

TASK FORCE ON JUDICIAL
CONDUCT COMMISSION REPORT

ON

PROPOSED LEGISLATION
(H. 1816)

AFFECTING

THE JUDICIAL CONDUCT COMMISSION

TASK FORCE MEMBERS

Paul R. Sugarman, Esq.
Chairman

James W. Dolan, Esq.

Martin W. Healy, Esq.
General Counsel

Rudolph F. Pierce, Esq.

Marylin A. Beck, Esq.

Richard W. Renehan, Esq.

Thomas J. Carey, Jr., Esq.

J. Owen Todd, Esq.

Randy Scott Chapman, Esq.

Erin C. Wyllie, Esq.

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RECOMMENDATION

We have concluded that at the present time the Massachusetts Bar Association should not support the passage of H.1816. Although problems have existed in some aspects of the practices, procedures, and operations of the Judicial Conduct Commission, we believe that the Commission has taken steps to address these issues administratively and that structural changes through legislation are unnecessary at this time. The Committee unanimously makes this recommendation.

INTRODUCTION

The Committee was appointed by the President of the Massachusetts Bar Association, Edward P. Ryan, Jr., to evaluate a bill filed by the Massachusetts Judges Conference that would make significant changes in the statute governing the Judicial Conduct Commission. (H.1816, hereinafter, “the proposed legislation”) The proposed legislation addresses four major issues: anonymous complaints, conducting of investigations without notice to the Judge involved, appointment and tenure of the Executive Director, and insurance to cover legal fees and expenses of judges in defending themselves against complaints.

The committee has met several times, and heard from people close to the issues, including judges, representatives of the Massachusetts Judges Conference, and staff personnel and members of the Judicial Conduct Commission. The Committee heard from both proponents and opponents of the proposed legislation.

It is no secret that there has been dissatisfaction voiced in some quarters about how the Judicial Conduct Commission has, in the past, handled some of the issues addressed in the proposed legislation. However, recent changes in the Commission’s rules have improved their procedures. Productive discussions have taken place among the affected groups. With a view toward continued improvement of the administration of justice in the Commonwealth, the Committee urges the continued frank exchange of ideas and viewpoints by all concerned. The situation could be markedly improved with better communication between the judiciary and the Commission. The committee’s charge, however, was to comment on the legislation, and this Report will focus on the proposed legislation.

Summary of Proposed Legislation

The text of the Bill is set out in Appendix A. Basically the legislation seeks to accomplish four objectives: 1) prohibit investigation of anonymous complaints without the prior approval of the Supreme Judicial Court; 2) prohibit the conducting of investigations without notifying the Judge involved absent the prior approval of the Supreme Judicial Court; 3) set a term limit for, and require the Supreme Judicial Court to approve the appointment of, the executive director of the Judicial Conduct Commission; and 4) mandate that the Commonwealth provide “liability insurance” which covers the defense of a judge who is charged with an offense or, perhaps, investigated by the JCC.

I.

General Comments On Proposed Legislation

Public confidence is critical to the judicial function. Massachusetts has been well served by its constitutional system for appointment of judges and is justifiably proud that its system was used as a model by the framers of the Constitution in fashioning the federal judicial system. (See Bibliography, App. E.) The rigorous threshold inquiry in the appointment process helps to insure the continued high quality of the Massachusetts Judiciary. Judicial appointees are drawn from those who are at the top of their profession and who have already demonstrated excellence. The quality of Massachusetts Judges probably ranks at or near the top in the nation. Preservation of a qualified and independent judiciary is essential to the protection of our citizens and care must be taken to insure the continuation of that independence as well as public confidence in the system.

Nevertheless, the public has the right to expect high standards of conduct from

judges to whom so much authority and independence is entrusted. The Code of Judicial Conduct recognizes this. (See Bibliography, App. E.) Public confidence in our judiciary depends on the assumption that appropriate oversight exists; the public must be confident that if judicial misconduct occurs, it will be corrected.

There have been very few examples of actual judicial misconduct in Massachusetts. When incidents have occurred, they have been dealt with promptly and fairly. There is also a fear that unfounded, anonymous complaints and investigations conducted without notice to the judge involved have the potential to interfere with a judge's ability to perform effectively. Any judge may feel threatened by an anonymous and unfounded complaint. However, there is a general recognition that on rare occasion there is reason to proceed with an anonymous complaint or investigation without notice to the judge in order to insure that justice and public confidence is served.

With these general principles in mind, we turn now to specific provisions of the proposed legislation.

II.

Specific Comments on Proposed Legislation

A. The issue of anonymous complaints.

The proposed legislation would prohibit commencing an investigation upon an anonymous complaint "until the commission has submitted the anonymous complaint, or has submitted its reasons for requesting a secret investigation, to the Supreme Judicial Court for its approval to commence an investigation." Commission rules (as most recently amended) now require a vote of the Commission to proceed on an anonymous

complaint (JCC Rule, 6F, App. C). No longer may the Executive Director, alone, make this determination. See also Section IIB of this report with reference to the commencement of an investigation without notice to the judge involved.

