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**STATE OF CALIFORNIA  
COMMISSION ON JUDICIAL PERFORMANCE**



**1999 ANNUAL REPORT**

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San Francisco, California 94102  
(415) 557-1200

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# COMMISSION ON JUDICIAL PERFORMANCE

## 1999 ANNUAL REPORT

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## INTRODUCTION



In February 1999, the terms of five Commission members ended and a vacancy was created in one of the judicial positions by virtue of trial court unification. I thank the retiring members for their dedicated service to the Commission. In working to fulfill the constitutional mandates of the Commission, they contributed to the preservation of public confidence in the State's judiciary and in the system of justice itself.

Shortly thereafter, each of the appointing authorities undertook to expeditiously appoint new members. Without this cooperation, the Commission could have lacked a quorum for undertaking its business.

The new commissioners came prepared to undertake their new tasks. I thank all of the new members for their diligence in orienting themselves to the work of the Commission and for their dedication to fulfilling its mandate.

In the past year, we saw two important court decisions affect the Commission's practices and procedures. The first, *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, held that the Commission has the authority to issue confidential advisory letters. The Court found that the Commission's practices and procedures provide adequate due process, and the Court held that such letters – warning judges of questionable conduct – are a form of discipline. The decision further provided guidelines for determining when legal error may become a matter for investigation or discipline. A judge who commits legal error which, *in addition*, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation. Mere legal error, without more, is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and, thus, should not be disciplined.

The second court decision was *The Recorder v. Commission on Judicial Performance* (1999) 72 Cal.App.4th 258. The Court of Appeal held that the votes of individual Commission members on disciplinary determinations, after the initiation of formal proceedings, are to be made public. The Commission also releases individual votes on public admonishments issued under Commission rules.

1999 marked the first full year of the Commission's shared responsibility with local courts for the discipline of court commissioners and referees. Both the Commission and the Judicial Council promulgated rules to assist the Commission and local courts in coordinating the handling of these complaints and the process appears to work smoothly. In determining when to undertake further investigation of complaints involving subordinate judicial officers and when to impose greater discipline, the Commission has given careful consideration both to the importance of the local court's exercise of discretion in matters involving employees of their courts and to the protection of the public. In so doing, the Commission has endeavored to fulfill the role contemplated for it by Proposition 221 and to serve as an important safeguard in the system of oversight for subordinate judicial officers.

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As this report goes to print, the fortieth anniversary of the passage of Proposition 10 and the establishment of the Commission approaches. By approving the "Administration of Justice" measure in November of 1960, California voters established the nation's first permanent disciplinary body for judicial officers. Today, comparable bodies exist in all fifty states and in the District of Columbia, many modeled after the "California system." While the Commission's authority has undergone numerous changes in the past four decades, its purpose remains the same: to uphold public confidence in the judiciary through the enforcement of high standards of conduct for judges. As Chair of the Commission, and on behalf of all of the members of the Commission, it is a privilege to serve the people of the State of California in this important work.

Finally, I wish to thank the dedicated and thoroughly professional staff for their work and assistance to the Commission in the past year.

A handwritten signature in black ink, reading "Daniel M. Hanlon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Honorable Daniel M. Hanlon  
Chairperson

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## COMPOSITION OF THE COMMISSION

Pursuant to California Constitution, article VI, section 8, the Commission is composed of eleven members: one justice of a court of appeal and two trial court judges, all appointed by the Supreme Court; two attorneys appointed by the Governor; and six lay citizens, two appointed by the Governor, two appointed by the Senate Committee on Rules and two appointed by the Speaker of the Assembly. Members are appointed to staggered four-year terms. The members do not receive a salary but are reimbursed for expenses relating to Commission business. The members of the Commission elect a chairperson and vice-chairperson annually.

### COMMISSION MEMBERS - 1999



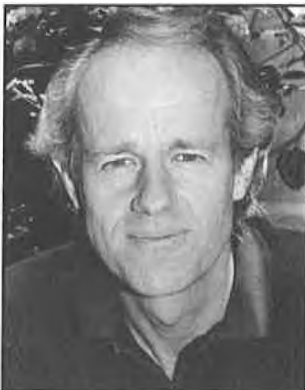
**HONORABLE  
DANIEL M. HANLON**  
Chairperson  
Justice, Court of Appeal  
Appointed by the Supreme Court  
Term Began: March 1, 1997  
Term Ends: February 28, 2001



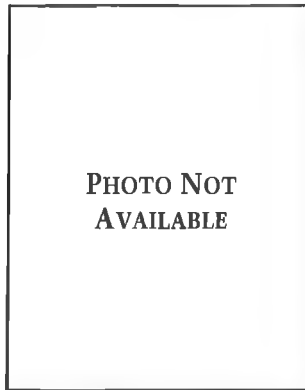
**MICHAEL A. KAHN, ESQ.**  
Vice-Chairperson  
Attorney Member  
Appointed by the Governor  
Term Began: March 1, 1999  
Term Ends: February 28, 2003



**MS. LARA BERGTHOLD**  
Public Member  
Appointed by the Governor  
Term Began: April 15, 1999  
Term Ends: February 28, 2003



**MR. MIKE FARRELL**  
Public Member  
Appointed by the  
Senate Committee on Rules  
Term Began: February 2, 1998  
Term Ends: February 28, 2001



**HONORABLE  
MADELEINE I. FLIER**  
Judge, Superior Court  
Appointed by the Supreme Court  
Term Began: March 3, 1999  
(to fill unexpired term)  
Term Ends: February 28, 2001



**PATRICK M. KELLY, ESQ.**  
Attorney Member  
Appointed by the Governor  
Term Began: March 1, 1995  
Reappointed: March 1, 1997  
Term Ends: February 28, 2001

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## COMMISSION MEMBERS



**MRS. CRYSTAL LUI**  
Public Member  
Appointed by the  
Speaker of the Assembly  
Term Began: April 9, 1999  
Term Ends: February 28, 2003



**HONORABLE  
RISE JONES PICHON**  
Judge, Superior Court  
Appointed by the Supreme Court  
Term Began: March 3, 1999  
Term Ends: February 28, 2003



**MS. RAMONA RIPSTON**  
Public Member  
Appointed by the  
Speaker of the Assembly  
Term Began: July 15, 1998  
(to fill unexpired term)  
Term Ends: February 28, 2001

**PHOTO NOT  
AVAILABLE**

**MS. JULIE SOMMARS**  
Public Member  
Appointed by the  
Senate Committee on Rules  
Term Began: March 1, 1999  
Term Ends: February 28, 2003

**VACANT POSITION**  
Public Member

## OUTGOING MEMBERS

**ROBERT C. BONNER, ESQ.**  
Attorney Member  
Appointed by the Governor  
Term Ended: February 28, 1999

**HONORABLE LOIS HAIGHT**  
Judge, Superior Court  
Appointed by the Supreme Court  
Term Ended: February 28, 1999

**MS. HARRIET C. SALARNO**  
Public Member  
Appointed by the Governor  
Term Ended: February 28, 1999

**MS. OPHELIA BASGAL**  
Public Member  
Appointed by the  
Senate Committee on Rules  
Term Ended: February 28, 1999

**MR. LUKE LEUNG**  
Public Member  
Appointed by the  
Speaker of the Assembly  
Term Ended: February 28, 1999

**DONALD E. VINSON, PH.D.**  
Public Member  
Appointed by the Governor  
Resigned: August 24, 1999

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# I.

## OVERVIEW OF THE COMPLAINT PROCESS



### THE AUTHORITY OF THE COMMISSION ON JUDICIAL PERFORMANCE

The Commission on Judicial Performance is the independent state agency responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges (pursuant to article VI, section 18 of the California Constitution). Its jurisdiction includes all active California judges. The Commission also has authority to impose certain discipline on former judges and – pursuant to Proposition 221, enacted in June 1998 – the Commission has shared authority with local courts over court commissioners and referees. The Commission does not have authority over judges pro tem or private judges. In addition to its disciplinary functions, the Commission is responsible for handling judges' applications for disability retirement.

This section describes the Commission's handling and disposition of complaints involving judges. The rules and procedures for complaints involving commissioners and referees and statistics concerning those matters for 1999 are discussed in Section V, Subordinate Judicial Officers.

### HOW MATTERS ARE BROUGHT BEFORE THE COMMISSION

Anyone may make a complaint to the Commission. Complaints must be in writing. The Commission also considers complaints made anonymously and matters it learns of in other ways, such as news articles or information received in the course of a Commission investigation.

### JUDICIAL MISCONDUCT

The Commission's authority is limited to investigating alleged judicial misconduct and, if warranted, imposing discipline. Judicial misconduct usually involves conduct in conflict with the standards set forth in the Code of Judicial Ethics (see Appendix 1E). Examples of judicial misconduct include intemperate courtroom conduct (such as yelling, rudeness, or profanity), improper communication with only one of the parties in a case, failure to disqualify in cases in which the judge has or appears to have a financial or personal interest in the outcome, delay in performing judicial duties, and public comment about a pending case. Judicial misconduct also may involve improper off-the-bench conduct such as driving under the influence of alcohol, using court stationery for personal business, or soliciting money from persons other than judges on behalf of charitable organizations.

### WHAT THE COMMISSION CANNOT DO

The Commission is not an appellate court. The Commission cannot change a decision made by any judicial officer. When a court makes an incorrect decision or misapplies the law, the ruling can be changed only through appeal to the appropriate reviewing court.

The Commission cannot provide legal assistance to individuals or intervene in litigation on behalf of a party.

### REVIEW AND INVESTIGATION OF COMPLAINTS

Complaints about judges are reviewed and analyzed by the Commission's legal staff. When



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OVERVIEW OF THE COMPLAINT PROCESS

the Commission meets, it decides upon the action to take with respect to each complaint.

Many of the complaints considered by the Commission do not involve judicial misconduct. These cases are closed by the Commission after initial review.

When a complaint states facts which, if true and not otherwise explained, would be misconduct, the Commission orders an investigation in the matter. Investigations may include interviewing witnesses, reviewing court records and other documents, and observing the judge while court is in session. Unless evidence is uncovered which establishes that the complaint lacks merit, the judge is asked to comment on the allegations.

### ACTION THE COMMISSION CAN TAKE

#### Confidential Dispositions

After an investigation, the Commission has several options. If the allegations are found to be untrue or unprovable, the Commission may close the case without action against the judge. If, after an investigation and opportunity for comment by the judge, the Commission determines that improper or questionable conduct did occur, but it was relatively minor, the Commission may issue an advisory letter to the judge. In an advisory letter, the Commission will advise caution or express disapproval of the judge's conduct.

