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Procedures for Judicial Discipline: Type of Commission, Due Process & (and) Right to Counsel

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PROCEDURES FOR JUDICIAL DISCIPLINE: TYPE OF COMMISSION, DUE PROCESS & RIGHT TO COUNSEL

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Recent events have focused public attention on the conduct of public officials.[1] No branch of government is immune but the judiciary, which has been given the last word in our three branched system, is most vulnerable to criticism where it has failed to scrutinize the conduct of its members, to compel conformity to appropriate standards, and to impose discipline for the protection of the public.

The public has an indisputable interest in those who preside in its courtrooms. It also has suspicions about courts and judges which will not be allayed by judicial reluctance to submit to visible disciplinary proceedings. In this era of "sunshine" laws,[2] consumerism[3] and government by public opinion poll, there is also the threat that legislative and executive branches will move into the vacuum where no court initiated judicial disciplinary system exists.

The discipline of judges is not a new idea.[4] Provision for extreme measures such as impeachment, recall or other techniques for removal is common in state constitutions.[5] Judicial discipline systems, however, providing for lesser sanctions and designating tribunals other than the legislature or the public are just now evolving.[6] The first state judicial disciplinary system, California's, dates only from 1960.[7]

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1. The most notable event which has contributed to this trend was the resignation of President Richard M. Nixon on August 9, 1974.

2 *See, e.g.*, ILL. ANN. STAT. ch. 102, §§ 41-46 (Smith-Hurd Supp. 1977); IND. CODE ANN. §§ 5-14-1-1—5-14-1-6 (Burns 1974).

3. H.R. 6805, 95th Cong., 1st Sess. (1977).

4. Only three states have yet to create judicial disciplinary systems: Maine, Mississippi and Washington.

5. *See* Todd & Proctor, *Burden of Proof, Sanctions & Confidentiality*, 54 CHI.-KENT L. REV. 177, 183 (1977) [hereinafter cited as Todd & Proctor].

6. *See* Gillis, *Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach*, 54 CHI.-KENT L. REV. 117, 132-35 (1977) [hereinafter cited as Gillis].

7. *See* Gillis, *supra* note 6, at 117. Judicial disciplinary systems are no doubt viewed by many as experimental and certainly, by few, as traditional. Attorney discipline systems, on the other hand, have been operating throughout the United States for many years. Although aspects of these systems are currently subject to challenge, judges are familiar with the basically self-discipline pattern and would probably be more hospitable to a judicial self-discipline system than to any other. This is likely for several reasons: (1) the identification with lawyers' professional antecedents such as special preparation, motivation to serve the public, the emphasis on self-imposed standards since recipients of the service cannot judge what is or

Most state judiciaries have already taken the initiative in developing judicial disciplinary systems. It is important that these systems achieve maximum effectiveness. It is also important in the interest of maintaining judge morale and public credibility, that there be minimal disparity among the systems.

Therefore, a model code can be useful both to assist the states in evaluating deficiencies in existing judicial disciplinary systems and to assist the courts in states just now establishing such systems. A model code further can present the states with workable procedures which balance the interests of: (1) the public—in the quality and style of its justice system; (2) the courts—in dignified coherent and professional operation; and (3) each judicial officer—whose conduct is to be scrutinized lest his reputation and effectiveness be destroyed by the very process by which that conduct may be vindicated.

The judiciary has responded to the need to establish standards, canons and rules governing the implementation of judicial conduct, canons and rules. A committee of judges and attorneys, drawn jointly from the Appellate Judges' Conference and the Standing Committee on Professional Discipline of the American Bar Association, has drafted proposed *Standards Relating to Judicial Discipline and Disability*.[8] This proposed model code is intended to assist states wishing to improve existing judicial disciplinary systems or to establish new systems.

This article will deal with the procedures in the Proposed Standards. Specifically, major focus will be on those sections of the Proposed Standards relating to the receipt,[9] screening,[10] evaluation,[11] investigation,[12] probable cause determination,[13] adjudication[14] and disposition[15] of judicial disciplinary complaints. The procedural steps will be considered in sequence and their due process implications and other relevant factors will be discussed. A review of the decisions bearing upon due process requirements for such proceedings will indicate where there is currently consensus and where alternate approaches are needed. The cases relied upon will include

should be done, and the mutual recognition of a shared status; (2) due process requirements which have been substantially identified and established; and (3) distrust of the ability of outsiders to maintain the confidentiality of proceedings deemed desirable.

8. ABA PROPOSED STANDARDS RELATING TO JUDICIAL DISCIPLINE & DISABILITY RETIREMENT NOS. 1.1-9.4 (1977) [hereinafter cited in the footnotes as PROPOSED STANDARDS NO. and referred to in the text as the Proposed Standards].

9. PROPOSED STANDARDS, *supra* note 8, at Commentary accompanying NO. 4.1.

10. *Id.* at NOS. 4.3, 4.4 and 4.6.

11. *Id.* at NO. 4.4.

12. *Id.* at NOS. 4.4 and 4.16.

13. *Id.* at Commentary accompanying NO. 4.24.

14. *Id.* at NOS. 5.1-5.28.

15. *Id.* at NOS. 4.22 and 6.1-6.8.

those involving judicial discipline proceedings and, where appropriate, those involving attorney discipline and others from which analogies may be drawn.

THE PROPOSED STANDARDS: ADMINISTRATIVE MODEL, FLEXIBILITY & ADOPTION

The clear majority view is that the disciplinary proceedings can appropriately be conducted by a single body, analogous to that in an administrative agency, which combines the investigative, prosecutorial and adjudicatory powers.[16] The drafters of the Proposed Standards followed the majority view and utilized the single body model as the basis for its proposed system.[17] The single body model is familiar. Its operation is relatively simple; its support costs minimal.[18] The danger of premature publicity is minimized where relevant files and information are kept in a central repository and there is no need for the transmission of such files among multiple disciplinary bodies prior to the commencement of public proceedings.[19] Further, as the number of entities involved increases, the time needed to resolve the matter lengthens.[20]

The emphasis throughout this article will be on the flexibility with which the Proposed Standards can operate. Although the drafters have endorsed a commission structure closely resembling the administrative agency, or single body model, many of the recommendations can be adapted to a multiple unit system. Indeed, differentiation of procedures for both single and multiple unit systems may be quite appropriate for many other reasons. Variations among states with respect to size and density of population, geography and the volume of complaints regarding judicial conduct are among the most significant factors to be considered in connection with the

