who is conscientious, learned, intelligent, creative, and independent. Though we do not know him as well as they do, we know that his work exhibits these qualities. But the conduct we review today, though largely a matter of appearances, is unacceptable. It is, moreover, the third time that Justice Brown has been called to order for his injudicious and intemperate remarks--the two previous occasions (noted in the Commission's report) having resulted in the Commission's issuing a "confidential letter of concern" and in a confidential "informal adjustment," in which Justice Brown acknowledged he had violated Canons 1 and 3 of the Code of Judicial Conduct. The statements which are the subject of this proceeding were made less than a month after Justice Brown executed that informal adjustment. Justice Brown must show appropriate restraint, lest he destroy his ability to perform effectively the very great service he has over many years rendered the people of the Commonwealth. We therefore publicly reprimand Justice

7

Justice Brown emphasizes that Edwards was appearing pro se, suggesting that therefore it was particularly important to probe his opponent's arguments. That may be, but as we have said, the remarks which are the basis of these charges probe no arguments. They merely berate and insult.

Brown for violating Canons 2(A) and 3(A)(3) of the Code of Judicial Conduct, and order that Justice Brown be recused from future cases involving NAGE, Lyons, or any member of Lyons's immediate family.

So ordered.

APPENDIX

Justice Brown's comments included:

1. "This NAGE, whether you know it or not, is really an outfit that's always in trouble. And that's why [the last time NAGE's attorney] was here, the position that [inaudible] NAGE was so bad we sanctioned him and made him pay extra money for bringing the case here."

2. "[T]he last time NAGE was here they--he had his whole family on the payroll. And he sued the Boston Herald. And [w]e threw the case out summarily."

3. "This [NAGE] is not one of the great American unions of our country. And unions are important. If Judge Goodman were here, he would be upset, one of the greatest judges ever to sit on this court. He was a great union man. He believed in unions. This is [a] union gone amok."

4. "If [Lyons] didn't like his job he ought to quit his \$100,000 job."

5. "We're talking about representation. In other words, a man or woman pay their dues for something. What do they get? For instance, I know the people in the courthouse here who pay their dues get absolutely nothing. Now, what do these people get for paying their dues? They get in trouble, they get a problem, and they expect their union to do it."

6. "I mean, they're paying big money to these unions. They must be, because I know, I just happen to have the case. Because Mr. Lyons and all his family are making \$200,000 a year, plus they have cars and expense accounts. So the money is not small change.... So what are they doing for the money? Here's a poor guy, and I'm not getting to the merits, and here's a guy who's got a legitimate complaint. And they just throw him out, saying they don't handle this kind of stuff."

7. "The last time we were here, if you were here, I don't know. [NAGE's counsel] was here. Same case: duty of fair representation. They [NAGE] don't represent anybody, as far as I can see. They just take the money and keep on stepping and buy more condos and have more expense accounts and have fancy banquets. I mean, when is somebody going to put their foot down? And if [the Labor Relations Commission is] not going to do it, we're going to do it."

APPENDIX F

In the Matter of John A. Markey

Supreme Judicial Court of Massachusetts,

Suffolk

Argued June 10, 1998

Decided July 14, 1998

427 Mass. 797 (1998)

Formal charges filed in the Supreme Judicial Court on August 18, 1997.

A hearing was held before the Commission on Judicial Conduct and a recommendation for discipline was submitted to this court.

BY THE COURT. We consider in this case what disposition should be entered after study of a report and recommendation concerning Judge John A. Markey (Judge), filed with this court by the Commission on Judicial Conduct (Commission).

Judge Markey has been a District Court judge since December, 1982, and First Justice of the New Bedford District Court since May, 1983. A complaint against Judge Markey was filed with the Commission on March 6, 1996, by Karen Macedo (Karen), and alleged that the Judge made an improper ex parte communication to Judge Prudence McGregor of the Bristol Probate and Family Court on February 26, 1996, which caused Judge McGregor to dismiss an abuse prevention order under G.L. c. 209A (209A order) that she had issued against Mrs. Macedo's ex-husband, Nelson Macedo (Nelson), the previous day.