When more serious misconduct is found, the Commission may issue a private admonishment. Private admonishments are designed in part to bring problems to a judge's attention at an early stage in the hope that the misconduct will not be repeated or escalate. A private admonishment consists of a notice sent to the judge containing a description of the improper conduct and the conclusions reached by the Commission.

Advisory letters and private admonishments are confidential. The Commission and its staff ordinarily cannot advise anyone, even the person who lodged the complaint, of the nature of the discipline that has been imposed. However, the Commission's rules provide that upon completion of an investigation or proceeding, the person who lodged the complaint will be advised either that the Commission has closed the matter or that appropriate corrective action has been taken. The California Constitution also provides that, upon request of the governor of any state, the President of the United States, or the Commission on Judicial Appointments, the Commission will provide the requesting authority with the text of any private admonishment or advisory letter issued to a judge who is under consideration for a judicial appointment.

A description of each advisory letter and private admonishment issued in 1999, without identifying the judge involved, is contained in Section IV, Case Summaries.

#### Public Dispositions

In cases involving more serious misconduct, the Commission may issue a public admonishment or a public censure for improper judicial conduct. The nature and impact of the misconduct generally determine the level of discipline;

a public censure is imposed for more serious misconduct than a public admonishment. Both public admonishments and public censures are notices that describe a judge's improper conduct and

state the findings made by the Commission. Each notice is sent to the judge and made available to the press and the general public.

In the most serious cases, the Commission may determine – following a hearing – to remove a judge from office. Typically, these cases involve persistent and pervasive misconduct. In cases in which a judge is no longer capable of performing judicial duties, the Commission may

#### ACTION THE COMMISSION CAN TAKE

Close (Dismissal)  
Advisory Letter  
Private Admonishment  
Public Admonishment  
Public Censure  
Removal or Involuntary Retirement

I.  
OVERVIEW OF THE COMPLAINT PROCESS

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determine – again, following a hearing – to involuntarily retire the judge from office. In cases in which the conduct of a former judge warrants public censure, the Commission also may bar the judge from receiving assignments from any state court.

A judge may petition the Supreme Court to review an admonishment, censure, removal or involuntary retirement determination.

**CONFIDENTIALITY**

Under the California Constitution and the Commission Rules, complaints to the Commission and Commission investigations are confidential. The Commission cannot ordinarily confirm or deny that a complaint has been received or that an investigation is under way. Persons contacted by the Commission during an investigation are advised regarding the confidentiality requirements.

At such time as the Commission orders formal proceedings, the matter becomes public. The charges and all subsequently filed documents are made available for public inspection. Any hearing on the charges is also public.

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## II. LEGAL AUTHORITY AND COMMISSION PROCEDURES



### LEGAL AUTHORITY

#### Recent Changes In The Law

In 1999, after review of public comment concerning interim rules, the Commission adopted rules for the handling of complaints involving subordinate judicial officers – discussed in Section V. The Commission also adopted various changes to its rules and policy declarations and sought further comment regarding additional rule changes, discussed below.

In 1999, the Supreme Court amended canon 3D(3) of the Code of Judicial Ethics, discussed below.

#### California Constitution, Government Code, and Code of Civil Procedure Section 170.9

The Commission on Judicial Performance was established by voter referendum in 1960. The Commission's authority is set forth in article VI, sections 8, 18, 18.1 and 18.5 of the California Constitution. In 1966, 1976, 1988, 1994 and most recently in 1998, the Constitution was amended to change various aspects of the Commission's work.

The Commission also is subject to Government Code sections 68701 through 68755. Commission determinations on disability retirement applications are governed by Government Code sections 75060 through 75064.

In addition, the Commission is responsible for enforcement of the restrictions on judges' receipt of gifts and honoraria, set forth in Code of Civil Procedure section 170.9. For 1999, the gift limitation amount was \$270, as adjusted by

the Commission pursuant to Code of Civil Procedure section 170.9.

The provisions governing the Commission's work are included in Appendix 1.

#### Commission Rules and Policy Declarations

Article VI, section 18(i) of the Constitution authorizes the Commission to make rules for conducting investigations and formal proceedings.

Commission Rules 101 through 138 were adopted by the Commission on October 24, 1996, and took effect December 1, 1996. In October 1998, various new rules and changes to existing rules were adopted by the Commission on an interim basis for the handling of complaints concerning court commissioners and referees, following the passage of Proposition 221 on June 2, 1998. The interim rules and proposed changes to other rules were circulated for public comment in October 1998. Effective February 11, 1999, the Commission adopted changes to the following rules: rule 102(b)(e)(1), rule 109(c)(d), rule 113, rule 115, rule 118(c), rule 119.5, rule 120(a)(b)(c), rule 134, and rule 138(b). Further changes to rule 108(a) and (b) and rule 119(b) were also adopted on an interim basis on February 11, 1999 and circulated for further comment. At year's end, those changes awaited final action by the Commission.

The Commission's internal procedures are further detailed in declarations of existing policy issued by the Commission. The Commission's Policy Declarations were substantially revised in 1997. The Commission approved changes to

Policy Declarations 3.3, 3.4, 3.7.5 and 3.10 on February 11, 1999.

The Commission Rules and Policy Declarations are included in Appendix 1 B and C, with the dates of adoption or approval and the dates of any amendments.

### **Code of Judicial Ethics**

The Constitution requires the Supreme Court to make rules "for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns," to be referred to as the "Code of Judicial Ethics" (California Constitution, article VI, section 18(m)). The Supreme Court adopted the Code of Judicial Ethics effective January 1996, with amendments in 1996, 1997 and 1999. At the request of the Commission, canon 3D(3) was amended by the Supreme Court, effective March 4, 1999. In addition to requiring judges to report to the Commission felony and misdemeanor charges involving moral turpitude, it requires the reporting of misdemeanors involving violence, the use or possession of controlled substances, the misuse of prescription drugs, or the personal use or furnishing of alcohol.

The California Code of Judicial Ethics is included in Appendix 1 E.

## **COMMISSION PROCEDURES**

### **Commission Review of Complaints**

Each written complaint about a California judge is voted upon by the Commission. The Commission determines whether the complaint is unfounded and should not be pursued or whether sufficient facts exist to warrant investigation. (Commission Rule 109.)

### **Investigation at the Commission's Direction and Disposition of Cases Without Formal Proceedings**

When the Commission determines that a complaint warrants investigation, the Commission directs staff to investigate the matter and

report back to the Commission. There are two levels of investigation: a staff inquiry and a preliminary investigation. (Commission Rule 109; Policy Declarations 1.2, 1.4.) Most cases begin with a staff inquiry. In more serious matters, the Commission may commence with a preliminary investigation.

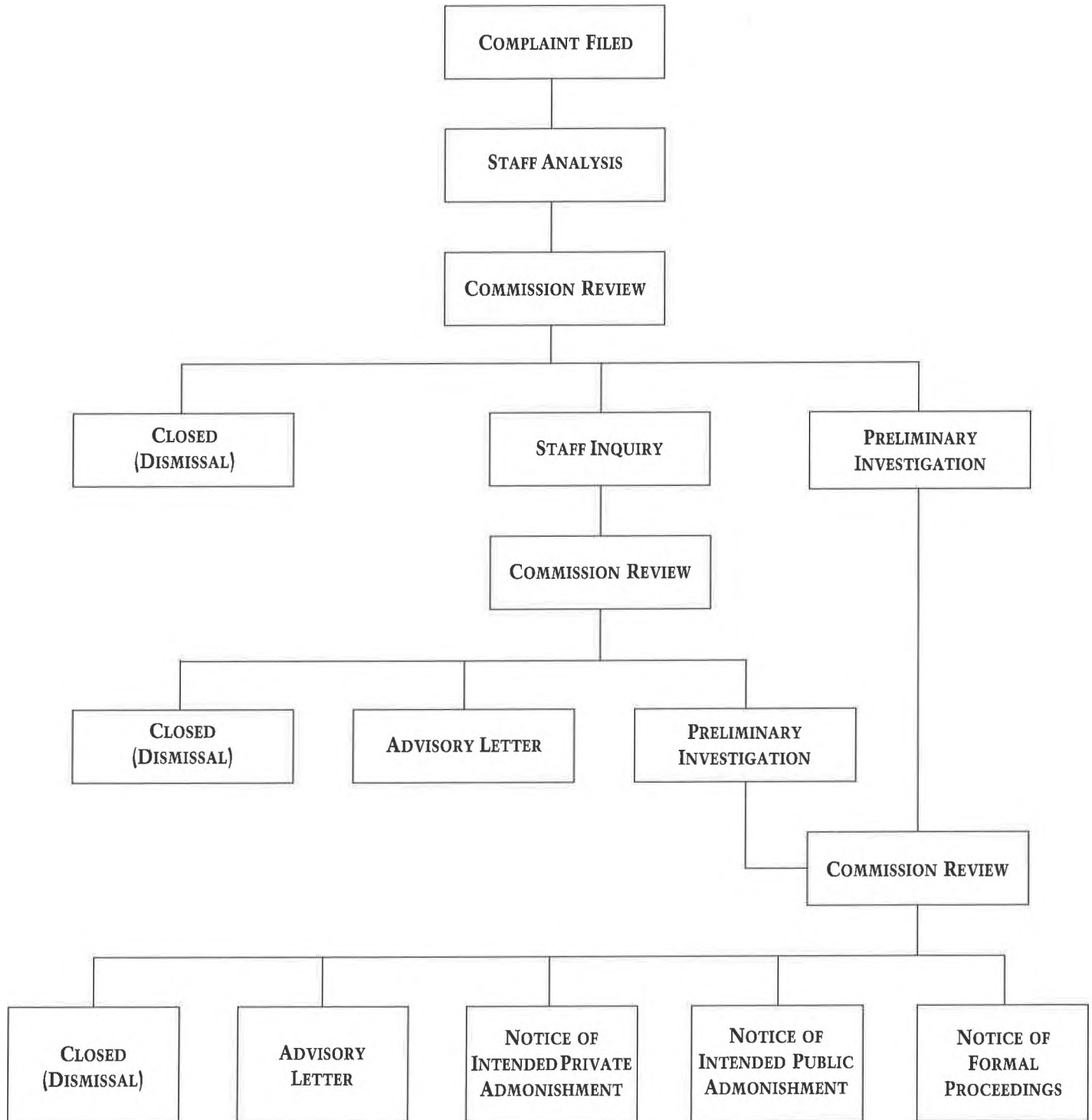
Commission investigations may include contacting witnesses, reviewing court records and other documents, observing courtroom proceedings, and conducting such other investigation as the issues may warrant. If the investigation reveals facts that warrant dismissal of the complaint, the complaint may be closed without the judge being contacted. Otherwise, the judge is asked in a letter to comment on the allegations.