16. Regardless of whether the disciplinary functions are performed by one entity or several, the same due process protections apply. *See* text accompanying notes 24-55 *infra*. Thus, considerations other than due process result in the recommendation that one body handle the discipline. In New Jersey, for example, where a statutory three judge court conducts the hearing and makes finding and recommendations to the state's supreme court, which finally determines the matter, it must first be constituted to that purpose in each case by the court. Appointment occurs upon the issuance of an order to show cause and the filing of a complaint after court review of a report from an advisory body, created by court rule to investigate allegations of misconduct and make probable cause findings where appropriate. N.J. STAT. ANN. § 2A:1B-2A:7 (West 1970). Cases known to this writer have averaged eleven months from beginning to end. Even if the judge's term does not expire before the case is concluded, mooting the whole thing, such a drawn out procedure cannot contribute to the public confidence in the system.

17. For an explanation of how the multibody, judicial disciplinary approach works, see Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.-KENT L. REV. 69 (1977).

18. *See* Gillis, *supra* note 6, at 128-35.

19. *See generally* Todd & Proctor, *supra* note 5, at 189-99.

20. *See* note 16 *supra*.

manner in which the disciplinary system should operate. Other valid bases for differentiation include the size of the disciplinary budget, the size and professionalism of the staff, the degree of publicity in specific cases, and whether the state's highest court administers both attorney and judicial discipline.

An assumption has been made that state court systems will be organized with the highest appellate court and its presiding member at the apex. Further, it has been assumed that administrative responsibility for the system will be reposed in that court.[21] Mere symmetry would probably suggest that disciplinary authority over the judiciary should also be the high court's responsibility[22] but there are more important reasons.

An administrative authority could not long remain effective if it could not to some extent discipline its members. The power to assign calendars, to designate presiding members of multi-judge courts, to move judges from one location to another, and to require the filing of reports is complemented and strengthened by the responsibility for the imposition of discipline. Thus, the recommended standards for the enforcement of judicial discipline are corollary to those on court organization.[23]

Wherever the Proposed Standards depart from disciplinary procedures which have become customary in a majority of jurisdictions, the departure will be noted and explained. The drafters, as a matter of policy, preferred the familiar to the novel wherever the alternatives were deemed equally effective.

No special mention will be made of transitional steps that may be required as a state adopts the Proposed Standards. Since the changes may be drastic in some jurisdictions and slight in others, general treatment of the area is impossible. It is likely, however, that the adoption of new rules with respect to judicial discipline will follow the usual practice required in each jurisdiction as to the adoption of court rules. Upon adoption, it is recommended that ample advance announcement and explanation be provided.

NATURE OF THE PROCEEDINGS

The due process requirements applicable to judicial discipline as in any adjudicatory system derive from a determination of the particular procedural rights and depend upon the nature of the proceeding and the interests of both the government and the individual.[24] The balancing of public and private

21. Of course, where the judge to be disciplined is a member of the state's highest court, special problems arise. Provision for an alternate court to decide such matters is discussed below. *See* text accompanying note 211 *infra*.

22. PROPOSED STANDARDS, *supra* note 8, at NO. 1.1.

23. ABA STANDARDS RELATING TO COURT ORGANIZATION (1974).

24. Goldberg v. Kelly, 397 U.S. 254, 263 (1969) (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

interests and the relative importance to be accorded each determines the degree to which the adjudicatory proceeding in question must protect the accused. For example, when an accused is confronted with a criminal prosecution where he may face deprivation of liberty by incarceration, he is guaranteed "the full panoply of due process protections."[25] In administrative proceedings, where a statute declares the applicable due process rights and sets forth the procedure to enforce them, as in a proceeding challenging the termination of employment of a non-probationary federal employee, the proceeding is not judicial and the possible loss of one's job is not an interest such as would be deemed analogous to the loss of liberty.[26] Thus, the employee in the administrative proceeding is not entitled to the same degree of due process protection as the accused in a criminal proceeding. Judicial discipline proceedings, however, are conceived of as judicial proceedings and, therefore, even where statutory provisions with respect thereto exist, they are not necessarily controlling.[27]

Disciplinary proceedings have been variously characterized as administrative, civil, and quasi-penal in nature.[28] California views attorney disciplinary proceedings as sui generis, neither civil nor criminal nor administrative, and holds accordingly that "ordinary [criminal] procedural safeguards do not apply."[29] Once it is established that the balance, in disciplinary proceedings, must favor the need "to protect the courts and the public from the official ministrations of the persons unfit to practice"[30] rather than the rights of the individual, it is clear that due process need not approach the criminal standard.

The principal thrust of cases attacking commission proceedings on due process grounds focuses on the fact that disciplinary bodies are empowered to perform both the functions of investigation and adjudication. The leading United States Supreme Court case on this aspect of professional disciplinary proceedings is *Withrow v. Larkin*,[31] involving charges against a licensed physician. In *Withrow*, the Supreme Court held that having a single board investigate and adjudicate the disciplinary case was not violative of due

25. Mildner v. Gulotta, 405 F. Supp. 182, 210 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976) (citations omitted).

26. Arnett v. Kennedy, 416 U.S. 134, 157 (1974).

27. Cincinnati Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 222, 291 N.E.2d 477, 483 (1972).

28. *See* Yokozeki v. State Bar, 11 Cal. 3d 436, 440, 521 P.2d 858, 861, 113 Cal. Rptr. 602, 605, *cert. denied*, 419 U.S. 900 (1974) (administrative); *In re* Haggerty, 257 La. 1, 15, 241 So. 2d 469, 471 (1970) (civil); Mildner v. Gulotta, 405 F. Supp. 182, 191 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976) (quasi-criminal).

29. Yokozeki v. State Bar, 11 Cal. 3d 436, 447, 521 P.2d 858, 865, 113 Cal. Rptr. 602, 609, *cert. denied*, 419 U.S. 900 (1974).

30. *In re* Ming, 469 F.2d 1352, 1353 (7th Cir. 1972) (citations omitted).