An anonymous, and unfounded complaint has the potential for mischief. Nevertheless, we believe the Judicial Conduct Commission is aware of that fact and will take steps to insure against abuse, by using its discretion wisely. Anonymous complaints have been relatively rare and most are dismissed at an early stage as being without merit. Still in the event of the rare case where anonymity is essential, the power to investigate must exist. The proponents of the proposed legislation recognize this fact by proposing such complaints may proceed, but only with the approval of the Supreme Judicial Court. We see no need to involve the Supreme Judicial Court at such a preliminary stage. That Court has much to do that cannot be delegated elsewhere and should not lightly be assigned additional administrative obligations that are not essential. We also believe that such decision should be made by an independent body such as the Judicial Conduct Commission.

B. Proceeding Without Notice

The proposed legislation would provide that the commission “shall notify the judge of the proceedings and their subject matter before commencing any inquiry, investigation or evaluation,” and, providing further, that notice to the judge may be withheld only upon the Commission’s recommendation to, and approval by, the Supreme Judicial Court (Proposed legislation in Section 2 (2) (a) (b) App. A). Recently (and after the original filing of the proposed legislation, the Judicial Conduct Commission amended

its rules by providing that notice to the judge of a complaint may proceed beyond the screening process without notice to the judge only upon recommendation by the Executive Director and a vote of approval by the Commission (JCC Rule 6G, App. C). Prior to that amendment the decision to proceed was made by the Executive Director alone. As in the case of “anonymous complaints” the Committee feels that the amendment to the rules of the Judicial Conduct Commission provide adequate safeguard to potential abuse by having the Commission itself determine when notice to the judge may be delayed. We feel there is no adequate reason for adding to the administrative burdens of the Supreme Judicial Court. In addition, it is more appropriate that the decision to delay notice reside an independent body charged with oversight rather than with the Supreme Judicial Court. We believe the Commission is fully capable of exercising this discretion fairly.

C. Appointment and Tenure of Executive Director

The proposed legislation would make the Commission’s appointment of an executive director “subject to the approval of the Supreme Judicial Court,” and would provide a fixed term of five years with the approval of the Supreme Judicial Court again required for any subsequent term of appointment by the commission. (Proposed legislation, § 4, App. A) Under present law, the executive director is appointed by and serves at the pleasure of the Judicial Conduct Commission (M. G. L., c. 211, §3(3) App. B). The JCC itself is composed of three judges who are appointed by the SJC, three members of the bar appointed by the Chief Justice of Administration and Management of the Trial Court, and three members of the public appointed by the governor.

It is essential that the public perceive that the JCC is independent from the judiciary it oversees. That perception might be questioned if the SJC directly approved the Executive Director who is responsible for investigating potential complaints against the SJC and other members of the judiciary. It might undermine the public perception of impartiality in terms of oversight to revise the method of appointment for no apparent reason. There seems to be no good reason for the SJC to become involved in JCC staff appointments. The JCC is fully capable of appointing its own Executive Director and determining when changes should be made.

The JCC is responsible for its operations and its Executive Director must be accountable to the Commission. The recent rule revisions demonstrate that the JCC is sensitive to the need for Commission review of staff activity. Methods of operation are under continuing review. It is by no means clear that a fixed term is preferable to service at the pleasure of the JCC. Statutory changes are not warranted at this time.

D. Insurance To Cover Legal Fees.

The proposed legislation would require the Commonwealth to “provide liability insurance to insure justices $\frac{1}{4}$ while in the performance of administrative and judicial functions.” (Proposed legislation, §1, App. A) Section 2B. In the context of Judicial Conduct Commission proceedings, current law provides that with the approval of the Supreme Judicial Court “a judge shall be entitled to the payment of reasonable attorney’s fees by the Commonwealth where the matter is dismissed after sworn complaint, the SJC decides no sanction is justified, or the SJC decides that justice will otherwise be served” (c. 211C, §7(15) (App. B). See also, In the matter of Brown, 427 Mass. pp. 1015 (1998)

(Appendix D) for the Court's discussion of this provision.

We have been informed that only one other state has such a provision (Rhode Island). We are also told that no other state officer or employee has the benefit of such insurance. The statute currently provides for counsel fees under certain circumstances. See M. G. L., c. 211C, § 7 (15), App. B.

The judges themselves, if they so desire, can purchase a relatively inexpensive policy, which would be even less expensive if the Judges Conference bought a group policy. Most complaints are dismissed at the preliminary stage. In the rare cases in which misconduct is proven, many believe that public funds should not be expended for an unsuccessful defense. To require of publicly funded liability insurance to pay counsel fees for judges in all cases appears unwise. In addition, a mechanism already exists for paying counsel fees in certain appropriate cases. (M. G. L., c. 211C, § 7(15), App. B.)

Conclusion

For the foregoing reasons, the Committee unanimously recommends that the Massachusetts Bar Association oppose the passage of House Bill H.1816.