A judge has 20 days from the date of mailing to respond to an inquiry or investigation letter. (Commission Rules 110, 111.) Extensions of time to respond to inquiry and investigation letters are governed by the rules. (Commission Rule 108.)

Following a staff inquiry, the Commission may take one of three actions. If the facts do not support a showing that misconduct has occurred, the Commission may close the case without any action against the judge. If improper or questionable conduct is found, but the misconduct was relatively minor or isolated or the judge recognized the problem and took steps to improve, the Commission may issue an advisory letter. (Commission Rule 110; Policy Declaration 1.2.) In 1999, the California Supreme Court upheld the Commission's authority to issue advisory letters in *Oberholzer v. Commission on Judicial Performance*, 20 Cal.4th 371, discussed in Section IV at page 24. If serious issues remain after a staff inquiry, the Commission will authorize a preliminary investigation. (Commission Rule 109; Policy Declarations 1.2, 1.4.)

After a preliminary investigation, the Commission has various options. The Commission may close the case without action or may issue an advisory letter. (Commission Rule 111;

### COMPLAINT PROCESS



Policy Declaration 1.4.) The Commission may also issue a notice of intended private admonishment or a notice of intended public admonishment, depending upon the seriousness of the misconduct. (Commission Rules 113, 115; Policy Declaration 1.4.) The Commission may also institute formal proceedings, as discussed below.

All notices of staff inquiry, preliminary investigation, or intended private or public admonishment are sent to the judge at chambers, unless otherwise requested. Notices that relate to a staff inquiry are given by first class mail, and notices that relate to a preliminary investigation or intended private or public admonishment are given by prepaid certified mail, return receipt requested. The Commission marks envelopes containing such notices "personal and confidential" and does not use the inscription "Commission on Judicial Performance" on the envelopes. (Commission Rule 107(a).)

### **Deferral of Investigation**

The Commission may defer an investigation of a pending matter under certain circumstances. Deferral may be warranted, under Policy Declaration 1.8, when the case from which the complaint arose is still pending before the judge, when an appeal or ancillary proceeding is pending in which factual issues or claims relevant to the complaint are to be resolved, and when criminal or other proceedings involving the judge are pending. While deferral of an investigation may result in delay in Commission proceedings, deferral is often appropriate to ensure that complaints before the Commission do not affect court proceedings. Deferral while a reviewing court or other tribunal completes its adjudication reduces the potential for duplicative proceedings and inconsistent adjudications.

### **Monitoring**

In the course of a preliminary investigation, the Commission may monitor the judge's conduct, deferring termination of the investigation for up to two years. Monitoring may include

periodic courtroom observation, review of relevant documents, and interviews with persons who have appeared before the judge. The judge is notified that a period of monitoring has been ordered and is advised in writing of the type of behavior for which the judge is being monitored. Monitoring may be used when the preliminary investigation reveals a persistent but correctable problem. One example is demeanor that could be improved. (Commission Rule 112.)

### **Formal Proceedings**

After preliminary investigation, in cases involving allegations of serious misconduct, the Commission may institute formal proceedings. (Commission Rule 118.) Formal proceedings also may be instituted when a judge rejects a private or public admonishment and files a demand for formal proceedings. (Commission Rules 114, 116.) When formal proceedings are instituted, the Commission issues a notice of formal proceedings, which constitutes a formal statement of the charges. The judge's answer to the notice of charges is filed with the Commission and served within 20 days after service of the notice. (Commission Rules 118(a), (b), 119(b).) Extensions of time to respond to a notice of charges are governed by the rules. (Commission Rules 108, 119.)

The rules provide for discovery between the parties after a written notice of formal proceedings is issued. A judge receives discovery from the Commission when the notice of formal proceedings is served. (Commission Rule 122.)

The Commission may disqualify a judge from performing judicial duties once formal proceedings are instituted if the judge's continued service is causing immediate, irreparable, and continuing public harm. (Commission Rule 120.)

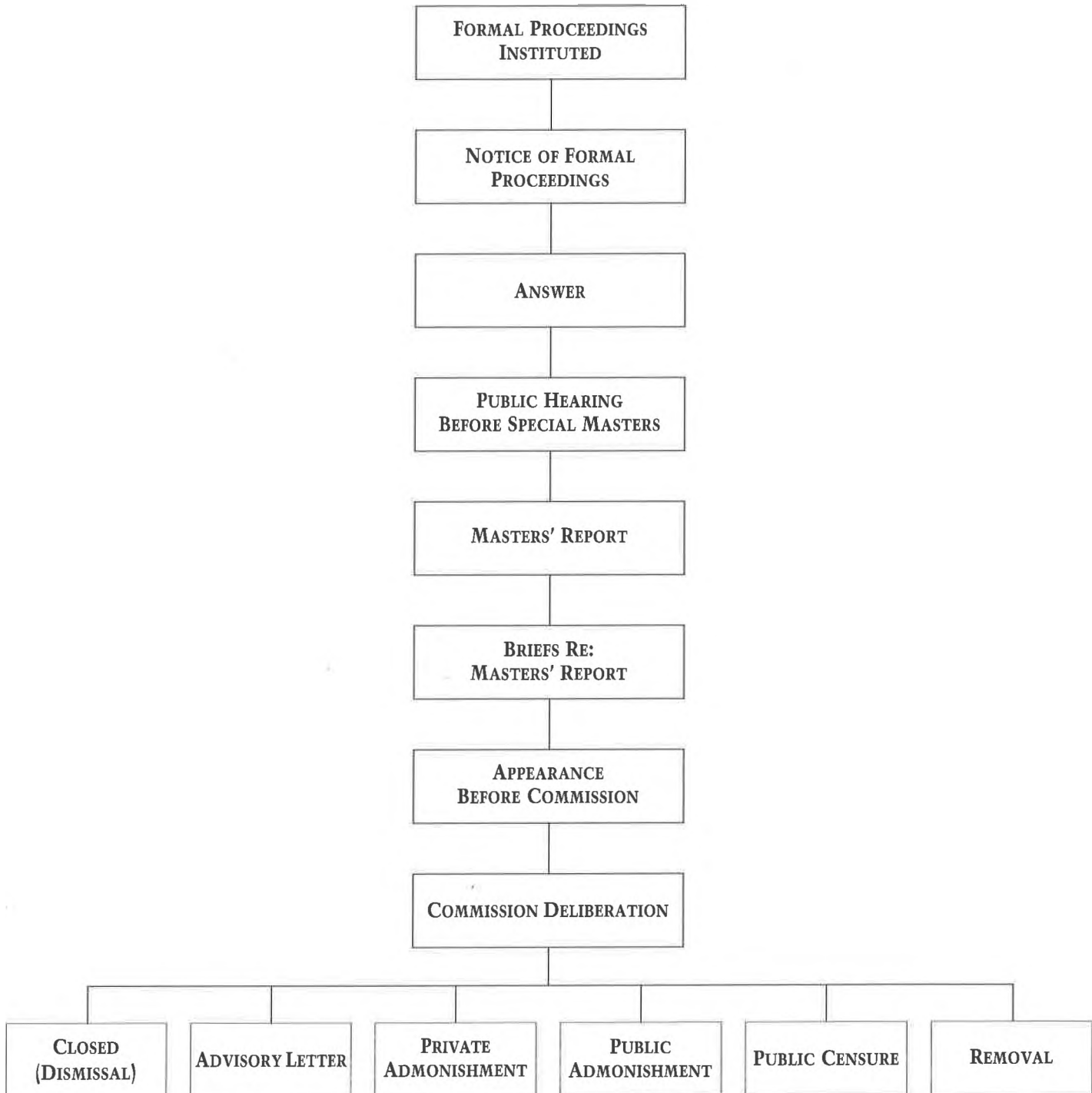
### **Hearing**

After the judge has filed an answer to the charges, the Commission sets the matter for a hearing. (Commission Rule 121(a).) As an alternative to hearing the case itself, the Commis-

**II.**  
**LEGAL AUTHORITY AND COMMISSION PROCEDURES**

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**FORMAL PROCEEDINGS**



sion may request the Supreme Court to appoint three special masters to hear and take evidence in the matter and to report to the Commission. (Commission Rule 121(b).) Special masters are active judges or judges retired from courts of record.

The judge may be represented by counsel at the hearing. The evidence in support of the charges is presented by an examiner appointed by the Commission (see Section VII, Commission Organization, Staff and Budget). The California Evidence Code applies to the hearings. (Commission Rule 125(a).)

### **Commission Consideration Following Hearing**

Following the hearing on the formal charges, the special masters file a report with the Commission. The report includes a brief statement of the proceedings and the special masters' findings of fact and conclusions of law with respect to the issues presented by the notice of formal proceedings and the judge's answer. (Commission Rule 129.) The judge and the examiner are given the opportunity to file objections to the masters' report and points and authorities concerning the issues in the matter and to be heard orally before the Commission upon receipt of the masters' report and any briefs. (Commission Rules 130, 132.)

Amicus curiae briefs may be considered by the Commission when it is demonstrated that the briefs would be helpful to the Commission in its resolution of the pending matter. (Commission Rule 131.)

### **Disposition of Cases After Hearing**

After a hearing on the formal charges, unless the case is closed without discipline, the Commission may take one of the following actions pursuant to article VI, section 18 of the California Constitution:

- Publicly censure or remove a judge for action that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the

use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

- Publicly or privately admonish a judge found to have engaged in an improper action or dereliction of duty.
- Retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent.

In cases involving former judges, after hearing, the Commission may publicly censure or publicly or privately admonish the former judge. The Constitution also permits the Commission to bar a former judge who has been censured from receiving an assignment from any court.

After formal proceedings, the Commission may also close the matter with an advisory letter to the judge or former judge.

### **Release of Votes**

The Commission discloses the votes of the individual Commission members on disciplinary determinations reached after formal proceedings are instituted. In a decision in May of 1999, the Court of Appeal held that disclosure is required by California Constitution, article VI, section 18(j) – enacted as part of Proposition 190 – which mandates that all proceedings subsequent to the filing of formal charges shall be open to the public. (*The Recorder v. Commission on Judicial Performance* (1999) 72 Cal.App.4th 258.) In addition to releasing individual votes on disciplinary decisions after formal proceedings are instituted, the Commission also releases those votes on public admonishments issued pursuant to Commission Rules 115 and 116.

### **SUPREME COURT REVIEW**

A judge may petition the California Supreme Court to review a Commission determination to admonish, censure or remove the judge. Review is discretionary. If the Supreme Court so



chooses, its review may include an independent, "de novo" review of the record. (California Constitution, article VI, section 18(d).) California Rules of Court 935 and 936 govern petitions for review of Commission determinations.