31. 421 U.S 35 (1974).

process without a showing of actual bias or so strong a likelihood of bias on the part of the decisionmaker as to be constitutionally intolerable.[32]

In the majority opinion, Justice White reviewed the various kinds of proceedings in which it had been deemed constitutional for both functions to be performed by a single responsible person or body and considered the courts which may try the same case more than once and various administrative agencies in which hearing examiners may hold multiple hearings in a matter either upon reversal and remand or for other reasons.[33] He pointed out that most agencies function under section 5 of the Administrative Procedure Act,[34] which exempts "the agency or a member or members of the body comprising the agency" from the prohibition against an employee's participation or advice in the adjudication of a matter which he has investigated or prosecuted.[35]

Justice White distinguished *In re Murchison*[36] where the judge had impermissibly presided over the trial of a matter as to which he had heard secret testimony by witnesses under compulsion and would be likely to rely on "his own personal knowledge and impression of what had happened in the grand jury room."[37] In *Withrow*, the commission's investigative proceeding, which involved criminal acts charged under an abortion statute, was not public but both the respondent and his counsel were permitted to attend and counsel actually did so. In the Court's unanimous view, this was comparable to a judge presiding, prior to the trial, at various pretrial hearings, as in *Murchison*, including those requiring a preliminary finding of probable cause and not contrary to due process.[38]

Essentially, the court concluded that the performance in disciplinary proceedings of dual functions by one body was constitutional as long as the proceeding remained sufficiently adversarial. The Court said that "[t]he initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation."[39] Where, unlike this case, "the initial view of the facts, based on the evidence derived from non-adversarial processes as a practical or legal matter, foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised."[40]

32. *Id.* at 47.
33. *See id.* at 47-51.
34. 5 U.S.C. § 554(d) (Supp. IV 1974).
35. 421 U.S. at 52.
36. 349 U.S. 133 (1955).
37. *Id.* at 138.
38. 421 U.S. at 56.
39. *Id.* at 58.
40. *Id.* Other courts dealing with attacks on the proceeding on the grounds that multiple

In short, the investigatory, prosecutorial and adjudicative functions are all performed by existing judicial disciplinary commissions and will be so performed pursuant to the Proposed Standards.[41] The United States Supreme Court has approved the use of a single commission in this manner. Conformity to the degree of due process required in other professional disciplinary proceedings is possible within the judicial disciplinary context.[42] Because the nature of disciplinary proceedings is not analogous to that of criminal proceedings, procedural safeguards accorded criminal defendants are often not required in the former.[43] The conceptual difference has been acknowledged and described as "not a full-blown trial but an inquest—a gathering of facts concerning the *conduct* of an attorney, a subject more likely to be illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else."[44]

Generally, professional disciplinary proceedings have been attacked on equal protection grounds because respondents in disciplinary matters are treated differently from other litigants. In *Mildner v. Gulotta*,[45] the petitioner-attorney challenged the New York attorney disciplinary system on the ground that since the appellate courts within the state court system performed an integral role in the disciplinary process, attorneys were denied the protection accorded other professionals in that they were denied appellate review.[46] The majority held that states may "legitimately find reason to conclude that differing procedural safeguards are appropriate for different professions."[47] The Court relied on the United States Supreme Court's view that there is no violation of equal protection if the denial of appellate right is reasonable and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."[48]

The New York system held reasonable by the *Mildner* court involved

functions were entrusted to one body have quibbled about which functions were actually performed. *See In re* Duncan, 541 S.W.2d 564 (Mo. 1976) involving a judge who broke into a neighbor's house, searched it and removed items which might be used as weapons. The disciplinary proceeding there was viewed by the Supreme Court of Missouri as combining, acceptably, an investigatory (not prosecutorial) and judicial function. *See also* McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974).

41. See Gillis, *supra* note 6, at 128-35 for an analysis of how existing systems have incorporated these functions into their systems. *See also* PROPOSED STANDARDS, *supra* note 8, at No. 1.1.

42. *See* text accompanying notes 122-152 *infra*.

43. *See id*.

44. Mildner v. Gulotta, 405 F. Supp. 182, 195 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901 (1976) (emphasis in original).

45. *Id*. at 182.

46. *Id*. at 193.

47. *Id*. (citations omitted).

48. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (*quoted in* Mildner v. Gulotta, 405 F. Supp. 182, 193 (E D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976)).

the use of the same judicial body to license attorneys and to discipline them.[49] In particular, despite a vehement dissent,[50] the Court found that the legislature was not arbitrary or capricious when it established the attorney disciplinary system and determined that final disposition under the system would be conclusive.[51] Appellate review could be had only upon a challenge on the basis of constitutional irregularities or where the appellate court granted a discretionary appeal.[52]

The challenge to the New York attorney discipline system in *Mildner* also focused on the fact that the disciplining court could and did hold, contrary to the report of its factfinder, that the misconduct alleged had been proved and that discipline was warranted.[53] The court, in so doing, did not hear witnesses or oral argument or give reasons for its rejection of the report submitted to it. The dissent thought that where a significant individual right such as a professional license was at stake, minimum due process required the opportunity to confront witnesses.[54] He stressed the stigma attaching to the proceedings and declared that, on balance, the due process to be accorded attorney respondents should amount to that given criminal defendants. This was the minority view in the *Mildner* court and remains so among those who have spoken with regard to judicial disciplinary proceedings.[55]

Judicial disciplinary proceedings are not unconstitutional because they do not treat those charged in the way that the criminal justice system treats criminal defendants. Neither the same separation of functions, allocated to the charging, adjudicatory and appellate entities, nor the same due process requirements are necessary. The Supreme Court has declared that so long as procedural rights appropriate to the proceedings are afforded the disciplinary respondent, the system's structure can utilize a single commission. In the discussion which follows, those rights will be considered in relation to the procedures recommended in the Proposed Standards.

