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**Commission on Judicial Performance Response to “Why a Spotlight must be put on the Commission on Judicial Performance”**

Recently, an entity called Court Reform LLC issued a document entitled “Why a Spotlight must be put on the Commission on Judicial Performance.” It was disseminated to the media and others on the eve of a March 28, 2016 hearing on the commission’s Fiscal Year 2016-17 budget before a subcommittee of the California State Assembly. Court Reform LLC’s website states that it is a court reform advocacy group. The only person identified as affiliated with Court Reform LLC is its founder Joseph Sweeney. At no time prior to the dissemination of the report did Mr. Sweeney or anyone else acting on behalf of Court Reform LLC contact the commission to verify the data or the analysis in the report.

The report purports to compare California’s Commission on Judicial Performance with judicial disciplinary bodies in Arizona, New York and Texas and concludes, based on erroneous selection and interpretation of data, that California’s commission is “a severe, negative outlier in investigating and disciplining judicial misconduct and making efficient use of public funds.” The report claims to demonstrate disparities in investigation rates, discipline rates and budget efficiencies amounting to “typically 200-300% differences across the board,” and concludes by accusing the commission of misappropriation of public funds and urging that the integrity of the commission be questioned.

The statistical analysis of the report is replete with errors and inconsistencies that negate the report’s conclusions. As a result, the commission has taken the time to prepare this response correcting the report’s statistics and analysis. The primary flaw in the report is the failure to compare equivalent data, repeatedly comparing “apples to oranges” instead. This lack of consistency in the report’s comparisons tainted the report’s conclusions as follows:

- To arrive at disciplinary rates and conclude that California’s commission disciplines “at a fraction of the rate of either Texas or New York,” Court Reform LLC based its statistics for New York and Texas not on the number of judges disciplined, but on the **number of complaints** that were pending against judges who were disciplined. In contrast, Court Reform LLC used the **number of judges disciplined** in California to determine California’s disciplinary rate. Since the discipline imposed on a judge often arises out of multiple complaints, this inconsistency in the data severely skewed the results. For example, in 2010 in Texas, there were 35 complaints pending against judges who were publicly disciplined but only 10 judges were publicly disciplined. When the actual numbers of judges disciplined in each state are compared, the average number of judges disciplined each year as a percentage of closed complaints between 2005-2014 was 3.4% in California, 3.6% in Texas, and 1% in New York.

- Court Reform LLC includes as discipline for both Arizona and New York actions that are **not** discipline, such as dismissals with comments including advice or recommendations to the judge. When the numbers of judges receiving actual discipline are compared, over the past 10 years, the average number of judges disciplined each year as a percentage of closed complaints between 2005-2014 was higher in California (3.4%) than either Arizona (3%) or New York (1%).
- New York, Texas and California all have what are called “full” or “formal investigations,” although there are some differences. Each state also conducts some form of preliminary checking for complaints when the merit of the complaint cannot be determined from the complaint alone. Court Reform LLC included data on these preliminary inquiries for New York and Texas, but omitted this data for California. The purported comparisons were further flawed by the failure to correct for differences in how the states count preliminary checking and investigations. Court Reform LLC’s erroneous tallies of preliminary checking and full investigations tainted its purported comparisons of costs per investigation. While the validity of comparing the states by cost per investigation simply by dividing each state’s budget by the total number of preliminary and full investigations is questionable, when comparable and correct data on investigations and budgets is included for each state, California’s average cost per inquiry or investigation in 2014 was \$7,540 (not \$23,427 as represented by Court Reform LLC). New York’s average cost was \$7,525 and Texas’s was \$1,622.
- Court Reform LLC’s comparison of California’s investigations during the periods 1984-1988 and 2010-2014 included preliminary checking of complaints for the earlier period but not for the later period, skewing that comparison as well. It also omitted 171 investigations authorized during the 2010-2014 period. When preliminary checking data is included for both periods and the numbers correctly tabulated, the percentage of cases in which preliminary checking or an investigation was conducted has increased by almost one-third since the 1980’s, from 22.6%<sup>1</sup> to 31.9%, contrary to Court Reform LLC’s representation that investigation rates have decreased.