Selected Supreme Court cases involving judicial disciplinary proceedings are listed in Appendix 2.

#### STATUTE OF LIMITATIONS

Article VI, section 18(d) of the California Constitution provides that a judge may be censured or removed, or a former judge censured, only for action occurring not more than six years prior to the commencement of the judge's current term (or a former judge's last term).

#### STANDARD OF PROOF

The standard of proof in Commission proceedings is proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275.)

#### CONFIDENTIALITY OF COMMISSION PROCEEDINGS

The California Constitution authorizes the Commission to provide for the confidentiality of complaints to and investigations by the Commission. (California Constitution, article VI, section 18(i)(1).) The Commission's rules provide that complaints and investigations are confidential, subject to certain exceptions, for example, when public safety may be compromised,

when information reveals possible criminal conduct, and when judges retire or resign during proceedings. (Commission Rule 102(f) - (k); Policy Declarations 4.1-4.6.) During the course of a staff inquiry or preliminary investigation, persons questioned or interviewed are advised that the inquiry or investigation is confidential. (Policy Declaration 1.9; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 528.)

The Constitution permits the Commission to make explanatory statements during proceedings. (California Constitution, article VI, section 18(k); Commission Rule 102(c).)

The Constitution provides that when formal proceedings are instituted, the notice of charges, the answer, and all subsequent papers and proceedings are open to the public. (California Constitution, article VI, section 18(j); see also Commission Rule 102(b).)

After final resolution of a case, the rules require the Commission to disclose to the person who filed the complaint that the Commission has found no basis for action against the judge, has taken an appropriate corrective action (the nature of which is not disclosed), or has imposed or recommended public discipline. The name of the judge is not used in any written communications to the complainant unless the proceedings are public. (Commission Rule 102(e).)

The Commission is also required to provide the text of any private admonishment, advisory letter or other disciplinary action to appointing authorities upon request. (California Constitution, article VI, section 18.5.)

### III.

## 1999 STATISTICS

### ACTIVE AND FORMER JUDGES



#### COMPLAINTS RECEIVED AND INVESTIGATED

In 1999, there were 1,580 judgeships within the Commission's jurisdiction. In addition to jurisdiction over active judges, the Commission has authority to impose certain discipline upon former judges, and the Director-Chief Counsel of the Commission is designated as the Supreme Court's investigator for complaints involving State Bar Court judges.

As noted in Section V, the Commission's jurisdiction includes California's 422 commissioners and referees. The Commission's handling of complaints involving commissioners and referees is discussed in Section V. The statistics presented in this section pertain only to judges.

#### JUDICIAL POSITIONS

As of December 31, 1999

Supreme Court .....	7
Court of Appeal .....	93
Unified Courts* .....	995
Superior Courts .....	264
Municipal Courts .....	221
<b>Total .....</b>	<b>1,580</b>

\*Unified courts are those courts established through voter passage of Proposition 220 on June 2, 1998. The creation of these courts is reflected in the reduction of the number of superior and municipal court positions.

#### New Complaints

In 1999, 1,022 complaints about active California judges and former judges were considered by the Commission for the first time. The complaints set forth a wide array of grievances. A

substantial percentage alleged legal error not involving misconduct. Other common allegations were poor demeanor and bias.

#### 1999 CASELOAD

Cases Pending 1/1/99 .....	120
New Complaints Considered .....	1,022
Cases Concluded in 1999 .....	1,056
Cases Pending 12/31/99 .....	83

Discrepancies in totals are due to consolidated complaints and/or dispositions.

The Commission also received in excess of 500 complaints in 1999 concerning individuals and matters which did not come under the Commission's jurisdiction: federal judges, former judges for matters outside the Commission's jurisdiction, judges pro tem, workers' compensation judges, other government officials and miscellaneous individuals. Commission staff responded to each of these complaints and, when appropriate, made referrals.

#### Staff Inquiries and Preliminary Investigations

In 1999, the Commission ordered 74 staff inquiries and 30 preliminary investigations.

#### INVESTIGATIONS COMMENCED IN 1999

Staff Inquiries .....	74
Preliminary Investigations .....	30

III.  
1999 STATISTICS - ACTIVE AND FORMER JUDGES

### Formal Proceedings

On December 31, 1998, the Supreme Court adopted the recommendation of the Commission and ordered Judge Thomas Fletcher removed from office in *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865. The Supreme Court's decision became final after a petition for rehearing filed by Judge Fletcher was denied on March 17, 1999. The *Fletcher* proceeding was the last matter pending before the Supreme Court in which formal proceedings were instituted prior to March 1, 1995, when Proposition 190 took effect. The *Fletcher* case was governed by pre-Proposition 190 law, pursuant to which the Supreme Court made disciplinary determinations upon recommendation by the Commission.

At the beginning of 1999, there were seven formal proceedings pending before the Commission.<sup>1</sup> The Commission instituted formal proceedings in four cases during 1999. In all of these cases – pursuant to Proposition 190 – the Commission has the authority to impose discipline, including censure and removal, subject to discretionary review by the Supreme Court upon petition by the judge. As of the end of 1999, seven formal proceedings had been concluded and four formal proceedings remained pending before the Commission.

#### FORMAL PROCEEDINGS

Pending 1/1/99 .....	7
Commenced in 1999 .....	4
Concluded in 1999 .....	7
Pending 12/31/99 .....	4

### COMPLAINT DISPOSITIONS

The following case disposition statistics are based on cases completed by the Commission in 1999, regardless of when the complaints were received.<sup>2</sup> In 1999, a total of 1,056 cases were concluded by the Commission.<sup>3</sup> Those cases named 784 active judges and 26 former judges. A chart of the disposition of all cases completed by the Commission in 1999 is included on page 13.

#### TYPE OF COURT CASE UNDERLYING COMPLAINTS CONCLUDED IN 1999

Criminal .....	41%
General Civil .....	21%
Family Law .....	14%
Small Claims/Traffic .....	10%
All Others .....	9%

5% of the complaints did not arise out of court cases. These complaints concerned off-bench conduct, such as the handling of court administration and political activity.

#### SOURCE OF COMPLAINTS CONCLUDED IN 1999

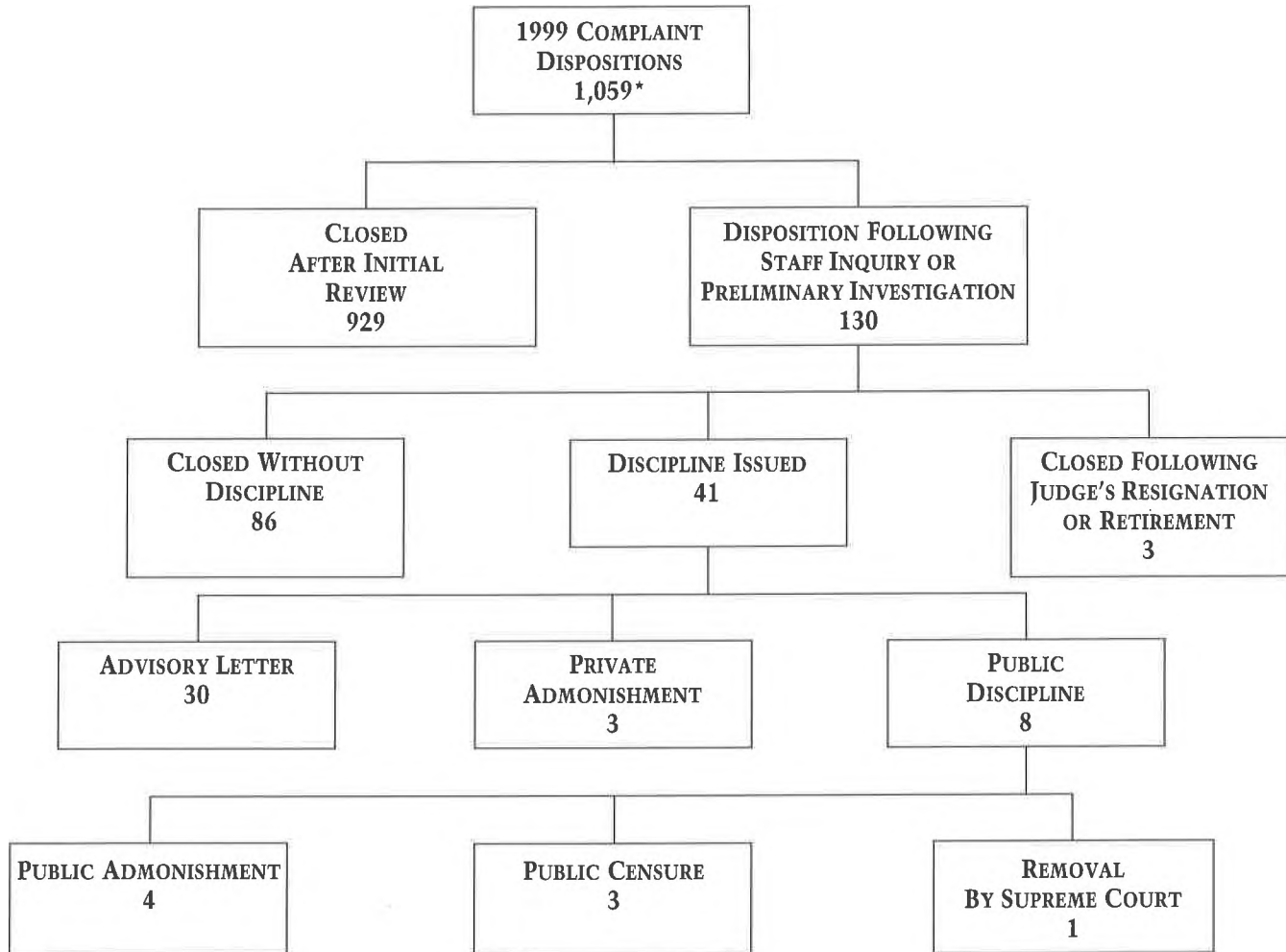
Litigant/Family/Friend .....	82%
Attorney .....	6%
Judge/Court Staff .....	2%
All Other Complainants .....	6%
(including citizens)	
Source Other Than Complaint .....	4%
(includes anonymous letters, news reports)	

<sup>1</sup> The 1998 Annual Report stated that six formal proceedings were concluded and six pending at the end of that year. Those figures should have been five proceedings concluded and seven pending.

<sup>2</sup> Staff inquiries and preliminary investigations in the cases closed in 1999 may have commenced in prior years. Cases or portions of cases pending at the end of 1999 are not included in complaint disposition statistics.