PROPOSED PROCEDURES PRIOR TO FINDING PROBABLE CAUSE

Preliminary Inquiry

The proposed procedures provide for the initiation, on any reasonable basis, of a preliminary inquiry to establish whether there is sufficient justification for a full investigation.[56] A preliminary inquiry is intended

49. 405 F. Supp. at 193-94.
50. *Id.* at 201 (Weinstein, J., dissenting).
51. *Id.* at 194.
52. *Id.*
53. *Id.* at 195.
54. *Id.* at 212 (Weinstein, J., dissenting); *see also In re* Ming, 469 F.2d 1352, 1355-56 (1972).
55. *See* text accompanying notes 25-30 *supra*.
56. PROPOSED STANDARDS, *supra* note 8, at No. 4.1.

primarily to enable accurate evaluation of all matters presented[57] and prompt identification of those properly subject to disciplinary review.[58] This is not the time to investigate in depth. If what is complained about amounts to a disappointed litigant's desire to change the result of a case, appellate review should be suggested.[59]

Present practice in many jurisdictions requires, by rule or by custom, the filing of a sworn complaint. The Proposed Standards recommend that there be no such requirement;[60] any person or group should have the opportunity to initiate a disciplinary inquiry.[61] Since the process is intended not to punish but to ensure judicial fitness, allegations of unfitness should not be disregarded if not under oath.

The inquiry might be triggered by a report in the news media or an anonymous letter.[62] Witnesses or litigants usually do not hesitate to sign their complaint letters but attorneys or court staff, who do not wish to risk a judge's wrath if their information is not taken seriously, might be willing to notify a disciplinary commission about the judge's misconduct if it can be done anonymously. The fact that no one knows who reported that a judge was drunk on the bench does not make him less drunk or more fit.

It is important that publicity be given to the location of the office to which complaints should be directed and that responsible persons, whether committee members or staff, should review the information transmitted with expedition and in confidence.[63] All sources of information should be accorded respect including telephone calls. Reports of misconduct appearing in the press can destroy a judge's reputation. Published items, true or not, are likely to generate public clamor for action and reporters' inquiries about what is being done. These cannot be disregarded because they are not submitted under oath. The judge has a right to expect prompt review by the commission's staff.

Adequate inquiry into allegations regarding a judge's treatment of litigants, attorneys or witnesses, may require a visit or two to his court or a reading of some transcripts before any reasonable evaluation can be made. Other acceptable forms of preliminary inquiry may further include discreet telephone calls, checking court dockets or interviewing complaining witnesses.

Until a screening decision is made following the preliminary inquiry,

57. *Id.*
58. *Id.* at No. 3.4.
59. *Id.* at Commentary accompanying No. 3.4.
60. *Id.* at Commentary accompanying No. 4.1.
61. *Id.*
62. *Id.*
63. *Id.* at Commentary accompanying Nos. 2.8 and 4.4.

the standards provide that the judge need receive no notification.[64] The question of notice to the judge who is the subject of a preliminary inquiry has been considered at length by the drafters. A minority thought the judge should always be apprised of the inquiry, whether or not his comments were sought. It was suggested that such notice might lessen the likelihood of "secret police" tactics or of a disciplinary staff generating business for itself. The majority has adopted the prevailing judicial view that notice is not required until and unless there arises a need for the judge to respond to a charge.[65] Therefore, the standards provide that until an evaluation and screening decision is made, following the preliminary inquiry, the judge need receive no notification of the matter. Of course a staff decision that there is suff:icient basis to proceed necessitates further consideration of the question of notice to the judge. It should be emphasized generally that interviewing of witnesses or the use of other investigatory methods likely to attract attention is not contemplated at this stage.

Proponents of the requirement that sworn complaints must provide the basis for judicial discipline inquiries may believe that this would thereby protect judges from unwarranted attacks. They may also believe that, if complaints had to be sworn to, inappropriate complaints would be less likely to be filed or the commission's staff would be saved wasteful inquiry and screening time. To some degree the latter statement is probably true, but limiting commission inquiries to those matters initiated by complaints under oath will do nothing to protect judges against unwarranted published criticism. Further, such limitation will do nothing to protect the court system where only attorneys, who must appear before a judge, know about his misconduct and, for a variety of reasons, will not wish to be identified as the complainants. Also, there are situations in which no one person deems himself injured by a judge's misconduct and no one would file a complaint even though the public is being disserved. Such reluctance may also apply where a physical or mental disability is present.

An additional consideration of the drafters in rejecting the necessity of a sworn complaint is that mere uncertainty might deter some from coming forward. Swearing to something is a serious matter. The commission should never seem to be inviting complaints but it should be receptive to all who can assist it. Those who think they have relevant information should be allowed to submit it without excessive formality.

To insure the public's confidence in the disciplinary system, all communications regarding a judge's conduct should be reviewed. Preliminary

64. *Id.* at Nos. 4.5 and 4 10.
65. *Id.* at No. 4.5; *see id.* at Commentary accompanying No. 4.5.

inquiries to ascertain the nature of the complaint, not to determine whether there is a substantial basis for it, should be made promptly and discreetly and with complete assurance as to confidentiality to all concerned.[66] On that basis notice to the judge need not be mandatory. Withholding of early notice is appropriate where there is a risk that an investigation might be impeded or undue anxiety would be caused.

Preliminary Evaluation

When the preliminary inquiry has been completed, an evaluation is to be made of the nature of the allegations, their substantiality and the likelihood that, if supported factually, there might be a basis for disciplinary action.[67] The evaluation should be by a senior staff member or, where the commission has no professional assistance, by the chairman or a member to whom the responsibility has been assigned. It is anticipated that the jurisdictions will develop guidelines by which the evaluating officer can judge each matter. Where there appears insufficient cause to proceed upon any of the bases suggested above, or others formulated by the commission, the matter should be dismissed.[68] The file should be closed without investigation. Those who have been informed about the inquiry should be told that it has been terminated without adjudication.[69]

A determination that there is sufficient cause to proceed does not constitute a finding of probable cause. Sufficient cause to proceed means that the allegation against the judge is *not* (1) patently frivolous;[70] (2) merely an effort by a disappointed litigant to get a redetermination;[71] (3) the result of ignorance about judicial proceedings;[72] or (4) a complaint which, even if true, would not be the basis for a disciplinary proceeding.[73] A finding of sufficient cause to proceed means that further investigation is warranted. The results of the investigation will indicate whether a probable cause review need be made.

Information gathered during a preliminary inquiry may be retained even if the charge is dismissed.[74] It may be useful subsequently as an aid in

66. See text accompanying notes 103-116 *infra* for a further discussion of confidentiality in relation to the various stages of the proceedings which follow.