On June 21, 1996, the Commission sent Judge Markey a letter summarizing the allegations, and, after failing to reach an agreement with the Judge, the Commission issued a statement of allegations against him. On April 30, 1997, this court appointed special counsel to investigate the matter. On August 5, 1997, the Commission served on Judge Markey a notice of formal charges, in which the Commission advanced eight charges against him. In his conduct regarding the Macedo matter, the Commission charged Judge Markey with violating several provisions of the Code of Judicial Conduct, S.J.C. Rule 3:09, as amended, 411 Mass. 1321 (1992), specifically Canon 1, 2(A), 2(B), 3(A)(4), and 3(C)(1), as appearing in 382 Mass. 808, 809, 811 (1981). The Commission alleged that the Judge violated the canons in the following ways: Canon 1, by failing to uphold the integrity of the judiciary and failing to observe high standards of conduct so that the integrity of the judiciary may be preserved; Canon 2(A), by failing to conduct himself in a manner that promoted public confidence in the integrity and impartiality of the judiciary; Canon 2(B), by allowing his social and other relationships to influence his judicial conduct and judgment, and lending the prestige of his office to advance the

private interests of others; Canon 3(A)(4), by engaging in an ex parte communication with another judge designed to influence her judicial action, thereby inducing that judge to violate the canon; and Canon 3(C)(1), by failing to disqualify himself in proceedings in which his impartiality might reasonably be questioned, including but not limited to one in which he had a personal bias favoring a party. The Commission also charged the Judge with violating the Disciplinary Rules of the Canons of Ethics, S.J.C. Rule 3:07, Canon 7, DR 7-110(B), as appearing in 382 Mass. 793 (1981), by engaging in a private ex parte communication with another judge in an adversary proceeding as to the merits of the case.

The Commission further charged Judge Markey with violating the Code of Judicial Conduct, S.J.C. Rule 3:09, Canons 2(A) and 3(A)(1), as appearing in 382 Mass. 809 (1981), by failing to give criminal defendants who had offered pleas of guilty or nolo contendere or admitted to sufficient facts to permit a finding of guilt the established plea colloquy as set forth in Mass.R.Crim.P.12(c), as amended, 399 Mass. 1215 (1987); G.L. c.278, Sec. 29D; and relevant Federal and Massachusetts case law.

On August 18, 1997, the Commission filed in this court the notice of formal charges and the Judge's answer to the charges. At the request of the Commission, we appointed a hearing officer to conduct an evidentiary hearing on the charges. After a three-day hearing, the hearing officer submitted to the Commission his findings of fact, conclusions of law, and recommendations. The hearing officer concluded that Judge Markey did not violate Canon 3(C)(1), but did commit the seven other violations as charged. He further determined that, although the Judge "knew (or reasonably should have known) that he was giving Judge McGregor information which could influence the outcome of the [209A] hearing," his only intent in calling Judge McGregor was to advance the hearing date. The hearing officer recommended that Judge Markey be publicly reprimanded, reassigned to other District Courts for at least four months, and required to attend the National Judicial College for a minimum of three weeks of instruction at his own expense and during vacation time. Judge Markey accepted this disposition.

Special counsel filed objections to the hearing officer's report and proposed findings and recommendations. The Commission determined that the Judge had violated the canons and disciplinary rules as alleged, and, contrary to the hearing officer's determination, concluded that Judge Markey intended to influence the outcome of the hearing on the 209A order through his ex parte communication to Judge McGregor. The Commission also objected to certain factors considered by the hearing officer in mitigation. The Commission then issued to the court its report and recommendations, in which it recommended that Judge Markey be publicly reprimanded for his misconduct and suspended from his judicial responsibilities for a period of three months without pay.