<sup>3</sup> The total number of dispositions exceeds the total number of complaints closed because complaints involving multiple allegations of varying severity may be closed with multiple dispositions. For example, some allegations in a case may warrant closure with an advisory letter while others in the same case warrant public discipline. These dispositions do not always occur within the same year – some allegations may be closed at the time formal charges are issued and the remaining allegations not concluded until after hearing and determination by the Commission.

**1999**  
**COMPLAINT DISPOSITIONS**



\* See footnote 3 at page 12.

### **Closed Without Action**

In 929 of the cases closed in 1999, a sufficient showing of misconduct did not appear after the information necessary to evaluate the complaint was obtained and reviewed. (In other words, there was an absence of facts which, if true and not otherwise explained, might constitute misconduct.) These cases were closed by the Commission without staff inquiry or preliminary investigation.

Following staff inquiry or preliminary investigation, another 86 matters were closed without any action. In these cases, investigation showed that the allegations were unfounded or unprovable, or the judge gave an adequate explanation of the situation.

### **Closed With Discipline**

In 1999, the Commission issued three public censures, four public admonishments, three private admonishments and 30 advisory letters. In one pre-Proposition 190 case, the Supreme Court ordered a judge removed from office. Each of these dispositions is summarized in Section IV.

A chart of the types of judicial conduct which resulted in an advisory letter or other discipline in 1999 appears on page 15. The types of conduct are listed in order of prevalence. The numbers on the chart indicate the number of times each type of conduct resulted in discipline. A single act of misconduct is counted once and is assigned to the category most descriptive of the wrongdoing. If separate acts of different types of wrongdoing were involved in a single case, each different type of conduct was counted and assigned to an appropriate category. If the same type of conduct occurred on multiple occasions in a particular case, however, it was counted only once.

### **Resignations and Retirements**

The Constitution authorizes the Commission to continue proceedings after a judge retires or resigns and, if warranted, to impose discipline upon the former judge. When a judge resigns or retires during proceedings, the Commission determines whether to continue or close the case and, if the case is closed, whether to refer the matter to another entity such as the State Bar. In 1999, the Commission closed three matters without discipline when the judge resigned or retired with an investigation pending.

III.  
1999 STATISTICS - ACTIVE AND FORMER JUDGES

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**TYPES OF CONDUCT RESULTING IN DISCIPLINE\***

**DISCLOSURE,  
DISQUALIFICATION AND  
RELATED RETALIATION**  
[9]

**BIAS OR APPEARANCE OF BIAS  
(NOT DIRECTED TOWARD A  
PARTICULAR CLASS)**  
(includes embroilment, prejudgment,  
favoritism)  
[8]

**FAILURE TO  
ENSURE RIGHTS**  
[7]

**EX PARTE COMMUNICATIONS**  
[6]

**CASE-RELATED  
ABUSE OF AUTHORITY**  
(includes disregard of law, failure to  
exercise judicial discretion, interference  
with attorney-client relationship,  
criticizing jurors)  
[5]

**ABUSE OF CONTEMPT/SANCTIONS**  
[5]

**BIAS OR APPEARANCE OF BIAS  
TOWARD PARTICULAR CLASS**  
[4]

**MISCELLANEOUS OFF-BENCH  
CONDUCT**  
[3]

**OFF-BENCH ABUSE OF OFFICE**  
(includes charitable fund raising,  
improper use of official stationery)  
[3]

**DECISIONAL DELAY,  
TARDINESS, ATTENDANCE**  
[3]

**COMMENT ON  
PENDING CASE**  
[2]

**DEMEANOR, DECORUM**  
(includes inappropriate humor)  
[2]

**FAILURE TO COOPERATE,  
LACK OF CANDOR WITH  
REGULATORY AUTHORITIES**  
[2]

**SUBSTANCE  
ABUSE**  
[2]

**MISUSE OF  
COURT RESOURCES**  
[2]

**ADMINISTRATIVE  
MALFEASANCE**  
(includes conflicts between judges, failure  
to supervise staff, delay in responding to  
complaints about commissioners)  
[1]

**IMPROPER POLITICAL  
ACTIVITIES**  
(includes improper campaign conduct,  
violation of Political Reform Act)  
[1]

**SEXUAL HARASSMENT,  
INAPPROPRIATE WORKPLACE  
GENDER-BASED CONDUCT**  
[1]

**PRE-BENCH MISCONDUCT**  
[1]

**ALCOHOL OR DRUG RELATED  
CRIMINAL CONDUCT**  
[1]

\* See "Closed With Discipline" at page 14 of text.

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## IV. CASE SUMMARIES



### PUBLIC DISCIPLINE

Following is a summary of public discipline imposed in 1999. The full text of these decisions is available from the Commission office.

#### Removal by the Supreme Court

Prior to the passage of Proposition 190, the California Supreme Court had the authority to remove judges from office based upon recommendations made by the Commission. On December 31, 1998, the Supreme Court acted upon the last pre-Proposition 190 recommendation pending before the Court. The Supreme Court's decision in *Fletcher v. Commission on Judicial Performance* became final after the Court's denial of Judge Fletcher's motion for rehearing on March 17, 1999.



#### **Fletcher v. Commission on Judicial Performance (1998) 19 Cal.4th 865**

The Supreme Court ordered Judge Thomas Fletcher of the Madera County Superior Court removed from office for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of California Constitution, article VI, section 18, former subdivision (c), now article VI, section 18(d).

In adopting the Commission's recommendation that Judge Fletcher be removed from office, the Supreme Court found that the judge engaged in willful misconduct when he directed a court clerk to alter a minute order, directed

that the order not indicate that it had been altered, and then submitted the altered order to the Commission with his response to allegations about his handling of the underlying case without detailing the circumstances. The Court found that the judge had attempted to deceive the Commission.

In another matter, the Court found that Judge Fletcher engaged in willful misconduct when he abandoned his judicial role in the handling of a criminal case. Because of a personal conflict with the prosecutor – the judge's political rival – the judge denied the prosecutor's request to dismiss a case and undertook to assume some of the prosecutor's duties.

The Court also determined that the following acts committed by the judge constituted prejudicial conduct:

- Engaging in ex parte communications on numerous occasions with defendants, the family members of a defendant, and a witness, and taking action in cases based on those communications;
- Failing to disqualify himself when his disqualification was legally required;
- Responding improperly to attempts to disqualify him;
- Making disparaging comments about an absent attorney and the office of the district attorney;
- Making a statement indicating prejudgment in a criminal case;
- Improperly using court staff for campaign purposes;
- Improperly telling a clerk she was in contempt; and

- Entering judgment against a nonparty in a small claims case.

The Court stated that these incidents reflected a continuing, pervasive pattern of misconduct and a manifest lack of judicial temperament; it was noted that instead of expressing contrition, the judge had alleged that there was a conspiracy against him. The Court concluded that removal was necessary to protect the public and the reputation of the judiciary.

### **Public Censure by the Commission**

Proposition 190 granted the Commission the authority to impose the sanction of public censure. Pursuant to this authorization, in 1999, the Commission imposed three public censures.



#### **Public Censure and Bar from Assignment of George W. Trammell III, January 5, 1999**

Judge George W. Trammell III (retired), a former judge of the Los Angeles County Superior Court, was publicly censured for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. He also was barred from receiving assignments, appointments or reference of work from any California state court. The Commission's action followed a hearing before special masters.

The Commission found that Judge Trammell engaged in willful misconduct by carrying on, and actively concealing, a sexual relationship with a probationer under his supervision, while continuing to preside over the criminal cases of the probationer's two co-defendants. The Commission also found willful misconduct in the judge's use of his judicial office to further the relationship. Certain ex parte communications with the probationer and her attorney were found to be willful misconduct, as they were made in a judicial capacity and made in bad faith for a corrupt purpose. Other ex parte communi-

cations with the probationer and with a co-defendant and the co-defendant's attorney were found to be prejudicial conduct.

The Commission noted that the judge's conduct warranted removal from office, a sanction not available because the judge had left office, but imposed the maximum discipline available to it because the judge's conduct "compromised the integrity and independence of the bench and cannot be tolerated."



#### **Public Censure and Bar from Assignment of Robert C. Bradley, June 3, 1999**

Judge Robert C. Bradley (retired), a former judge of the Ventura County Superior Court, was publicly censured by the Commission for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. He was also barred from receiving assignments, appointments or reference of work from any California state court. The Commission specified, however, that this bar was without prejudice to Judge Bradley filing, not sooner than a year after entry of the Commission's order, a motion to remove the bar "based on a showing that he has maintained, and is maintaining, complete sobriety." The Commission's action followed a hearing before special masters and an appearance before the Commission during formal proceedings.

The Commission found that Judge Bradley engaged in prejudicial misconduct by:

- Driving under the influence of alcohol on three occasions, resulting in two criminal convictions;
- Coming to the courthouse one morning under the influence of alcohol, shortly after receiving a memorandum from the presiding judge advising of a "zero tolerance" policy regarding the judge's use of alcohol while performing judicial duties;
- Making threats and inappropriate telephone calls about a deputy district at-



torney who had become involved with the judge's estranged wife;

- Surreptitiously entering the family residence and engaging in an altercation with his estranged wife and the police, while under the influence of alcohol in violation of probation conditions, and twice violating an emergency protective order;
- Riding a bicycle under the influence of alcohol, resulting in a criminal conviction.

In mitigation, the Commission noted that Judge Bradley had an excellent judicial reputation before his first arrest. In addition, the Commission noted that the judge had not consumed alcohol for six months before issuance of the censure and that recent declarations from the judge and his treating psychiatrist suggested that the judge was recovering from his alcohol problems.



**Public Censure of Judge Fred L. Heene, Jr.,  
October 13, 1999**

Judge Fred L. Heene of the San Bernardino County Superior Court was publicly censured for misconduct under article VI, section 18(d) of the California Constitution, pursuant to Commission Rule 127 (Discipline by Consent). The Commission's action followed the commencement of formal proceedings.

Judge Heene was disciplined for nine incidents, occurring over slightly less than two years, in which the Commission found that the judge failed to respect the rights of unrepresented defendants in criminal matters before him, as follows:

- The judge ordered the victim in a rape case taken into custody – with no charges having been filed against her – after she testified inconsistently with what she had previously told police.
- The judge refused to allow the defendant

in a traffic matter – who was representing himself – to cross-examine the arresting officer.