67. PROPOSED STANDARDS, *supra* note 8, at No. 4.4.

68. *Id.* at No. 4.14.

69. *Id.*

70. *Id.* at No. 4.3.

71. *Id.* at No. 3.4.

72. *Id.* at No. 4.3.

73. *Id.*

74. *Id.* at No. 4.15. *See also In re* Kelly, 238 So. 2d 565 (Fla. 1970), *cert. denied sub nom.* Kelly v. Florida Judicial Qualifications Comm'n, 401 U.S. 962, *rehearing denied*, 403 U.S. 940 (1970) (accumulation of evidence of past acts may be used to show a pattern of judicial misconduct).

investigating later allegations of misconduct by that judge. Review of such records might serve to avoid duplication of a previous inquiry upon receipt of similar complaints.

Probable Cause: Pleadings

When an allegation of judicial misconduct is not dismissed following preliminary evaluation and sufficient cause to proceed is found, a formal investigation should take place without delay.[75] The results of this investigation will lead to a presentation to the commission and a determination as to the existence or lack of probable cause.[76]

The investigation must be premised on a filed complaint.[77] A sworn complaint should be obtained from each complainant.[78] This complaint should be differentiated from the formal statement of charges which will be filed prior to a formal hearing in any case in which probable cause has been found.[79] If it is not possible to obtain a sworn complaint, because the witness is not available or adamantly refuses to cooperate, the commission's staff may prepare a clear statement of the allegations.[80] The complaint or the alternative statement should be served promptly on the judge.[81]

In the complaint, each alleged act of misconduct should be set forth clearly.[82] The charges and the facts on which they are based should be specified. Adequate notice to the judge should include an indication of the constitutional, statutory or disciplinary code provisions deemed to have been offended.[83]

Not all courts regard codes of judicial or professional conduct as having legal force. The Louisiana Supreme Court stated in *In re Haggerty*[84] that the Canons of Judicial Ethics[85] merely set a standard of conduct expected of the judiciary without having the force of law.[86] However, the drafters of the

75. PROPOSED STANDARDS, *supra* note 8, at NOS. 4.16 and 4.17.

76. Neither a grand jury nor an analogous charging body is recommended in relation to judicial disciplinary proceedings. *Id.* at NO. 4.24.

77. PROPOSED STANDARDS, *supra* note 8, at NO. 4.16.

78. *Id.*

79. *See* text accompanying notes 122-152 *infra*.

80. PROPOSED STANDARDS, *supra* note 8, at NO. 4.16.

81. *Id.* at NO. 4.17.

82. *Id.* at NO. 4.16; *see id.* at Commentary accompanying NO. 4.17.

83. *Id.* at Commentary accompanying NO. 4.17.

84. 257 La. 1, 241 So. 2d 469 (1970).

85. ABA CANNONS OF JUDICIAL ETHICS (1969).

86. 257 La. at 17, 241 So. 2d at 474. In *Haggerty*, the judge was charged with many indiscretions and the court was considering the question of the adequacy of the notice to him. The court was quite sure that the judge in question knew exactly what he was doing and what standard he was offending when it commented, regarding three women who were invited by him to a stag party, that "*conviction* is not the only method by which it may be established that one is, in fact, a prostitute. . . . It is unthinkable that, knowing the character of the party and the nature of the films to be shown, respondent would have invited decent women to the party." *Id.* at 31-35, 241 So. 2d at 480 (emphasis in original).

Proposed Standards recommend the use of references to such code provision in complaints or statements of charges.[87] Where such codes have been enacted as statutory or court rules, they provide the basis for enforceable conduct standards. Where they do not have such status, they may serve as illustrations of the conduct prescribed by law.[88]

Adequacy of notice is measured at both the probable cause stage and, subsequently, in relation to the formal hearing. The standards, however, which apply are quite different. The question of notice of charges at the preliminary investigation stage was discussed at length by the California Supreme Court in *McCartney v. Commission on Judicial Qualifications*[89] in which it was concluded that "notice to the judge under preliminary investigation as to the nature of the complaints against him is not compelled as a matter of due process."[90] This was deemed true even if the rules governing the commission provided "reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose."[91] In that case, the respondent judge had been made aware of certain welfare fraud allegations against him but he had had no notice of other pending charges until formally served in advance of the evidentiary hearings. The court held that "[a]t [that] stage of the proceedings. . . , the Commission clearly has not yet commenced to perform any adjudicatory function, but is merely attempting to examine citizen complaints in a purely investigatory manner."[92]

A similar question before the Texas Supreme Court in *In re Carrillo*,[93] where the preliminary notice did not set forth all the charges ultimately considered, was resolved in much the same way as by the *McCartney* court.[94] Only the notice of charges filed prior to formal hearings or adjudication was held to be significant with respect to due process and the fact that respondent had replied earlier to a preliminary notice did not prevent amendment and supplementation of the charges, so long as he had ample opportunity to reply and did reply to the twelve charges finally filed against him.[95]

The notice to be provided the respondent judge by the complaint or statement of allegations must be specific enough to allow preparation of a response which will be meaningful. The decisions defining adequacy in this

87. *Id.* at 17, 241 So. 2d at 474.
88. *Id.*
89. 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974).
90. *Id.* at 519, 526 P.2d at 273, 116 Cal. Rptr. at 265.
91. *Id.*
92. *Id.*
93. 542 S.W.2d 105 (Tex. 1976).
94. *Id.* at 108.
95. *Id.*

context make clear the desirability of completeness but also demonstrate enough flexibility to permit supplementation and amendment.

Determination of Probable Cause

A finding of probable cause must be made by the commission before a formal hearing takes place.[96] Since the Proposed Standards do not suggest the test for a finding of probable cause, it may be inferred that the various states are expected to apply their respective standards. It is submitted that for a finding of probable cause, the threshold determinations are that: (1) there is evidence of misconduct; (2) the judge in question engaged in the misconduct; and (3) the misconduct warrants formal review.