The sole issue before us is the determination of the appropriate disposition to be imposed. Judge Markey does not dispute the impropriety of his conduct, nor that a sanction is warranted. He contends, however, that the severity of the sanction recommended by the Commission is unjustified, and unfair, in view of this court's precedents, and because of certain factors, among them his lack of intent to influence any aspect of the Macedo cases, and his reputation, contrition, financial situation, and reformed conduct since the Commission's investigation. He also submits that we may not order a suspension without pay because such a sanction essentially equates to a removal, which, if imposed by the judiciary, is unconstitutional.

1. We set forth in detail the findings made by the hearing officer, and not objected to by the Commission.

a. *Ex parte communication.* On February 21, 1996, Judge Markey was scheduled to sit in the first session of the New Bedford District Court where arraignments were routinely heard, and when he arrived at the courthouse that morning he knew he would be presiding over all arraignments that day. As he entered the courthouse, the Judge was approached by Nelson, who had been arrested the previous evening and charged with assault and battery on Karen. Nelson was a janitor at the courthouse who had served on the New Bedford city council when Judge Markey was mayor of the city. Nelson also had lived about seven houses from Judge Markey, on the same street, for several years.

Nelson informed the Judge that he had a fight with Karen and had been arrested. He said he did not know what to do and that his attorney was unavailable. Judge Markey told Nelson that he would arrange to have an attorney file an appearance on Nelson's behalf at his arraignment. Based on this conversation, Judge Markey assumed that Nelson faced a charge of assault and battery. Judge Markey asked an attorney present in the courthouse if he would file an appearance and represent Nelson for his arraignment that morning, as an accommodation to the court. Later that day, Nelson was arraigned in the first session. When his case was called, Judge Markey knew it involved an assault and battery against Karen. Judge Markey also was aware that the assistant district attorney would seek an order that Nelson stay away from Karen, as was customary in domestic abuse cases. Nonetheless, Judge Markey did not recuse himself from Nelson's arraignment. At the arraignment, the prosecutor requested that the Judge issue a stay-away order against Nelson. Although Judge Markey was aware that Karen previously had received a 209A order against Nelson, he made no inquiry as to the reasons for the stay-away request or the circumstances surrounding Nelson's arrest the previous evening. Judge Markey did not respond to the prosecutor's request, and failed to rule on it, effectively denying relief.

At some time within the following two days, Judge Markey went to his house at 65 Cottage Street to retrieve the mail.¹ While in front of his house, Judge Markey was approached by Nelson who asked the Judge to accompany him to his home at 31 Cottage Street to observe the condition of the Macedos' apartment. Judge Markey then walked to 31 Cottage Street with Nelson. While there, Nelson told Judge Markey that Karen had moved out, taken everything, and left the apartment a mess.

On February 26, 1996, Nelson went to Judge Markey's lobby and told the Judge that he had been served with a temporary 209A order issued by the Bristol Probate and Family Court which forbade him from his home at 31 Cottage Street. A hearing on the order was scheduled for March 8, 1996. Nelson asked Judge Markey what he should do, and the Judge responded that he should call his lawyer and have him advance the case. Nelson told Judge Markey that he could not call his lawyer because he had not yet paid his lawyer for representing him in the Macedos' divorce proceedings. Judge Markey told Nelson that he would call the Probate and Family Court himself to have the case

1

At that time, Judge Markey no longer lived at the Cottage Street address, although he continued to own the property.

advanced.

Following his discussion with Nelson, Judge Markey called the Probate and Family Court, and his call was forwarded to Judge McGregor, the judge who had issued the 209A order. Judge Markey identified himself and asked Judge McGregor to advance the case, essentially as a favor to him. In particular, Judge Markey stated, "There [is] a case that I would ask that [you] advance. I would appreciate it if [you] would advance it, Macedo versus Macedo." Judge Markey also told Judge McGregor that, as a result of the 209A order, Nelson was forced out of his home, and that Karen was not living there. Judge Markey told Judge McGregor that he knew Karen was not living there because he had gone to the Macedos' apartment and had seen that all the furniture was gone. As a result of this telephone conversation, Judge McGregor advanced the hearing date to February 27, 1996, the day following Judge Markey's call.