- The judge ordered a defendant who was charged with the infraction of driving a vehicle with expired registration to sell his automobile.
- The judge remanded a defendant into custody for failure to complete community service work. The judge did not inform the defendant that he was conducting a probation violation hearing.
- The judge remanded a juror into custody for returning late to court without citing the juror for contempt or otherwise informing him that he was conducting a contempt hearing before finding him in contempt.
- At the arraignment of a defendant charged with speeding and the related misdemeanor of failure to attend traffic school, the defendant indicated that she could pay only the original fine, not the increased fine. Notwithstanding the absence of a plea of guilty or no contest or a conviction at trial, the judge sentenced the defendant and remanded her into custody.
- After the judge declined to appoint counsel for an unemployed defendant charged with a misdemeanor and urged him to get a job, the judge suggested to the defendant that he "go back and talk to the D.A. in earnest about the case."
- At a probation revocation hearing in a misdemeanor case, the judge reinstated and modified the defendant's probation – adding 30 days to the jail sentence – and remanded the defendant without advising the defendant of his constitutional rights regarding revocation of probation (e.g., the right to an attorney, to a hearing, and to subpoena and examine witnesses).
- At a probation revocation hearing in another misdemeanor case, the judge reinstated and modified the defendant's pro-

bation by imposing community service instead of a fine, without advising the defendant of her constitutional rights regarding revocation of probation.

In imposing discipline, the Commission noted the absence of prior discipline and the judge's entry into the proposed disposition as a sign that the judge appreciated his misconduct.

### **Public Admonishments by the Commission**

The Commission may publicly or privately admonish a judge for improper action or dereliction of duty. Public admonishments are issued in cases when the improper action or dereliction of duty is more serious than conduct warranting a private admonishment. In 1999, the Commission publicly admonished four judges.



#### **Public Admonishment of Judge Walter Blackwell III, February 23, 1999**

Judge Walter L. Blackwell III of the San Bernardino County Superior Court was publicly admonished for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, pursuant to Commission Rule 127 (Discipline by Consent). The Commission's action followed commencement of formal proceedings.

Judge Blackwell was disciplined for conduct occurring while he was a practicing attorney, before he became a judge. Because he had assumed judicial office, the State Bar was without jurisdiction to impose discipline. The Commission imposed discipline under article VI, section 18 of the California Constitution, which authorizes the imposition of discipline for conduct occurring not more than six years prior to the commencement of the judge's current term.

Before taking the bench, Judge Blackwell was employed by a bank as its general counsel. Upon the termination of his employment, he entered

into a separation, consulting, and settlement agreement under which he was to receive payments for sixteen months. After making the agreed-upon severance and consulting payments, the bank inadvertently sent eight additional checks, of about \$3,000 each. While the mistaken payments were being made, the former president and CEO of the bank became involved in litigation involving the bank. He retained then-attorney Blackwell to represent him, and the bank agreed to pay his attorney's fees. A dispute arose, however, and the bank refused to pay the fees. Attorney Blackwell sued the bank, and in settlement negotiations agreed to accept \$15,000 for his services if the bank would agree to "a general release of all claims against him, known and unknown." When asked if he knew of any claims the bank might have against him, he replied in the negative. After the bank discovered that it had sent attorney Blackwell eight checks inadvertently, it asked for its money back. Attorney Blackwell refused. The bank sued, and attorney Blackwell raised the settlement agreement and general release as a defense to the bank's claims. The trial court found for the bank and awarded punitive damages based upon a finding of malice and fraud by attorney Blackwell. The Court of Appeal affirmed, but reversed the trial court's order of punitive damages, in an opinion filed after the judge took the bench.

Judge Blackwell and the Commission stipulated that his actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and stipulated to the imposition of a public admonishment.



#### **Public Admonishment of Judge Howard R. Broadman, February 26, 1999**

Judge Howard R. Broadman of the Tulare County Superior Court was publicly admonished for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The

Commission's action followed a hearing before special masters and an appearance before the Commission during formal proceedings.

Judge Broadman was disciplined for his conduct in three matters:

- In a civil case assigned to him for trial, the judge conducted proceedings in an informal manner; he questioned the parties without taking any testimony under oath and stated that he was proceeding "off the record." Judge Broadman then announced that he was taking the case under submission and later signed a statement of decision and judgment. The Commission found that the judge engaged in willful misconduct in denying the parties their right to procedural due process.
- While a fifteen-year-old girl was testifying in contempt proceedings which had been brought against her mother, the judge asked her argumentative and unanswerable questions which appeared designed to intimidate her. The Commission found that the judge's questioning constituted prejudicial conduct.
- In recusing from a case, the judge stated in open court on the record that he was disqualifying himself because one party's attorney, who had made allegations of misconduct against the judge in another case, was "unethical and dishonest." The Commission found that the judge engaged in prejudicial conduct.

These proceedings followed shortly after the Supreme Court's public censure of Judge Broadman in *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079. The Commission noted that the similarity between certain of the conduct in the cases was troubling.



**Public Admonishment of Judge Nancy Brown,  
September 1, 1999**

Judge Nancy Brown of the Los Angeles County Superior Court was publicly admonished for willful misconduct. The Commission's action followed a hearing before special masters and an appearance before the Commission during formal proceedings.

The Commission found that Judge Brown engaged in willful misconduct by banning a court administrator from her courtroom for more than three years and prohibiting him from communicating with her staff during that time. The judge admitted that her purpose was to punish the administrator for perceived mistreatment of another judge. The judge also admitted that she lacked authority to ban the administrator and that she did not reveal the reason for the ban to any judge or to the administrator for more than three years.

The Commission declined to consider whether the judge's past conduct of smoking in chambers constituted anything other than improper conduct.



**Public Admonishment of Judge Lisa Guy-Schall, October 14, 1999**

Judge Lisa Guy-Schall of the San Diego County Superior Court was publicly admonished pursuant to article VI, section 18(d) of the California Constitution and Commission Rule 115 (Notice of Intended Public Admonishment).

Judge Guy-Schall was disciplined for abuse of the contempt power. The judge had a litigant removed from her courtroom for disruptive conduct. Without having the litigant returned to the courtroom, the judge found the litigant in contempt. Without informing the litigant that she was in contempt or giving her an opportunity to respond to the contempt order, the judge sentenced the litigant to five days in jail. The

contempt order entered by the judge failed to state on its face facts sufficient to constitute a contempt, as required by law. The judge acknowledged no problems in her handling of the matter.

### PRIVATE DISCIPLINE

#### PRIVATE ADMONISHMENTS

Private admonishments are designed in part to correct problems at an early stage, thus serving the Commission's larger purpose of maintaining the integrity of the California judiciary.

A private admonishment may also be used to elevate discipline in subsequent proceedings. This is particularly true in cases where the judge repeats the conduct that was the subject of the earlier discipline.

In 1999, the Commission imposed three private admonishments. The admonishments are summarized below. In order to maintain confidentiality, it has been necessary to omit certain details. Thus, some summaries are less informative than they otherwise would be, but because these examples are intended in part to educate judges and assist them in avoiding inappropriate conduct, the Commission believes it is better to describe them in abbreviated form than to omit them altogether.

1. In a number of cases, a judge inappropriately introduced religion into the proceedings, creating the appearance that the judge's rulings were influenced by the judge's personal religious views.
2. A judge conducted a proceeding in such an informal manner that some of the participants were unaware that the judge would rule on the matter at that time; consequently, they did not introduce evidence and testimony. The judge – not wearing the judicial robe – sat at counsel table with the litigants and informally explored their positions.
3. A judge made improper use of court resources and displayed a lack of candor in responding to

the Commission's inquiries about the judge's conduct.

#### ADVISORY LETTERS

The Commission advises caution or expresses disapproval of a judge's conduct in an advisory letter. The Commission has issued advisory letters in a variety of situations. As noted by the California Supreme Court in *Oberholzer v. Commission on Judicial Performance*, "Advisory letters may range from a mild suggestion to a severe rebuke." (20 Cal.4th at p. 393.) An advisory letter may be issued when the impropriety is isolated or relatively minor, or when the impropriety is more serious but the judge has demonstrated an understanding of the problem and has taken steps to improve. An advisory letter is especially useful when there is an appearance of impropriety. An advisory letter might be appropriate when there is actionable misconduct offset by substantial mitigation.

In 1999, the Commission issued 30 advisory letters. These advisory letters are summarized below.

#### Disclosure and Disqualification

A number of advisory letters concerned judges' failing to disqualify themselves when disqualification was required or failing to make appropriate disclosures to those appearing before them. (Canon 3E of the Code of Judicial Ethics.)

1. A judge failed to disclose that the judge was in a business partnership with a member of a law firm whose associate was appearing before the judge and that the partnership received income from the law firm.
2. At sentencing, a judge failed to disclose an association between the judge and the prosecutor and failed to disclose that the judge and the prosecutor had attended a weekend function the week before the sentencing hearing.
3. A judge presided over matters involving an individual from whom a member of the judge's

family was attempting to collect a judgment. In a separate matter, the judge conducted an investigation concerning an issue in the case before the judge.

#### Case-Related Abuse of Authority

Acts in excess of judicial authority may constitute misconduct, particularly where a judge deliberately disregards the requirements of fairness and due process. (See *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 371, 374; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694.)

4. After discovering an error in sentencing, the judge changed details of the disposition of the case without notice to the parties or a hearing.
5. A judge directed the jury commissioner to excuse an employee of a friend of the judge from jury duty without following the court's requirements for release from jury duty.

#### Demeanor and Decorum

A judge "shall require order and decorum in proceedings before the judge" and "shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...." (Canon 3 B(3), (4).)

6. In questioning prospective jurors about their attitudes concerning race in a criminal trial, a judge repeatedly used a racial epithet and negative stereotypes in reference to the defendant's race, with the defendant's apparent consent. The Commission urged the use of other means to accomplish the judge's stated purpose of ferreting out attitudes of racial bias.

7. A judge made undignified and sexually suggestive comments to defendants in two cases.

#### Abuse of Contempt/Sanctions

Before sending a person to jail for contempt or imposing a fine, judges are required to provide due process of law, including strict adher-

ence to the procedural requirements contained in the Code of Civil Procedure. Ignorance of these procedures is not a mitigating but an aggravating factor. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533.)

8. A judge sanctioned an attorney without affording due process. The sanctions order also failed to provide the requisite details of the attorney's conduct, on which the award of sanctions was based.

9. A judge imposed contempt upon a prospective juror without following the requisite procedures. In another case, the judge remanded a misdemeanor defendant into custody out of irritation with what the judge believed to be the defendant's insolent attitude. The judge used the word "contempt" to describe the defendant's remark but failed to follow any of the procedures required for contempt. The judge also made a public comment on a pending case.

10. A judge imposed sanctions on attorneys and pro per litigants without notice or hearing for violation of local delay reduction rules.

#### Ex Parte Communications

Unless expressly allowed by law or expressly agreed to by the opposing party, ex parte communications are improper. (Canon 3B(7).)