The finding could be made without the participation of the respondent judge,[97] but the Proposed Standards contemplate affording him a reasonable opportunity to answer the charges. Provision is made for the judge to respond in writing or, if he prefers, by a personal appearance before the commission.[98] The judge is entitled to counsel and both the judge and the commission are empowered to compel the attendance and testimony of witnesses and the production of books and records.[99]

The Proposed Standards provide that the vote of a majority of the commission members present suffices to establish probable cause.[100] If the commission fails so to find, the disciplinary proceeding should be terminated and prompt notice given to the judge and the complainants.[101] Upon a finding of probable cause, further proceedings are formal and public.[102]

Confidentiality

The drafters have considered at length the problem of balancing the public interest in knowledge of the disciplinary proceedings and the need to protect a judge's reputation from premature, perhaps inaccurate, disclosure. Confidentiality of the proceedings during the preliminary inquiry, the investigatory stage and prior to a determination of probable cause is commonly recognized as appropriate protection for the judge. It has been deemed a matter of right.[103] It is also perceived as secrecy, an opportunity for private arrangements among those wishing to minimize public awareness of a

96. PROPOSED STANDARDS, *supra* note 8, at No. 4.6 and Commentary accompanying No. 4.6.
97. *Id.* at No. 4.21.
98. *Id.*
99. *Id.* at Nos. 4.18-4.20.
100. *Id.* at No. 4.24.
101. *Id.* at No. 4.22.
102. *Id.* at Nos. 5.1-5.28.
103. *See In re* Mikesell, 396 Mich. 517, 533-34, 243 N.W.2d 86, 94 (1974).

judge's misconduct and avoid scandal.[104] The Proposed Standards recommend that the judge be accorded the right to confidential proceedings until there is a determination of probable cause and that he be allowed to waive that protection if he so desires.[105]

In circumstances where both the judge and the public are aware of the proceedings and the matter has not been dismissed upon evaluation following the preliminary inquiry, the judge may believe that his reputation and his judicial effectiveness will suffer more from secrecy regarding the proceedings, even if there is ultimate vindication, than from public knowledge about them. An election or opportunity for reappointment may be imminent. The judge may have reason to believe that his willingness to acknowledge the pendency of the proceedings and to permit disclosure of information about them will assist him in the quest for another term.[106]

Confidentiality regarding the proceedings benefits participants other than the judge. Maintenance of the policy of confidentiality shields witnesses and citizen complainants whose identities are known and who may desire not to be publicly identified until absolutely necessary, such as upon initiation of a formal adjudication hearing.[107] Thus, the threat of a waiver of confidentiality may affect a potential complainant's willingness to come forward. A complainant whose identity is prematurely disclosed in connection with a complaint about one judge may refrain from submitting important information about another.

It is true that the opportunity to provide information anonymously may relieve some informants of anxiety regarding public identification but upon investigation they may well become known. The drafters of the Proposed Standards have concluded that the reasons for accepting anonymous information as a basis for initiating an inquiry apply as well to the need to protect the privacy of known complainants at least until a finding of probable cause is made and a public hearing of the matter is to follow.[108] This position accords with that expressed by the Michigan Supreme Court which stated in *In re Mikesell*:[109]

> If the respondent and others similarly situated were allowed to discover the name of every complainant, including those who will not appear and those whose complaints have been dismissed, the free flow of information to the commission would be curtailed. The commission carefully investigates all complaints and this Court would not want to discourage citizen complainants from voicing their ideas.[110]

104. *See* text accompanying notes 63-65 *supra*.
105. PROPOSED STANDARDS, *supra* note 8, at NO. 4.6.
106. *Id.* at NOS. 4.8 and 4.6.
107. *Id.* at Commentary accompanying No. 4.6.
108. *Id.*
109. 396 Mich. 517, 243 N.W.2d 86 (1974).
110. *Id.* at 534, 243 N.W.2d at 93. *Mikesell* involved a judge who was accused of intemper-

Upon a finding of probable cause and the commencement of the hearing process, "it is no longer necessary to protect the identity of the complainant"[111] because: (1) there is no longer a danger that the charges would be frivolous; and (2) the judge is entitled to know the identity of complainants and witnesses so as to pursue effective discovery in preparation of his defense.[112]

In considering the question of probable cause, the commission may ask the judge to respond to questions or comment about the preliminary inquiry or, thereafter, about the investigation.[113] A problem arises with respect to the judge's participation at this stage, however, because he may decide to rely at a formal hearing on his constitutional right under the fifth amendment not to incriminate himself.[114] Once he has participated voluntarily, however informally, during preliminary proceedings, he will be deemed to have waived that right. This is true with respect to the subject matter about which the judge commented even though the matter was handled confidentially.[115]

The judge charged has been accorded, in the Proposed Standards, confidentiality at all stages of the proceedings prior to a finding of probable cause. He has also been provided the right to request public disclosure of the proceedings at a stage earlier than the adjudicatory hearing. This recommendation is made even though, as indicated above, witnesses and complainants are benefited by confidentiality and are thereby protected from intimidation.[116]

Right to Counsel

Once a judge has notice that charges have been made against him, he is entitled to counsel of his own choice.[117] The problems that may be generated

ance. He was alleged to have repeatedly and continually criticized, abused and harassed attorneys appearing before him and to have failed to remain impartial, frequently taking over criminal matters and assuming a prosecutorial role. There were many complainants. *See also* Kentucky State Bar Ass'n v. Taylor, 482 S.W.2d 574 (Ky. 1972).

111. PROPOSED STANDARDS, *supra* note 8, at Commentary accompanying No. 4.6.

112. *Id.*

113. *See id.* at No. 4.5.

114. *See In re* Haggerty, 257 La. 1, 241 So. 2d 469 (1970).

115. In *Haggerty*, the Louisiana Supreme Court found that, although the respondent had the fifth amendment privilege against self-incrimination as a matter of minimum due process, he had waived it. The court held that he did so not only by his testimony at the hearing, but also by volunteering a statement during the investigation and by his appearance and voluntary testimony for a prehearing discovery deposition. 257 La. at 14, 241 So. 2d at 473. *See also In re* Kunkle, 218 N.W.2d 521 (N.D. 1974), *cert. denied*, 419 U.S. 1036 (1974).

For a discussion of the relationship between a judge's appearance before a grand jury and subsequent proceedings *see* Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972), *cert. denied*, 409 U.S. 1037 (1972). In that case, the testimony preceded the remand in question. *See also* Kugler v. Helfant, 421 U.S. 117 (1975), where a special brand of coercion was claimed by a former judge seeking federal intervention in a state prosecution.