At the hearing, Judge McGregor told the Macedos that she had received a call the previous afternoon from a judge of the District Court who informed her that he had gone to the property and that there was nothing in the house that Karen needed to remove. Judge McGregor asked Karen:

"Tell me why, ma'am, that you can conceivably think that there [is] a judge of the district court that tells me there's nothing in there for you to take and that you're telling me there [is] children's stuff and stuff that you need as well as the dishwasher and stove."

Judge McGregor further stated:

"I am loathe to have a judge from the district court call and tell me that there is nothing in that property and you tell me that there is."

Judge McGregor stated that she found Karen's testimony "not credible," and dismissed the 209A order.

Later that day, Karen's lawyer filed a motion to recuse Judge McGregor from any further proceedings between the parties, based on Judge McGregor's ex parte communication with Judge Markey. At a hearing held on the motion, Judge McGregor admitted that her decision regarding the restraining order had been influenced by her conversation with Judge Markey:

"Counsel, I will tell you that I did indeed receive an ex parte communication from Judge Markey; that I disclosed that on the record; that I completely and absolutely asked your client why Judge Markey was telling me that he had gone to the premises and there was nothing at all there to be taken out.... And yes, counsel, that is part of what my decision concluded. So that if you would like another judge to hear this matter, that is fine with me, counsel."

On March 19, 1996, Nelson filed a cross complaint against Karen in the New Bedford District Court. Judge Markey presided at Karen's arraignment on April 18, 1996, and her pretrial conference on May 30, 1996. Karen did not object to Judge Markey's presiding at either her arraignment or pretrial conference.

b. Failure to engage in plea colloquies. Judge Markey was aware that under Mass. R.Crim.P.12, and as a matter of constitutional law under both the United States and Massachusetts

Constitutions, he was required to engage in an established plea colloquy with criminal defendants who were pleading guilty or nolo contendere or admitting to sufficient facts to permit a finding of guilt. Judge Markey knew that, as part of this required colloquy, he was obligated to inform a defendant of the rights he or she was waiving, and determine on the record whether the defendant's waiver of those rights was made knowingly and voluntarily. Judge Markey knew that the law required him to determine that there was an appropriate factual basis for a charge before accepting a plea or admission. Judge Markey also knew that the law required him to inform a defendant that his or her plea of guilty or admission to sufficient facts could have an impact on his or her possible deportation, naturalization, or ability to remain in the United States.

Although Judge Markey knew of the legal requirements regarding plea colloquies, in the years immediately preceding 1996 (when the Commission notified him that his failure to engage in the colloquies was a violation of Canons 2[A] and 3[A][1]), Judge Markey routinely failed properly to advise defendants.²

2. The Commission's objections to the hearing officer's report and recommendations are based on its conclusion that Judge Markey intended to influence the outcome of the 209A hearing when he communicated ex parte with Judge McGregor. This determination is also central to the Commission's recommended disposition. The Judge has contended from the inception of the Commission's investigation that he did not intend to influence the 209A proceedings.

The Commission relied on the hearing officer's findings, as well as Judge Markey's testimony in reaching its conclusion as to Judge Markey's intent. Judge Markey testified that when he called the Probate and Family Court, he understood 31 Cottage Street to be Nelson's residence. In addition, he knew that Nelson had been served with a 209A order that forbade him from going to that address until March 8, 1996, when the matter would be heard. He presumed that the Probate and Family Court had issued an order forbidding Nelson from going to 31 Cottage Street because the court viewed it as the residence of Karen, and, from having gone to the residence only days before, he thought that Karen was no longer living there. He also presumed that, when Judge McGregor learned that Karen did not live at 31 Cottage Street, she would vacate that part of the 209A order which forbade Nelson from going to 31 Cottage Street.