Each of these points is discussed in greater detail below. All of the reports and data relied on by the commission are available from the commission.

### **States Selected for Comparison**

Court Reform LLC does not explain how it selected the states it compares to California’s judicial disciplinary system. Numerous factors affect disciplinary rates. Court Reform LLC suggests without explanation that a state’s population should affect complaint and disciplinary rates and contends that California should receive more complaints and discipline more often because its population exceeds New York’s and Texas’s. No consideration is given to the significance of the size of the judiciaries in the respective states — California – 2,200, Texas – 3,700, New York – 3,150 — and its effect on the volume of complaints received.

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<sup>1</sup> The 1984-1988 numbers for preliminary checking and investigations may have some overlap. The 2010-2014 numbers contain no duplication. Thus, the percentage increase in preliminary checking and investigations between 1984-1988 and 2010-2014 may actually be greater than 9%.

No consideration is given to differences in the qualifications for judicial office in each state. All of California's 2,200 judicial officers are required to be lawyers, but judges in Arizona, Texas and New York are not. Approximately 40% of New York's judges are non-lawyers and perhaps as much as 50% of the Texas judiciary are non-lawyers, according to staff at the commissions in those states. Legal training or the absence of legal training may affect the incidence of judicial misconduct. It may also explain the prevalence of non-disciplinary dispositions such as advice letters in states with a large number of non-lawyer judges.

As to those judges who have legal training, Court Reform LLC also fails to consider or compare how that training and experience may affect judicial discipline rates. In California all trial court judges must have a minimum of 10 years of State Bar membership. In Texas, all trial court judges must have at least four years of legal experience. In New York, five years of bar membership is required for city court and 10 years for Supreme Court (courts of statewide general jurisdiction). New York's town and village justices, who comprised 64% of New York's judiciary in 2014, must be 18 years old and residents; there is no minimum education requirement. No consideration was given by Court Reform LLC to whether judges in each state were elected to office or appointed through some form of merit selection process, which also impacts disciplinary rates. (See State of California Commission on Judicial Performance – Summary of Discipline Statistics 1990-2009.)

Court Reform LLC also fails to consider the judicial training and education provided to judges in each state, the availability of judicial ethics advice, and other programs to assist judges in performing their duties ethically. California requires every new judge to attend a weeklong "New Judge Orientation" and to attend a two-week "Judicial College." All California judges are required to also complete at least 30 hours of continuing education every three years (Cal. Rules of Court, rules 10.461-10.462), as well as fairness and access education the objective of which is to assist "judicial officers in preserving the integrity and impartiality of the judicial system through the prevention of bias." (Cal. Rules of Court, rules 10.469(e).) Judges serving in family law, domestic violence, and probate courts must complete further formal training within six months of commencing such assignments. (Cal. Rules of Court, rules 10.463-468.) To be eligible for insurance to cover defense costs in disciplinary proceedings, judges must attend a "Qualifying Ethics Training" every three years.

Court Reform LLC also fails to consider other distinct circumstances in each state that appear to affect disciplinary rates. It touts the number of suspensions in Texas without noting that 14 of the 17 suspensions issued in Texas between 2010-2014 involved criminal charges pending against a judge. In California during the same time period, there was only one disciplinary matter that involved criminal charges which, upon conviction, could have resulted in the judge's removal from office had the judge not resigned and stipulated to a censure and bar from judicial assignments, the most severe sanction the commission can impose on a former judge. (*Censure and Bar of Judge Paul D. Seeman* (2013).) Lastly, Court Reform LLC fails to note differences in the disciplinary processes that may impact disciplinary rates, such as differences in the burden of proof in disciplinary proceedings. In both New York and Texas, cases must be proved by only a preponderance of the evidence. In contrast, in Arizona and California, disciplinary charges must be proved by the higher standard of clear and convincing evidence.<sup>2</sup> Texas and California have private discipline; Arizona and New York do not. Standards for review can also differ. For example, California's commission's role in the oversight of subordinate

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<sup>2</sup> In California, the clear and convincing evidence standard was mandated by the California Supreme Court in *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275.

judicial officers is secondary to that of the local court employing the commissioner. The standard for determining whether to open an investigation or impose discipline is when the commission determines that the local court has abused its discretion in the handling of a complaint against a subordinate judicial officer, not the prima facie standard used to open investigations of judges.