116. *See* 396 Mich. at 534, 243 N.W.2d at 94.

117. PROPOSED STANDARDS, *supra* note 8, at No. 4.18. Apparently the matter of counsel, whether as to the entitlement, selection or consequences of such service, has required little adjudication in the context of proceedings to discipline judges. No reported cases have been

when an attorney representing a judge may also practice in the judge's court must be considered in the light of the impact on the court system and possible appearance of conflict or partiality. In addition, there are questions of fee and the inferences that may be drawn if no fee is charged, the desirability of using counsel with whom the judge may be unfamiliar but whose appearances are not usually in the court where the judge sits, and the permissibility of special admission of counsel who may be experienced in the trial of judicial disciplinary proceedings.

It is reasonable to expect the respondent-judge in disciplinary proceedings to choose to be represented by an attorney he knows and in whom he has confidence, both as to professional ability and as to personal integrity. Such a choice is likely to involve an attorney who practices in the geographical area where the judge sits and may be one who makes appearances before him. If the appearances are occasional, the conflicts of interest that may or may appear to result will reasonably cause the judge to recuse himself from cases involving his counsel. Opposing counsel and his clients should be permitted to request such action if the relationship between the judge and the attorney is known.

If the appearances are potentially frequent, or if it is a single judge court or one with a small bench, such recusal could cause serious imbalances in the handling of the caseload. This is obviously undesirable from the point of view of good judicial administration. If recusal is not used and a party and his attorney are initially unaware of the judge's earlier retention of opposing counsel, the disclosure at some future date of the prior relationship will have serious implications for the reputation of the court system. There is likely to be an inference of partiality on the part of the judge and the usual consequences thereof with respect to challenges to the trial decision. If recusal is not employed and the judge-counsel relationship is known initially, no one appearing in opposition will believe he is facing an impartial judge. This is true even though such opposing counsel may forego moving that the judge disqualify himself lest he incur the displeasure of that judge before whom he must appear in the course of his practice.

It is unfair to put attorneys and clients in the position of having to choose between moving for disqualification or submitting to a court which they believe biased. It is for these reasons that the following suggestion has

found. Nor is there much decisional law regarding counsel with respect to attorney discipline. In one attorney discipline case, however, the attorney-respondent was told by the court that "(a) member of the bar has an obligation to obtain counsel if he wishes to be represented at a hearing." Yokozeki v. State Bar of Cal., 11 Cal. 3d 436, 447, 521 P.2d 858, 865, 113 Cal. Rptr. 602, 609, *cert. denied*, 419 U.S. 900 (1974). The attorney-respondent had an active South Seas practice which presented special problems of communication (and also of discovery since depositions were sought from persons in Tokyo) and the procedural rules were fashioned with great concern for due process on the part of the commission. The respondent was apparently somewhat less diligent about his role, including the retention of counsel. The court seemed to equate the right to appear with the right to counsel.

been made. Where such arrangements can be made, counsel should be chosen from among attorneys whose practice is not in the same geographical area as the court over which the judge presides. Where possible, bar associations should exchange information about the availability of their members to serve judges in commission proceedings occurring in neighboring districts. It may also be that, in the future, some attorneys will develop experience in judicial discipline matters. Such practitioners could be brought from another jurisdiction under a special admission rule for the purpose.

An additional problem which arises in the occasional case involving protracted proceedings is that of the cost of counsel. Where the factual basis for the charges is complicated and involves the analysis of much data or extended discovery or the presentation of many witnesses, the matter may be prolonged. This is especially true where the commission itself hears the evidence and its meetings cannot be scheduled continuously but must be adjourned and resumed periodically. There may also be a delay if elaborate physical or mental examinations are indicated and the reports thereof require specialized interpretation.

The suggestion that counsel should be provided at public expense was rejected by the drafters even where fees may mount up for special reasons because of the anticipated adverse public reaction. Presently counsel is provided at public expense in most jurisidictions only to indigents.[118] Judges are certainly not viewed by the public as indigents or anywhere near indigent. Besides, judicial disciplinary proceedings cannot be equated with criminal proceedings. It is only in criminal matters that the constitutional right to counsel has been found to require the appointment and public reimbursement of attorneys.

The Proposed Standards recommend that all costs associated with the proceedings should be borne by the public,[119] except the judge's counsel fee.[120] There is also provision for the assessment of costs as a sanction.[121]

The drafters believed that except for an extraordinary situation, a respondent judge should arrange for his own representation. There is a likelihood in some circumstances that counsel fees will not be charged. That may involve the incurring of some obligation on the part of the judge represented, resulting in increased appearance of probable bias as discussed above. As to the propriety of representation without fee, the drafters have taken no position. Judges must be expected to evaluate fairly their ability to deal impartially with attorneys in matters before them and, in doing so, to weigh carefully acceptance of an attorney's services for any purpose.

118. *See* Gidion v. Wainright, 372 U.S. 335, 344-45 (1969).
119. PROPOSED STANDARDS, *supra* note 8, at NO. 5.28.
120. *Id.* at Commentary accompanying No. 5.28.
121. *Id.*; *see id.* at NOS. 5.25 and 6.8.

ADJUDICATION: PROCEDURES AFTER FINDING OF PROBABLE CAUSE

Notice: Procedural Due Process Considerations

These Proposed Standards provide that, once probable cause is found, a series of procedures dealing with the initiation, conduct and resolution of a formal adjudicatory process shall follow.[122] These procedures include the filing of formal charges; [123] service on the judge;[124] provision of an opportunity to respond;[125] preparation and discovery;[126] conduct of the hearing;[127] and the disposition.[128] There is provision for the amendment of the statement of charges,[129] for the preparation of transcripts[130] and for the utilization of the report where the factfinder is not the whole commission.[131] The proposed procedures are expected to be implemented by the state's adoption of procedural rules appropriate to the jurisdiction.[132] Although the Proposed Standards were intentionally drafted with less specificity than is expected to characterize the procedural rules as ultimately adopted by the states, the desirability of adopting rules to facilitate expeditious disposition of judicial disciplinary cases is emphasized.[133]