Judge Markey also testified about his own experience in ruling on 209A applications. He testified that he considers whether the defendant will be forced out of his residence as a result of the order, and whether the plaintiff resides at the residence from which the defendant would be barred. In addition, Judge Markey stated his belief that any judge who learned that the plaintiff was not living at the address from which the defendant had been barred would more than likely vacate an order barring the defendant from that address.

The Judge's testimony, in combination with the hearing officer's findings, supports the conclusion that the expected consequence of Judge Markey's ex parte communication to Judge

2

For example, records from the New Bedford District Court indicate that during the week of June 10, 1996, through June 14, 1996, Judge Markey failed to engage in a plea colloquy in thirty-one cases in which he was required to do so.

McGregor was that she would vacate or alter the 209A order. In fact, the inference drawn by the Commission regarding Judge Markey's intent was manifestly justified by the evidence. "One would have to be wearing blinders not to draw the strong and reasonable inference" that the ex parte communication was intended to influence the outcome of a judicial proceeding. *Matter of Orfanello*, 411 Mass. 551, 556, 583 N.E.2d 1277 (1992).

Judge Markey argues that the Commission's proposed discipline, that he be suspended without pay for a period of three months, would constitute a de facto removal from office prohibited by art. 30 of the Declaration of Rights to the Massachusetts Constitution. A temporary suspension without pay would not remove Judge Markey from his judgeship or create a vacancy in his office triggering the Governor's appointment authority. The Commission has been authorized by the Legislature, pursuant to G.L. c. 211C, § 8(4), to recommend to this court various sanctions, including "removal," the "imposition of limitations or conditions on the performance of judicial duties," the "imposition of a fine," and the "imposition of any other sanction which is reasonable and lawful." The Commission's recommendation that Judge Markey be suspended without pay for a period of three months is fully consistent with its statutory authority. In addition, we have concluded on previous occasions that a temporary suspension does not constitute a removal. See *The Governor v. McGonigle*, 418 Mass. 558, 560-561, 637 N.E.2d 863 (1994) (sheriff not removed from office where his temporary suspension did not create vacancy in the office); *Tobin v. Sheriff of Suffolk County*, 377 Mass. 212, 214, 385 N.E.2d 972 (1979) (chief deputy sheriff's suspension without pay by sheriff not tantamount to removal from office); *O'Hara v. Commissioner of Pub. Safety*, 367 Mass. 376, 381, 326 N.E.2d 308 (1975) (suspension of State trooper without pay pending a hearing is not discharge or removal). Judge Markey's reliance on *Matter of Bonin*, 375 Mass. 680, 711, 378 N.E.2d 669 (1978), for the proposition that a suspension without pay is constitutionally impermissible does not advance his argument.³

3

In *Matter of Bonin*, 375 Mass. 680, 683, 378 N.E.2d 669 (1978), this court entered an order temporarily enjoining Robert Bonin, who was then Chief Justice of the Superior Court, from the performance of all judicial and administrative functions during the pendency of this court's proceedings. At the conclusion of the proceedings, the court extended his suspension "for a reasonable time to permit the executive and legislative branches to consider ... the question of the continuance of the Chief Justice in office." *Id.* at 711-712, 378 N.E.2d 669. Thus, a distinction was drawn in that case between temporary suspension of a judge from his duties, which is appropriate for the court to impose, and a removal of the judge from office, which is the prerogative of the Executive and Legislature. The fact that the Commission's recommendation that Judge Markey's suspension be without pay does not alter this conclusion.

We reject Judge Markey's claim that adoption of the Commission's recommendation would deprive him of the ability to work in any capacity. He concedes that the Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 4(A), as appearing in 382 Mass. 814 (1981), permits a judge to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice."