### **Comparison of California and Arizona<sup>3</sup>**

Court Reform LLC included Arizona's "dismissals with comments" as discipline in determining Arizona's disciplinary rate, notwithstanding the fact that these dispositions are not discipline. (Arizona Commission on Judicial Conduct, rules 16(b), 17 and 18.) The Arizona commission's most recent annual report explains that the commission may determine "that a judge has not engaged in judicial misconduct, but should be encouraged to avoid similar complaints in the future in an advisory or warning letter." Also in that state, "[a]dvisory letters are issued when a judge's conduct does not technically violate the rules, but the commission believes the judge would benefit from advice in a particular area. A warning letter advises the judge of an evaluated concern that, absent correction on a going forward basis, could lead to judicial discipline." (Arizona Commission on Judicial Conduct 2015 Annual Report, p. 8.) The average annual percentage of judges who received discipline or a dismissal with advice in Arizona was 13.7% of closed complaints over the 10-year period; however, when California's and Arizona's actual discipline is compared, the average number of judges disciplined each year as a percentage of closed cases between 2005-2014 was higher in California (3.4%) than Arizona (3%).

### **Comparison of California, New York and Texas<sup>4</sup>**

The most significant flaw pervading the comparisons of California, New York and Texas is that the statistics for New York and Texas are based not on the number of judges disciplined, but on the number of complaints that were pending against judges who were disciplined. To illustrate, there were 221 complaints pending against judges who were publicly disciplined in New York between 2005-2014, but the number of judges disciplined was only 150. Court Reform LLC appears to have relied upon New York's "Statistical Analysis of Complaints" charts at the end of its annual report, rather than on the statistics about disciplinary actions furnished in the text of each annual report. Similarly, Texas's "Commission Activity" charts, attached to Court Reform LLC's report and apparently relied upon, relate to the disposition of individual complaints, not to the number of judges disciplined. Information on discipline by judge is available on the Texas commission's website and from its office. The statistics used by Court Reform LLC for California, in contrast, relate to the number of judges disciplined. When statistics concerning the actual number of judges disciplined in each jurisdiction are compared, the average number of judges disciplined each year as a percentage of closed complaints between 2005-2014 was 3.4% in California, 3.6% in Texas, and 1% in New York.<sup>5</sup> (As with Arizona, New York's Letter of Dismissal and Caution and Letter of Caution are not private discipline, as represented by Court

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<sup>3</sup> Court Reform LLC Report at pp. 8-9; Appendix Charts at pp. 24 and 29.

<sup>4</sup> Court Reform LLC Report at pp. 9-10; Appendix Charts at pp. 24, 33 and 46.

<sup>5</sup> New York's total number of complaints and average number of complaints per year include complaints against lawyers, federal judges and others not in the commission's jurisdiction. California and Texas do not include such non-jurisdictional complaints in their statistics. For consistency in comparisons, non-jurisdictional complaints have been removed from New York's total complaints in tabulating the average number of judges disciplined each year as a percentage of closed complaints.

Reform LLC. Even if the letters were treated as discipline, New York's average number of judges disciplined as a percentage of closed cases would be 3.3%.)

This inconsistency in data also skewed Court Reform LLC's comparisons of judges who resigned with proceedings pending. While Court Reform LLC claims that New York had 10 times as many judges resign or retire with proceedings pending as did California, in fact, the annual average percentage of such dispositions of total dispositions over the past 10 years was 1% compared to 0.3% in both California and Texas.<sup>6</sup>

Further, in comparing rates of investigations, Court Reform LLC includes data concerning certain levels of investigation for New York and Texas but not for California, skewing those comparisons as well. The descriptions and parameters of investigation differ from state to state and there are some differences in various states' reporting. California has two levels of investigation: staff inquiry and preliminary investigation, the equivalent of "full" investigations in New York and Texas. But California also conducts "preliminary checking" in matters that are not unmeritorious on their face and which often require some factual or legal investigation or workup to assist the commission's review, comparable to Texas's "preliminary investigation" and New York's "preliminary inquiries." Court Reform LLC omitted California's preliminary checking data from the comparisons.<sup>7</sup>