11. A judge initiated an ex parte discussion with attorneys present in court about a legal issue that was pending in another case before the judge.

12. A judge engaged in ex parte communications with a defendant and his attorney about a possible sentence modification and then – without prior notice to the prosecutor – the judge modified the sentence.

#### Failure to Ensure Rights

Society's commitment to institutional justice requires that judges be solicitous of the rights of persons who come before the court. (See *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 286.)

13. In two cases, a judge terminated parental visitation in violation of the parents' fundamental rights. In one of the cases, the parent did not receive either notice or a hearing.

#### **Bias**

Judges are prohibited from manifesting bias in the performance of judicial duties. (Canon 3B(5).)

14. During a chambers proceeding in a civil case, a judge referred to the case by the national origin of the litigants and made other comments which appeared to disparage persons from that nation. The judge acknowledged that the remarks were inappropriate and indicated regret for having made them.

15. At the conclusion of a hearing in a criminal matter, a judge made injudicious remarks which suggested a lack of impartiality. The judge also commented publicly on the proceedings.

16. A judge's remarks about sexual orientation may have created the appearance of bias.

17. A judge used a vulgar expression in response to a party's presentation and stated that the judge would rule regardless of the applicable law, which fostered an appearance of prejudgment and bias.

18. In open court, a judge accused an attorney of unethical conduct. The attorney was not present in court when the remarks were made. The judge's comments were unfounded.

19. After a jury returned a verdict of not guilty, but before the jury was discharged, a judge referred to prejudicial and incriminating facts about the defendant, thereby creating the appearance of a lack of impartiality. The judge's remarks also posed the risk of influencing jurors with respect to future jury service.

20. While a case was still pending but no longer before the judge, the judge initiated a private conversation with one of the litigants about the case when the litigant's counsel was not present. The judge made derogatory comments about the litigant's attorney. When information was

sought about the contact in other litigation, the judge gave inaccurate information about the incident.

#### **Sexual Harassment, Inappropriate Workplace Conduct**

The prohibition against manifestation of bias in the performance of judicial duties includes requiring judges to refrain from conduct that could reasonably be perceived as sexual harassment. (Commentary to canon 3B (5).)

21. A judge engaged in conduct toward a member of court staff that reflected unwelcome and excessive personal interest.

#### **Off-Bench Improprieties**

A judge is required to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. (Canon 2A and Commentary.)

22. A judge sent two complaint letters to a company regarding its billings, using official court stationery and the judge's title. The language and tone of the letters gave the appearance of trying to obtain special treatment for the judge.

23. A judge publicly participated in fundraising in violation of canon 4C. The judge also used court resources for the fundraising.

24. A judge improperly interceded with jail officials to help an acquaintance and contacted the judge assigned to the case.

25. A judge mishandled reimbursements the judge received that were owed to the county. The judge also failed to observe high standards of conduct in the judge's personal financial activities, thereby undermining confidence in the judiciary.

#### **Delay, Dereliction of Duty**

Judges are required to perform the duties of

judicial office diligently as well as impartially. (Canon 3.)

26. A judge delayed more than a year in issuing a final order on attorneys' fees. A tentative decision had issued earlier.

#### Miscellaneous

Some cases involved more than one type of misconduct.

27. A judge failed to fully disclose a social relationship with an attorney appearing before the judge. The judge also engaged in ex parte communications in two cases. In another matter, after recusing from the case, the judge issued substantive orders.

28. A judge initiated a conversation in court with a victim – outside the attorneys' hearing – on the day before trial. In another case, the judge appeared to engage in an ex parte conversation with the prosecutor, prior to a hearing, but refused to allow defense counsel to make a record of the incident. On a number of occasions, the judge's advisement about a defendant's right to appointed counsel and obligation to pay for appointed counsel was misleading.

29. A judge failed to recuse from a matter involving a family member. In a separate matter, the judge failed to handle a habeas petition in a timely manner and did not give the petitioner an opportunity to be heard – as required under rule 260(d), California Rules of Court – regarding information properly received ex parte.

30. A judge failed to disclose that a member of the judge's court staff was married to an attorney appearing in a case before the judge. In another matter, out of apparent pique, the judge refused to hear a motion involving matters prejudicial to the defendant outside the presence of prospective jurors. In a separate proceeding, the judge reacted in a hostile manner to an attorney seeking to disqualify the judge. In another matter, the judge made statements displaying discourtesy and lack of impartiality toward the litigants. On one occasion, the judge appeared to be under the influence of alcohol during court

hours. As to the series of events, there was substantial mitigation.



#### **Oberholzer v. Commission on Judicial Performance (1999) 20 Cal.4th 371**

A judge who had received a confidential advisory letter from the Commission in 1997 petitioned the California Supreme Court for a writ of mandate directing the Commission to withdraw the advisory letter. In 1999, the Supreme Court issued its decision rejecting the judge's argument that the Commission lacks the authority to issue confidential advisory letters. The Court held that such letters are discipline, and that adequate due process is provided by the Commission's practice of providing the judge written notice of the nature of the charge and giving the judge a reasonable opportunity to respond in writing. The Court also rejected the judge's argument that a judge may not be subject to investigation or discipline for legal error. The Court held that a judge who commits legal error which, *in addition*, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duties is subject to investigation and discipline. After reviewing the facts underlying the advisory letter issued to Judge Oberholzer, the Court concluded that the letter must be withdrawn because the evidence did not support a determination that the judge's dismissal of a criminal case reflected any of the additional surrounding factors providing a basis for discipline.

#### **DECISION AND ORDER OF DISMISSAL OF FORMAL PROCEEDINGS**

In one matter, the Commission dismissed formal proceedings prior to a hearing before special masters.

The Commission determined to dismiss formal proceedings instituted on June 30, 1998 against Justice J. Anthony Kline of the Court of

IV.  
CASE SUMMARIES

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Appeal, First Appellate District. Justice Kline had been charged with refusing to follow the law governing motions for stipulated reversal established by the California Supreme Court in *Neary v. Regents of the University of California* (1992) 3 Cal.4th 273. In a dissenting opinion, Justice Kline declined to follow the Supreme Court precedent, expressing his view that the Supreme Court's decision was "analytically flawed and empirically unjustified" and stating that he would continue to refuse to apply the rule set forth in the *Neary* decision when asked to do so by litigants but would comply with an order of the Supreme Court to grant any particular request for stipulated reversal.

Citing the California Supreme Court's decision in *Oberholzer v. Commission on Judicial Performance* (discussed at p. 24, *supra*), the Com-

mission found a lack of clear and convincing evidence that Justice Kline's decision to file a dissent was legal error and that the decision was made in bad faith or for some improper motive. The Commission also found a lack of clear and convincing evidence that Justice Kline's statement that he would continue to refuse to apply the law of the Supreme Court decision in question in future cases met the *Oberholzer* standard for the imposition of discipline. The Commission reaffirmed its fundamental belief in the principle of judicial independence, citing its appreciation of the critical need for judicial officers to act both independently and in conformity with the laws of the State, and recognizing that substantial issues arise when these principles clash.



## V. SUBORDINATE JUDICIAL OFFICERS



Since June of 1998, the Commission has had shared authority with local courts over the discipline of "subordinate judicial officers" – attorneys employed by California's state courts to serve as court commissioners and referees. In 1999, there were 422 authorized subordinate judicial officer positions in California.

<b>SUBORDINATE JUDICIAL OFFICERS AUTHORIZED POSITIONS As of December 31, 1999</b>	
Court Commissioners .....	378
Court Referees .....	48
Total .....	422

### COMMISSION PROCEDURES

The constitutional provisions governing the Commission's role in the oversight and discipline of court commissioners and referees expressly provide that the Commission's jurisdiction is discretionary. Each local court retains initial jurisdiction to discipline subordinate judicial officers or to dismiss them from its employment and also has exclusive authority to respond to complaints about conduct problems outside the Commission's constitutional jurisdiction. Since the local court's role is primary, the Commission's rules require that complaints about subordinate judicial officers be made first to the local court. (Commission Rule 109(c)(1).)

There are various ways in which complaints about subordinate judicial officers come before the Commission. First, when a local court completes its disposition of a complaint, that court

must notify the complainant of the right to seek review by the Commission within thirty days. Second, a local court must notify the Commission when it imposes written or formal discipline or terminates a subordinate judicial officer. Third, a local court must notify the Commission if a referee or commissioner resigns while an investigation is pending. (Commission Rule 109(c)(3), (4).) Lastly, the Commission may also investigate or adjudicate a complaint against a subordinate judicial officer at the request of a local court. (Commission Rule 109(c)(2).)

When a matter comes to the Commission after disposition by a local court, the Commission may commence an investigation if it appears that the local court has abused its discretion by failing to investigate sufficiently, by failing to impose discipline, or by imposing insufficient discipline. To assist in coordinating the Commission's review of complaints and discipline involving commissioners and referees, the California Rules of Court require local courts to adopt procedures to ensure that complaints are handled consistently and that adequate records are maintained. (See California Rules of Court, rule 6.655.) Upon request by the Commission, the local court must make its records concerning the complaint available to the Commission.

The Constitution requires the Commission to exercise its disciplinary authority over subordinate judicial officers using the same standards as specified in the Constitution for judges. Thus, the rules and procedures that govern investigation of judges and formal proceedings (discussed above in Section II, Commission Proce-

V.  
SUBORDINATE JUDICIAL OFFICERS

dures) also apply to matters involving subordinate judicial officers. In addition to other disciplinary sanctions, the Constitution provides that no person found unfit to serve as a subordinate judicial officer after a hearing before the Commission shall have the requisite status to serve as a subordinate judicial officer. The Constitution also provides for discretionary review of Commission determinations upon petition to the California Supreme Court.

**1999 STATISTICS**

**1999 CASELOAD**

Cases Pending 1/1/99 .....	3
New Complaints Considered .....	102
Cases Concluded in 1999 .....	104
Cases Pending 12/31/99 .....	1

Because the local courts have the initial responsibility for the oversight and discipline of subordinate judicial officers, the Commission's function with respect to complaints involving subordinate officers primarily entails reviewing the local court's action to determine whether there was an abuse of discretion in that court's disposition of the complaint. In 1999, after review of each complaint and – when appropriate – review of the complete record of the local court's investigation, the Commission authorized further formal investigation in two cases. Both of the cases in which the Commission authorized further investigation were subsequently closed after the Commission determined that neither case warranted the institution of formal

proceedings or further action by the Commission.

