The Washington State Commission on Judicial Conduct

I. About Judicial Conduct Commissions

All 50 states and the District of Columbia have established judicial conduct organizations charged with investigating complaints against judicial officers. Most of the states, including Washington, have established their judicial conduct organizations under the state constitution (WA. State Const. Article IV, Section 31). The Washington State Commission is an independent agency of the judicial branch, and has jurisdiction over State Supreme Court justices, trial and appellate court judges, court commissioners, magistrates, part-time and pro tem judges, and some court employees. It does not have jurisdiction over administrative law judges or federal judges, adjudicators, mediators, or attorneys.

A. Membership - The Washington Commission on Judicial Conduct (CJC) is composed of eleven members, each of whom have an alternate to serve in the case of the member’s unavailability. The membership is composed of one judge from the court of appeals, one from the superior court, and one from a court of limited jurisdiction. The judges are selected for service by their respective judge associations. There are also two attorney members, selected by the Bar Association, and six (the majority) non-lawyer non-judge members, appointed by the governor.

B. Purpose of the Commission - The Washington Commission on Judicial Conduct was established to maintain and restore public confidence in the integrity, independence, and impartiality of judges in the judicial system by enforcing rigorous standards of judicial conduct on and off the bench. The Commission also exists to assist the judiciary in maintaining the necessary balance between independence and accountability; to reassure the public that the judiciary neither permits nor condones misconduct. The Commission provides a forum for citizens’ complaints against judges that is independent of the political process. It is also charged with creating a greater public awareness of what constitutes proper and improper judicial conduct. Quite importantly, the Commission serves to protect judges from false, unfounded, and inaccurate accusations that can damage their reputations.

More specifically, the Commission on Judicial Conduct is empowered to:

- investigate complaints about judges’ conduct;
- determine whether a judge is disabled,
- assist judges who have committed minor ethical violations to change their behavior,
- impose or recommend discipline if appropriate against a judge who violates ethical standards, and
- when necessary, secure the removal of a judge from office.
C. Jurisdiction -

i. Individuals - The Commission has jurisdiction over all state-level judicial officers, from justices of the State Supreme Court through magistrates of courts of limited jurisdiction. The Commission sometimes receives complaints against people over whom it does not have jurisdiction, such as police, attorneys, administrative law judges, or federal judges. Those complaints are not accepted by the Commission, and the complainant is referred to the appropriate agency, if any. The Commission has jurisdiction over pro tem and part-time judges, and retains jurisdiction over behavior that took place while a person was a judge, even if he or she has since left the bench.

ii. Subject matter - The Commission enforces the Code of Judicial Conduct - ethics rules for judges promulgated by the State Supreme Court. The vast majority of complaints filed with all judicial conduct commissions – generally more than 95% each year – are dismissed. Some of these are dismissed because, even if true, the allegations would not comprise a violation of the Code of Judicial Conduct. (For example, a litigant might allege that a judge failed to respond to a letter or telephone call and instead had a clerk respond, copying the other side in the case. In this instance, the litigant didn’t understand that a judge is required not to engage in ex parte communication.)

The majority of complaints are dismissed because the complainant is essentially asking the Commission to act as an appellate court and review the merits of the judge’s decision. The complainant may claim that the judge made an incorrect finding of fact, misapplied the law, or abused his or her discretion. These complaints are frequently filed by disappointed litigants, particularly in emotionally-charged litigation such as custody cases, contested probates, or criminal trials. Examples of typical complaints dismissed for these reasons include complaints that a judge:

• improperly admitted or excluded certain evidence
• believed perjured testimony
• was too harsh or lenient in sentencing,
• awarded child custody to the wrong person.

Even if a judge did make an error, in most cases this does not comprise judicial ethical misconduct; it simply reflects the human fallibility of judges. Correcting such mistakes is the province of appeals courts, not of judicial conduct commissions. Disappointed litigants are not allowed to circumvent the appellate process established in the constitution by filing a complaint with the Commission as a substitute for appeal.

The power of the Commission on Judicial Conduct is limited in order to protect the independence of the judiciary. A judge must feel free to make a decision that may prove to be unpopular with the public or cause the losing party to become hostile without fearing that he or she will be disciplined by the Commission.
It is vital to maintain the integrity of judicial conduct commissions, themselves. Accordingly, they must remain neutral in all underlying litigation and resist efforts to use to complaint process to sway the outcome in a case. The Commission membership has established policies for consistency and integrity in the members’ personal and professional conduct.