In addition, Court Reform LLC fails to address differences in how preliminary checking and investigations were counted in each state and thus, fails to adjust for some overlapping in the tallies. Texas counts investigations in which the judge is not contacted as preliminary investigations and investigations in which the judge is contacted as full investigations. There is no overlap between the two investigations. In contrast, both New York and California conduct preliminary checking to assist their commissions in deciding whether to open an investigation. Some complaints that receive preliminary checking may be opened as investigations; each of these actions may be separately tallied. Court Reform LLC failed to address differences in how preliminary checking and investigations were tallied to make consistent comparisons.

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<sup>6</sup> According to staff at the New York commission, Court Reform LLC's claim of a larger figure appears to have resulted from its lumping together all New York matters in which a judge left office, even if the departure was not prompted by the New York commission's investigation. For example, while New York reports investigations that are closed when a judge agrees to resign in lieu of discipline, it also reports all other closures due to the judge vacating office. Such closures can include judges who resign to take another job, judges who reach mandatory retirement age, lose reelection or die. Such closures are not on the merits. The only New York resignations that can fairly be attributed to commission action are those in which the judge and the commission publicly stipulate that the judge left office while commission proceedings were pending; and that number, found in the text of the New York commission's annual reports, was 142 between 2005-2014 (or 0.3% of total dispositions), far lower than the 358 that Court Reform LLC claims.

<sup>7</sup> While Court Reform LLC notes that there are approximately 2,200 judicial officers in California, which includes 332 subordinate judicial officers, it fails to include anywhere in its data statistics regarding the approximately 100 complaints against subordinate judicial officers received and processed each year by the commission. Statistics regarding these complaints and dispositions are provided in each of the commission's annual reports.

Although data eliminating any duplication in tallies of preliminary checking and investigations was not available from each state for all of the last 10 years, some data was obtained for 2014. However, the data for Texas and California relates to case dispositions in 2014 whereas New York's data relates to preliminary and full investigations that commenced in 2014. When California's statistics for "preliminary checking" for 2014 (346 complaints) are included, and its staff inquiries and preliminary investigations tallied without overlap (135), California conducted preliminary checking or investigations of 32% of the 1,174 complaints closed in 2014, two and a half times the annual average of 13.6% claimed by Court Reform LLC. In comparison, New York conducted preliminary checking of 499 complaints and 103 investigations, a combined total of 40.2% of the 1,497 complaints it received in 2014. Texas conducted preliminary checking of 278 complaints and 281 full investigations, a combined total of 51.8% of the 1,080 complaints it closed.

While the validity of measuring the efficiency of judicial conduct organizations by simply dividing each state's budget by the number of investigations is questionable, Court Reform LLC's results and conclusions were unreliable for a number of other reasons. As noted, Court Reform LLC included preliminary checking for Texas and New York and not for California and did not address overlap in some of the statistics. Also, Texas pays only \$2,002 annual rent in a state building, as compared to \$954,000 in New York and \$707,000 in California. Omitting rent and eliminating duplication in the counting of investigations to provide for a more consistent cost comparison, the cost per investigation in 2014<sup>8</sup> should have been \$1,622 for Texas, \$7,525 for New York, and \$7,540 for California (not \$23,427 as claimed by Court Reform LLC). The number of inquiries or investigations per staff member should have been 43 for Texas, 13 for New York and 24 for California (not nine as claimed by Court Reform LLC).

### **Alleged Degradation of the Commission's Performance**

Court Reform LLC contends that each complaint before the commission receives an average of 2 minutes 34 seconds of review at its full meeting sessions (Court Reform LLC Report at p.11). The report overlooks that commission members receive voluminous mailings one and two weeks before each meeting to prepare for the agenda.