In 1999, the Commission reviewed four cases in which discipline had been imposed by local courts and the matters were either referred to the Commission by the local courts under the Rules of Court or submitted to the Commission for review by the complainants. In two of those matters, the Commission declined to take further action, as the complaints had initially been made to the local courts before passage of Proposition 221. In one case, after review, the Commission found no abuse of discretion by the local court in the level of sanction imposed. One matter in which discipline had been imposed by a local court remained under consideration by the Commission at the end of the year.

**TYPE OF COURT CASE UNDERLYING  
SUBORDINATE JUDICIAL OFFICER  
COMPLAINTS CONCLUDED IN 1999**

Small Claims .....	37%
Family Law .....	32%
General Civil .....	9.5%
Traffic .....	9.5%
Criminal .....	7%
All Others .....	5%

**SOURCE OF COMPLAINTS  
INVOLVING SUBORDINATE JUDICIAL OFFICERS  
CONCLUDED IN 1999**

Litigant/Family/Friend .....	96%
Attorney .....	3%
Judge/Court Staff .....	1%

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## VI. VOLUNTARY DISABILITY RETIREMENT



In addition to its judicial disciplinary duties, the Commission reviews judges' applications for disability retirement. The statutory provisions governing judicial disability retirement are set forth in Government Code sections 75060 through 75064. Commission Policy Declarations 5.1 through 5.5 delineate Commission procedures in disability retirement matters.

At the beginning of 1999, two disability retirement applications were pending before the Commission. The Commission received six additional applications during the year.

The Commission granted six disability retirement applications and denied one application during 1999.

One application remained pending at the close of 1999.

## VII. COMMISSION ORGANIZATION, STAFF AND BUDGET



### COMMISSION ORGANIZATION AND STAFF

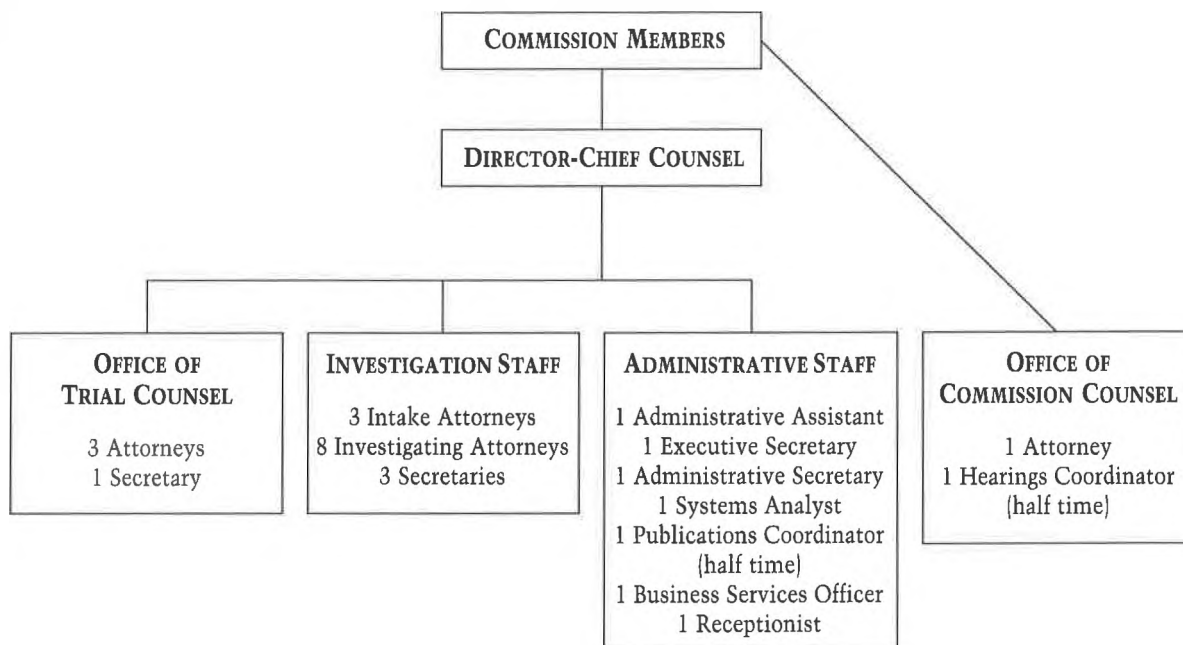
The Commission has 27 authorized staff positions, including 16 attorneys and 11 support staff. All Commission staff are state employees.

The Director-Chief Counsel heads the agency and reports directly to the Commission. The Director-Chief Counsel oversees the intake and investigation of complaints and the Commission examiners' handling of formal proceedings. The Director-Chief Counsel is also the pri-

mary liaison between the Commission and the judiciary, the public, and the media. Victoria B. Henley has served as Director-Chief Counsel since 1991.

The Commission's legal staff includes 11 attorneys responsible for the evaluation and investigation of complaints. Of these, three are primarily responsible for reviewing and evaluating new complaints, and eight are primarily responsible for conducting staff inquiries and preliminary investigations.

### ORGANIZATIONAL CHART



**VII.**  
**COMMISSION ORGANIZATION, STAFF AND BUDGET**

Three Trial Counsel serve as examiners during formal proceedings. The examiner is responsible for preparing cases for hearing and presenting the evidence that supports the charges before the special masters. The examiner handles briefing regarding special masters' reports, and presents cases orally and in writing in hearings before the Commission and the California Supreme Court.

Commission Counsel reports directly to the Commission. Commission Counsel is responsible for the coordination of formal hearings and is solely responsible for assisting the Commission in its deliberations during its adjudication of contested matters. Commission Counsel does not participate in the investigation or prosecution of cases. Richard G.R. Schickele has served as Commission Counsel since July of 1998.

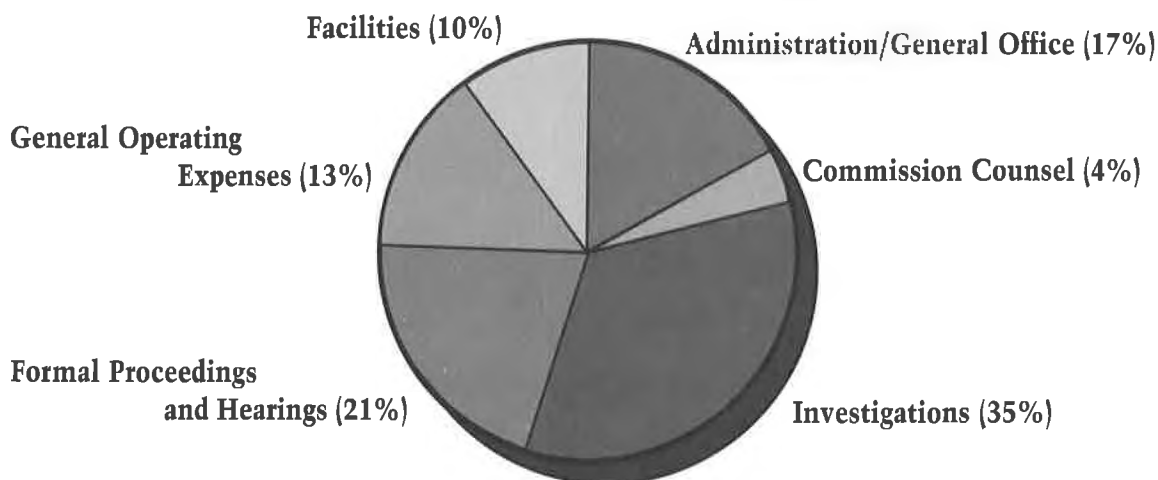
**BUDGET**

As mandated by Proposition 190, the Commission's budget is separate from the budget of any other state agency or court. For the 1999-2000 fiscal year, the Commission's budget allocation is \$3,626,000.

During the 1998-99 fiscal year, approximately 35% of the Commission's budget supported the intake and investigation functions of the Commission and approximately 25% of the Commission's budget was used in connection with formal proceedings. The remaining 40% went toward sustaining the general operations of the Commission, including facilities, administrative staff, supplies, and security.

**COMMISSION ON JUDICIAL PERFORMANCE  
1998-99 BUDGET**

**Percent of \$2,986,879 (Actual Expenditure)**



## APPENDIX 3.

### 10-YEAR SUMMARY OF COMMISSION ACTIVITY

#### NEW COMPLAINTS CONSIDERED BY COMMISSION

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
	885	744	966	950	997	1,263	1,187	1,183	1,125	1,022

#### COMMISSION INVESTIGATIONS COMMENCED

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Staff Inquiries	92 (10%)	109 (15%)	136 (14%)	121 (13%)	120 (12%)	163 (13%)	114 (10%)	132 (11%)	122 (11%)	74 (7%)
Preliminary Investigations	29 (3%)	33 (4%)	15 (2%)	35 (4%)	51 (5%)	64 (5%)	60 (5%)	65 (5%)	65 (6%)	30 (3%)
Formal Proceedings Instituted	9 (1%)	6 (1%)	2 (<1%)	9 (1%)	14 (1%)	4 (<1%)	8 (1%)	5 (<1%)	6 (<1%)	4 (<1%)

#### DISPOSITION OF COMMISSION CASES \*

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Total Dispositions	893	712	975	930	940	1,213	1,176	1,174	1,088	1,059
Closed after Initial Review	787 (88%)	621 (87%)	827 (85%)	809 (87%)	834 (89%)	1,053 (87%)	1,024 (87%)	1,001 (85%)	950 (87%)	929 (88%)
Closed without Discipline after Investigation	45 (5%)	48 (7%)	93 (10%)	79 (8%)	53 (6%)	94 (8%)	102 (9%)	114 (10%)	71 (7%)	86 (8%)
Advisory Letter	41 (5%)	29 (4%)	40 (4%)	26 (3%)	41 (4%)	41 (3%)	34 (3%)	42 (4%)	53 (5%)	30 (3%)
Private Admonishment	11 (1%)	9 (1%)	11 (1%)	7 (1%)	6 (1%)	7 (1%)	4 (<1%)	10 (1%)	3 (<1%)	3 (<1%)
Public Admonishment (or Reproval)	2 (<1%)	0 (0%)	3 (<1%)	2 (<1%)	3 (<1%)	6 (<1%)	3 (<1%)	4 (<1%)	7 (<1%)	4 (<1%)
Public Censure (by Supreme Court or Commission)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	1 (<1%)	4 (<1%)	1 (<1%)	2 (<1%)	3 (<1%)
Removal	3 (<1%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	2 (<1%)	0 (0%)	0 (0%)	0 (0%)	1 (<1%)
Judge Resigned or Retired with Proceedings Pending	4 (<1%)	5 (1%)	1 (<1%)	7 (1%)	3 (<1%)	9 (1%)	5 (<1%)	2 (<1%)	2 (<1%)	3 (<1%)

\* See footnote 3 at page 12.