3. Mitigating facts found by the hearing officer include that Judge Markey has been a District Court judge for many years and has established a reputation for honesty and integrity,³ and for being a hard-working, fair, and compassionate judge, who is respected by other judges and the New Bedford community. At the time Nelson initially approached him, Judge Markey was under some degree of personal stress resulting from family health issues. Furthermore, the Judge's misconduct was not prompted by any motivation other than concern and compassion for "a member of the courthouse family." Judge Markey has corrected his practice with regard to plea colloquies, and the proceedings around the Commission's charges have raised his consciousness with regard to the impropriety of his ex parte telephone call to Judge McGregor.⁴

Nonetheless, despite the overwhelming evidence to the contrary, Judge Markey continues to deny that he intended to influence Judge McGregor's decision on the 209A order. He also contends that his misconduct was less serious than that of other judges who have avoided suspensions, and that this court has never imposed the sanction of involuntary suspension without pay on a judge. However, none of the previous dispositions he relies on involved the misconduct at issue here: the making of an ex parte communication to another judge designed to influence the outcome of a pending case. Cf. *Matter of Brown*, 427 Mass. 146, 691 N.E.2d 573 (1998); *Matter of King*, 409 Mass. 590, 568 N.E.2d 588 (1991); *Matter of Killam*, 388 Mass. 619, 447 N.E.2d 1233 (1983); *Matter of Scott*, 377 Mass. 364, 386 N.E.2d 218 (1979); *Matter of Bonin*, *supra*.

Furthermore, contrary to Judge Markey's contention, the charges against him involve substantially more than creating an appearance of partiality. Judge Markey affirmatively undertook, through a private ex parte communication, to intercede on behalf of one party in a judicial proceeding. He asks us to view his involvement in the Macedo matter as "a single deviation from his usual practice of recusing himself on cases in which he had personal contacts with the parties." We conclude that Judge Markey's misconduct did not consist of an "isolated instance of aberrant behavior," *Matter of Killam*, *supra*, at 624, but rather included a "wide variety of improprieties" in connection with the Macedo matter. See *Matter of Larkin*, 368 Mass. 87, 91, 333 N.E.2d 199 (1975). He not only failed to recuse himself from proceedings involving the Macedos on three separate occasions, but he also acted as an advocate on behalf of Nelson, obtaining a lawyer for him, viewing the Macedos' home at Nelson's request, calling the Probate Court on behalf of Nelson to advance the 209A hearing, and providing Judge McGregor with ex parte testimony on an issue he recognized to be critical to Judge McGregor's decision. Furthermore, at Nelson's arraignment, Judge Markey denied the prosecutor's stay-away request without disclosing that he had spoken to the defendant about the events leading up to his arrest.

"Once one has concluded that [Judge Markey] hoped to influence the merits of the case ... public censure ceases to be an acceptable level of discipline, and at least some term of suspension ... must be imposed." *Matter of Orfanello* *supra* at 557. As we said in *Matter of Orfanello*:

"Any attempt to tamper with a judicial disposition constitutes a vicious

4

We agree with the Commission that the hearing officer should not have considered Judge Markey's personal financial resources in mitigation.

attack on the dispensation of even-handed justice. It does not matter whether the interference comes from a member of the bar, another judge, an elected or appointed official, or from a member of the general public. It does not matter whether it involves a traffic ticket, a probate disposition, or a felony. It was ... grossly improper for such communication to have been made...."

Id. at 557, quoting *Matter of DeSaulnier*, 360 Mass. 787, 813, 279 N.E.2d 296 (1972).

We reject Judge Markey's argument that the disposition against Judge McGregor should not be considered in determining an appropriate sanction for his misconduct.⁵ The sanction imposed on Judge McGregor is relevant as both judges were involved in the misconduct, and Judge Markey's transgressions were substantially more serious than those of Judge McGregor. He initiated the ex parte communication with her, asked her to advance the hearing date as a favor to him, volunteered his personal observations with respect to the condition of the Macedos' apartment, and sought to influence her decision on the 209A order.