The report notes that in 2014, the commission dismissed 1,039 of 1,174 complaints without a staff inquiry or preliminary investigation (Court Reform LLC Report at p. 13). Once again, Court Reform LLC did not account for preliminary checking of 346 complaints (not included in the tally of staff inquiries or preliminary investigations) done by staff to assist the commission in determining whether to open an investigation. Court Reform LLC alleges that the commission may be engaging in improper governmental activity by adopting "underground complaint review processes" or allowing staff "to co-opt the complaint review process." Court Reform LLC is wrong: the commission adheres to its rules that require the commission to vote on every complaint.

Court Reform LLC alleges that "inquiry and discipline rates have dropped drastically since the 1980's." Significantly, Court Reform LLC omitted 171 investigations authorized by the commission during the 2010-2014 time period. Court Reform LLC's comparison of California's investigations during the time periods 1984-1988 and 2010-2014 included preliminary checking of complaints for the earlier period

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<sup>8</sup> Data for Texas and California is based on 2014 case dispositions; data for New York is based on cases commenced in 2014.

but not for the later, further skewing the comparison. Also, the data used for the 1984-1988 period relates to checking and investigations of complaints opened each year; data used for the 2010-2014 period relates to case dispositions each year. The commission conducted preliminary checking of 115 complaints on average yearly between 2010-2014. When preliminary checking data is included for both periods and the numbers of staff inquiries and preliminary investigations correctly tabulated, the percentage of cases in which preliminary checking and/or an investigation was conducted has increased by almost one-third since the 1980's, from 22.6%<sup>9</sup> to 31.9%, contrary to Court Reform LLC's representation that investigation rates have decreased.

The number of advisory letters issued by the commission decreased from 1989-1998 (annual average of 40) to 2000-2009 (annual average of 17.5). As noted in the commission's Summary of Discipline Statistics 1990-2009, in 1999, the California Supreme Court decided *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371 [84 Cal.Rptr.2d 466]. One of the issues in the case was whether advisory letters were discipline. The commission had maintained that advisory letters represented informal action by the commission falling short of discipline, like Arizona and New York's dismissals with advice or caution. The *Oberholzer* court held that advisory letters were a form of discipline, not merely advisory or informal action, and, as a consequence the commission has issued advisory letters only when discipline – as distinct from a warning or advice – is appropriate.

#### **The commission's relationship to the Judicial Council and the Courts**

Court Reform LLC contends that the commission was established as part of the Judicial Council and that the commission has retained much of its Judicial Council staff, including the director-chief counsel. From its inception, the commission has been an independent constitutional agency, has never been part of the Judicial Council and its director-chief counsel has never been employed by the Judicial Council.

#### **The commission is exempt from the California Public Records Act and the Bagley-Keene Act**

Court Reform LLC attaches to its report a letter from the commission to the First Amendment Coalition declining to produce records under the Public Records Act, the Bagley-Keene Act and California Rules of Court, rule 10.500 because the commission is exempt from the mandates of those provisions. What Court Reform LLC's report omits is the following statement in that letter:

While the commission is not required to release the records you seek and declines to do so under the foregoing provisions, some of your requests raise issues that I believe should be further considered by the commission. I hope that these issues can be addressed by the commission at its March 23-24, 2016 meeting and that I will be able to get back to you shortly after the meeting.

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<sup>9</sup> The 1984-1988 numbers for preliminary checking and investigations may have included some overlap; some cases in which there was both preliminary checking and an investigation may have been counted twice. The 2010-2014 numbers contain no duplication. Thus, the percentage increase in preliminary checking and investigations between 1984-1988 and 2010-2014 may actually be greater than 9%.

The commission did consider the request at its March 23-24, 2016 meeting and determined to voluntarily make available salary, benefit, expense, attendance and other records regarding the commission's operations, although it cannot produce information regarding confidential case matters.

### **Changes to the commission**

As stated by the commission's director-chief counsel at the March 28, 2016 budget subcommittee meeting, the commission is prepared to provide whatever input the Legislature wishes on the policy issues raised by Court Reform LLC's reform proposals. Certain of the amendments, such as eliminating confidentiality, eliminating private discipline and creating a full-time paid member commission would require amending the constitution.

4/20/16