Commissions do not have the power to:

• provide individual legal assistance,
• intervene in litigation on behalf of a party,
• interfere in pending litigation,
• order a judge to step down from a particular case, or
• order anyone released from jail.

Distinguishing Between Legal Error and Judicial Misconduct

Although review of a judge’s decision is the province of the appellate court, the Commission on Judicial Conduct may occasionally review a judge’s exercise of discretion of judicial rulings where the allegation is that the decision was the product of an improper motive (bias, revenge, conflict of interest), or if the legal error was part of a pattern or practice of egregious legal error that could show incompetence or a pattern of violating defendants’ fundamental rights. Improper use of the contempt power is something that could be both legal error and misconduct that could be addressed by a conduct commission, as is ex parte communication and a few other legal issues.

II. Investigation of Judicial Conduct Complaints

In Washington, investigations are initiated by complaint and may be accepted from any source, including anonymous ones. Complainants are not required to be personally involved in the matter complained of, nor are they generally identified to the judge or to others in the course of an investigation. Complaints could also be generated by the Commission, for example, where a media account shows that a judge’s behavior might have violated the Code of Judicial Conduct. All complaints, no matter from where they are generated, are investigated (though some investigations may be minimal, if the complaint is facially deficient). The CJC meets on a regular basis every two months (extra meetings may be convened as needed). The Commission members, not staff, make all decisions on whether to dismiss a complaint, whether to contact the judge (“respondent”), and whether to file a public Statement of Charges.

There is also a special proceeding process, wherein the Commission may determine whether a judge suffers from an incapacity which is either permanent or likely to become permanent and which seriously interferes with the judge’s ability to perform judicial duties. These cases are investigated and processed in similar fashion to misconduct cases, and the Commission may, if it concludes that the respondent judge suffers from such an incapacity, recommend retirement to the State Supreme Court.
A. Confidentiality During an Investigation

As elsewhere in the country, the vast majority of complaints investigated by the Commission are dismissed, because they address purely legal issues outside the Commission’s jurisdiction, or because they are unsubstantiated. In the typical case, the respondent judge is not made aware of the investigation. The state constitution requires that during an investigation, the Commission keep the existence of Commission proceedings confidential. The Commission cannot confirm or deny to outside parties that a complaint has been filed against a judge or that the Commission is investigating the judge. We ask complainants and anyone contacted by the Commission during its investigation to refrain from revealing that a complaint has been made or that there is an investigation, although they may discuss the facts underlying a complaint. (For example, a complainant may say to the newspaper: “Judge Jones called me a name,” but we request that they do not say “I filed a complaint with the Commission on Judicial Conduct after Judge Jones called me a name and they are investigating the matter.”) It is well established in case law that a judge is not required to recuse from a case simply because a party or attorney involved filed a complaint to the Commission. Members of the Commission, its staff, and court personnel, including attorneys as officers of the court who violate confidentiality during an investigation may be subject to contempt proceedings. There are multiple reasons for confidentiality in investigations, including:

- to encourage complainants and witnesses to come forward without fear that the judge will retaliate or that the media will pursue them,
- to prevent unscrupulous complainants from harassing or intimidating judges,
- to protect a judge’s reputation (and that of the judiciary in general) from unfounded complaints being made public.

After a complaint is dismissed, or if the complaint is filed publicly as a Statement of Charges by the Commission, the requirement of confidentiality imposed upon third parties is dissolved. The requirement of confidentiality remains for Commission members and employees, except, of course, information that is filed as part of a Statement of Charges, and public proceedings thereafter.

B. Investigation of Judicial Conduct Complaints

Investigators for the Commission make an independent assessment of the allegations in a complaint and seek independent evidence as to whether a violation of the Code of Judicial Conduct can be substantiated or disproved. An investigation typically involves interviewing, personally and over the telephone, witnesses who may have information about the subject matter of the complaint. Relevant transcripts and other documents, may be reviewed. The Commission investigators, who are attorneys, have access to the JIS information system.
Very frequently, a Commission investigator will need to review court files, listen
to audiotapes of proceedings, and otherwise examine the record in a case or
cases. As noted above – all complaints within the Commission’s jurisdiction are
investigated, even though the majority of them are eventually dismissed. The
majority of the judicial officers in the state have, at some time, been the subject
of a complaint. That fact, and the fact that the complaint is then investigated, has
no repercussions for an individual judicial officer under investigation. It is simply
a reflection of the fact that judges are called upon to make difficult decisions that
are bound to leave someone dissatisfied. Most typically, once a complaint has
been investigated, the results of the investigation are considered by the
Commission members, who dismiss the complaint without the respondent judge
ever being made aware of the existence of the complaint. The Commission
members make all decisions whether to proceed further or whether to dismiss
any specific investigation. The investigators simply make recommendations to
the members.