Judge Markey was an experienced judge, having been in the District Court for more than thirteen years, as compared to Judge McGregor, who had been a judge for less than three years when the incident occurred. Moreover, Judge Markey's other acts of misconduct on behalf of Nelson created an appearance of "impropriety, bias, and special influence." *Matter of Bonin supra* at 711. As First Justice of the New Bedford District Court, it is incumbent on Judge Markey to set an example for other District Court judges to follow, whether in his court or in another court, and to "be sensitive to the impression which his conduct creates in the minds of the public." *Id.*

Compounding his misconduct in the Macedo matter, is the Judge's pattern of conduct with regard to plea colloquies, whereby he exhibited a wilful disregard of the law and not merely an error of law. See *Matter of King supra* at 608, *Matter of Troy*, 364 Mass. 15, 40, (1973). Judge Markey engaged in a "pattern[] of disregard or indifference" which, leaving aside the charges related to his involvement in the Macedo matter, alone warrants discipline. *Matter of Scott supra* at 367. Although, as Judge Markey states, his "practice promptly and conclusively reformed immediately upon his being advised that his deviations from protocol constituted violations of the Code and Canons," nowhere does he recognize that those "deviations" also deprived numerous defendants of a substantial constitutional right. As the hearing officer concluded, despite the fact that, in each known instance where Judge Markey failed to give the required colloquy the defendant was represented by counsel and was not sentenced to jail time, "[n]either these facts, nor the additional facts of the [c]ourt's heavy caseload and the time necessary to give a full plea colloquy, excuse in any respect the failure to do so."

4. We have carefully considered the charges and evidence against the Judge, and we have concluded that the Commission has established eight distinct charges and violations of the canons of

5

The Commission determined that Judge McGregor violated the Code of Judicial Conduct by permitting a private communication designed to influence her judicial action, and by permitting that communication to influence her judicial action. Judge McGregor agreed to a six-week suspension without pay and a two-week education program during her vacation time and at her own expense.

the Code of Judicial Conduct, and the disciplinary rules of the Canons of Ethics. Against these conclusions, we have weighed mitigating and aggravating factors, and considered the recommendations of the Commission. Judge Markey has been, overall, a conscientious judge who has endeavored in a high volume court to do justice in the myriad cases that have been brought before him. His misconduct with respect to the Macedo matter, however, is most serious, and no amount of good behavior can negate the damage it inflicts on the judicial system which depends for its institutional independence on the bedrock principle that all disputes coming before a judge should be decided solely on their merits, openly presented, without extraneous influences. This principle has been violated. We agree with the disposition recommended by the Commission, and we direct that Judge Markey be publicly reprimanded for his misconduct and suspended from his judicial responsibilities for three months without pay.⁶

So ordered.

6

We reject Judge Markey's argument that the sanction urged by the Commission is effectively a monetary sanction not warranted by the facts, and that, because he did not personally gain from his misconduct, he should not suffer a financial penalty. We acknowledged in *Matter of King*, 409 Mass. 590, 611, 568 N.E.2d 588 (1991), that a monetary sanction may be appropriate in circumstances other than where a judge receives some personal benefit from his misconduct.



COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT
14 BEACON STREET SUITE 102
BOSTON, MASSACHUSETTS 02108
Phone: (617) 725-8050

COMPLAINT FORM

CJC Complaint No. _____

This form is designed to provide the Commission with the information to screen your complaint and to begin an investigation of your allegations. Please read the accompanying materials on the Commission's function and procedures before filling out this form. ONLY ONE JUDGE MAY BE COMPLAINED OF ON EACH FORM.

PLEASE TYPE OR PRINT CLEARLY ALL INFORMATION

Your name _____

Address _____

_____ Zip Code _____

Daytime telephone _____

Name of judge _____

Court _____

Case name _____

Docket number _____

Attorneys involved _____

Date(s) of misconduct _____

Has an appeal been filed? _____

A summary of the general nature of your complaint: _____

Executive Director
Commission on Judicial Conduct
14 Beacon Street, Suite 102
Boston, MA 02108