Some complainants wrongly believe that by filing a complaint against a judge,
they can require the judge to recuse from their case. As noted above, that is not
correct. Case law establishes that a litigant cannot create a recusal issue on
their own behalf. As in a number of other situations, the judge must decide
whether in fact they are unable to remain a neutral and objective arbitrator in the
complainant’s case.

During the course of an investigation, if the members determine that the initial
investigation reveals evidence supporting the allegations and that, if true, the
allegations are of sufficient misconduct that the judge may be sanctioned, a
judge may be asked to respond to allegations about them. In order to respond, a
judge may sometimes need to ask court personnel or attorneys questions, to
gather sufficient information about the allegations to respond to the Commission.
It is not appropriate, however, for a judge to question court employees about
whether they made the complaint, what they have told the Commission, or other
questions about the investigation.

   i. Immunity from suit

Statements made to the Commission or its investigators or other employees are
absolutely privileged in actions for defamation. This absolute privilege does not
apply to statements made in any other forum, such as statements made to the
newspaper (RCW 2.64.080).

C. After the Investigation

After considering the judge’s response and other evidence gathered during the
investigation, the Commission members may:

• dismiss the complaint if the facts discovered during the investigation do
  not support a showing that the judge committed misconduct,
• direct that further information be gathered, accept a stipulated resolution and impose the negotiated discipline,

• find probable cause from specific evidence in the investigation that the judge committed misconduct and direct the filing of a public Statement of Charges.

Some states allow private sanctions. Washington State’s Constitution does not permit private sanctions. If a case is not dismissed and there is some form of sanction in Washington, that must be filed publicly. The Washington State process does permit the judge to enter into a stipulation with the Commission in exchange for a specific sanction. Such a stipulation may be entered into at any time prior to the final disposition of a public hearing on the charges.

Once a Statement of Charges has been filed, the case will proceed toward a public hearing and the lawyer presenting the charges, hired on a contract basis, is referred to as disciplinary counsel. He or she, and the judge or judge’s lawyer, conduct discovery, which may include depositions, prior to the fact-finding hearing in the case. The hearing is held before a panel of at least six members of the Commission, and a member of the panel is selected prior to the hearing as a presiding officer, who has chief responsibility for making procedural rulings in the case. Following the hearing, the panel deliberates, and determines (1) whether violations of the Code of Judicial Conduct were proven by clear, cogent, and convincing evidence, and (2) if they were, then what level of sanction is appropriate. Sanctions available to the Commission include:

- Admonishment - a written action of the Commission of an advisory nature that cautions a respondent judge not to engage in certain proscribed behavior. An admonishment may include a requirement that the respondent follow a specified corrective course of action. Admonishment is the least severe disciplinary action the Commission can issue.

- Reprimand - a written action of the Commission that requires a respondent judge to appear personally before the Commission and that finds that the conduct of the respondent is a violation of the Code of Judicial Conduct and does not require censure or a recommendation to the State Supreme Court that the respondent be suspended or removed. A reprimand shall include a requirement that the respondent follow a specified corrective course of action. Reprimand is an intermediate level of disciplinary action the Commission can issue.

- Censure - a written action of the Commission that requires a respondent judge to appear personally before the Commission. A censure by the Commission indicates the conduct of the respondent violates a rule of judicial conduct, detrimentally affects the integrity of the judiciary, undermines public confidence in the administration of justice, and may or may not require a recommendation to the State Supreme Court that the
respondent be suspended (with or without pay) or removed. A censure shall include a requirement that the respondent follow a specified corrective course of action. Censure is the most severe disciplinary action the Commission can issue.

In determining the appropriate level of sanction, the Commission considers mitigating factors, such as:

- the misconduct is a single, isolated mistake that is not likely to be repeated,
- the misconduct is relatively minor,
- the judge has acknowledged the mistake, has cooperated with the process, and agrees to take steps to improve such as counseling or training;

The Commission also considers aggravating factors, such as

- the extent of the misconduct – was it part of a pattern of behavior? Did it affect multiple people in serious fashion?
- the record of the judge – has this judge been sanctioned by the Commission before?
- did the judge intentionally fail to comply with rules or orders of the Commission and/or submit false evidence, or engage in other deceptive practices during the disciplinary process?
- did the judge refuse to acknowledge the wrongful nature of his or her conduct?
- did the judge exploit the judicial position to satisfy personal desires?
- did the judge’s misconduct tend to undermine public confidence in the integrity of the judiciary?

D. Appeal to the State Supreme Court

A decision adverse to a judge may be appealed by the respondent judge to the State Supreme Court within thirty days after filing of the Commission’s decision. The State Supreme Court reviews the decision de novo on the record. While the court does not take new evidence, it reviews the Commission’s findings of fact to see if they’re supported by the evidence, reviews the conclusions of law, and reviews the sanction decisions, and may accept, modify or reverse any of them. If the Commission has made a recommendation that the respondent judge be suspended or removed from office, the State Supreme Court must make the final determination whether to order such suspension or removal.

E. Enforcement/Monitoring

When the Commission or the Supreme Court has entered an order of discipline, the Commission’s investigative officers are required to monitor and report on compliance with the order. Evidence of noncompliance could result in a new
case being filed by the Commission or in the Commission seeking an order from the State Supreme Court to enforce its orders.

If a respondent judge was ordered removed from the bench by the State Supreme Court, he or she may file with the Commission a petition for reinstatement of eligibility. The petition must show by clear, cogent and convincing evidence that reinstatement will not be detrimental to the integrity and standing of the judiciary and the administration of justice, or be contrary to the public interest.

The Commission will recommend to the State Supreme Court that the petitioner should or should not be reinstated to eligibility to hold judicial office. The petitioner is responsible for all costs and reasonable attorney’s fees in reinstatement proceedings.

III. Resources for Court Employees and Judges

A. Washington State Commission on Judicial Conduct

Commission investigators, who are all attorneys, are available to answer questions for court employees or any other citizens with regard to whether and how to file a complaint, what is likely to happen, details on how the process works, etc. Such inquiries are entirely confidential. A Commission investigator can, if requested, return a call after or before regular working hours.

The Commission maintains a web site: www.cjc.state.wa.us that contains information about its structure, organization, public cases, and links to other organizations. Speakers are available to address groups on CJC issues.

B. Ethics Advisory Committee

Judicial officers, including part time and pro tem judges and commissioners, may seek an advisory opinion about judicial ethics issues from the Ethics Advisory Committee (EAC). The EAC is appointed by the Chief Justice of the State Supreme Court and consists of judges from the court of appeals, superior courts, courts of limited jurisdiction, an attorney, and an employee of the Administrative Officer of the Courts. This is the designated body to advise judicial officers on the application of the Code of Judicial Conduct. They can give verbal consultations on issues, as well as issuing more formal written opinions that are circulated publicly by the OAC. Although EAC opinions are not binding on the CJC, a judge’s compliance with an opinion by the EAC shall be considered by the CJC as evidence of the judge’s good faith. They have a searchable web site at http://www.courts.wa.gov/ethics/, at which you can find their published opinions, and their telephone number is (360) 357-2124.
C. American Judicature Society - Center for Judicial Ethics

The American Judicature Society’s Center for Judicial Ethics is a nationally-recognized authority and leader in promoting judicial ethics education and an effective, fair system of judicial discipline. It provides technical assistance, educational programs, and information clearinghouse services that assist in maintaining the highest standards of ethical conduct in the judiciary. They have publications and referrals to others with a great deal of information in this area. They maintain an informative web site at: http://www.ajs.org/ethics/index.asp with excellent links to other organizations. Their mailing address is Box 190, 3304 N. Broadway, Chicago, IL, 60657, and the telephone number is (773) 248-6005.

D. Textbook - Judicial Conduct and Ethics

The textbook, Judicial Conduct and Ethics, by Shaman, Lubet, Alfini and Geyh, fourth edition, Lexis Law Publishing, copyright 2007 by Matthew Bender and Company, is recognized as the most outstanding in the field. It is broken down into sections such as “Use of Power,” “Demeanor, Impartiality, and Competence,” and “Case Management and Administrative Imperatives.” It contains a readable discussion of the history, concepts, and application of judicial conduct codes across the country.