Adherence to procedural due process standards is required in judicial disciplinary proceedings as it is required in any formal adjudicative process. Respondents must be accorded fair, reasonable notice of the charges against them and an opportunity to be heard. The timing and manner of notice is significant.[134] Notice requirements must be measured in association with the opportunity afforded the respondent to obtain discovery, to compel tes-

122. *Id.* at NOS. 5.1-5.28.
123. *Id.* at NO. 5.1.
124. *Id.* at NO. 5.2.
125. *Id.* at NO. 5.3.
126. *Id.* at NOS. 5.4 and 5.6-5.8.
127. *Id.* at NOS. 5.9-5.15.
128. *Id.* at NOS. 5.20-5.24.
129. *Id.* at NO. 5.16.
130. *Id.* at NO. 5.18.
131. *Id.* at NO. 5.19.
132. For example, in a small state the commission may be able to meet in a central location. In a large state, it might be necessary to ride circuit. Hearings before the whole commission might be appropriate in states with small or moderate caseloads. Where the volume is great three member panels or referees (masters) might be utilized to increase productivity. Referees might be used where a hearing is expected to be of long duration or to involve especially complex or technical matters.
133. PROPOSED STANDARDS, *supra* note 8, at Commentary accompanying NO. 5.5. The setting of deadlines must take note of staff capacity, degree of public scrutiny and other relevant factors. As long as they are reasonable in each case, the time limits provided do not need to be the same. *See* note 117 *supra*.
134. Goldberg v. Kelly, 397 U.S. 254, 268 (1970). In *Goldberg*, where welfare payments were at stake, the New York practice of seven days notice by letter and personal conference was acceptable to notify the potential recipient that there were questions regarding the recipient's continued eligibility. The Supreme Court suggested that in some cases it would be fairer to give more time. However, the fatal due process defects occurred when the city denied the

timony and production of materials, to move for particularization, and other means by which he can prepare a response and a defense.[135]

The United States Supreme Court applied the fair notice and hearing test in the leading case on procedural rights in attorney discipline proceedings, *In re Ruffalo*.[136] In that case, the respondent was a trial lawyer whose practice included many Federal Employers' Liability Act[137] cases. Respondent had been charged, originally, among other counts, with using an agent to solicit FELA plaintiffs as clients. During the hearings, respondent testified, as did the agent, that the latter did not solicit clients but merely investigated FELA cases for him. Since some of the cases investigated involved, as defendant, the Baltimore & Ohio Railroad, the agent's principal employer, the disciplinary board permitted the pleadings to be amended to include a count charging that the attorney hired the agent to investigate his own employer. A motion to strike the new charge was denied but a continuance to prepare a response thereto was granted.[138]

The Supreme Court concluded that the respondent had been deprived of fair notice and an opportunity to be heard because the charge, as amended, was not known before the proceedings began and no new evidence was taken to determine its validity—all the relevant evidence was adduced prior to the amendment.[139] The attorney had "had no notice that his employment of [the agent] would be considered a disbarment offense until *after* both he and [the agent] had testified at length on all material facts pertaining to this phase of the case."[140] The Court emphasized that the charges must be made known before the disciplinary proceedings commence. "They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh."[141] The Court reversed the disbarment decision below on the ground that "[t]his absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."[142]

The need for specificity of the formal charges is related to the opportunity given a respondent to request clarification, particularization and to obtain discovery. Where courts have made statements as to the necessary

recipients an opportunity to appear personally or by counsel before the official determining eligibility. Thus, no evidence could be presented nor could witnesses be confronted or cross-examined.

135. *Id.* at 267-69.
136. 390 U.S. 544, 550 (1967).
137. 45 U.S.C. §§ 51-54 (1970) [hereinafter referred to in the text as the FELA].
138. *See* 390 U.S. at 545-47 for the factual background of the *Ruffalo* case.
139. *Id.* at 549.
140. *Id.* at 550-51 (emphasis added).
141. *Id.* at 551.
142. *Id.* at 552.

degree of specificity, they have tended to emphasize the noncriminal nature of the proceedings and to allow pleadings which give adequate notice even though they may be inartfully drawn.[143] The states might consider adopting the rule applied by the Supreme Court of Louisiana in *In re Haggerty*.[144] This approach emphasizes that the factual allegations should be "sufficiently specific to fairly inform the respondent of the charges against him and of the nature of the facts sought to be proved so as to enable him to prepare his defense."[145] The Court pointed out that respondent retained the right to request a supplementary hearing to produce further testimony in rebuttal or explanation of evidence adduced by the commission or where he might have been surprised.[146]

As to the length of time to be given a judge to prepare his defense in a disciplinary proceeding, there is no clear rule established. In *McCartney v. Commission on Judicial Qualifications*,[147] the court indicated that three months was ample. In *In re Hanson*,[148] the Alaska Supreme Court found satisfactory written notice to respondent by certified mail, at least fifteen days prior to the scheduled hearing. The Supreme Court of Texas, in *In re Carrillo*,[149] viewed notice as adequate where the notice was filed on October 8, 1975, and the pretrial hearing was October 25, 1975, and a hearing on the merits was November 3, 1975. Each jurisdiction should establish reasonable notice provisions and permit, as appropriate, additional time for preparation by respondent for the hearing.

Motions for increased specificity are provided for under the Proposed Standards and are to be presented to the commission.[150] An appeal from the commission ruling is available.[151] Amendment to charges is permitted, pursuant to the Proposed Standards, so long as a reasonable amount of time following amendment is allowed for the preparation of the defense and so long as respondent has not testified with respect to the subject matter of the amendments.[152]

Discovery

The Proposed Standards recommend that commission rules provide that all parties to judicial discipline proceedings be entitled to discovery to

143. *See In re* McKay, 280 Ala. 174, 191 So. 2d 1 (1966); *In re* Kunkle, 218 N.W.2d 521 (N.D. 1974), *cert. denied*, 419 U.S. 1036 (1974).
144. 257 La. 1, 241 So. 2d 469 (1970).
145. *Id.* at 19, 241 So. 2d at 475.
146. *Id.* at 22-23, 241 So. 2d at 476.
147. 12 Cal. 3d 512, 519, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1974).
148. 532 P.2d 303, 305 (Alas. 1973).
149. 542 S.W.2d 105, 108 (Tex. 1976).
150. PROPOSED STANDARDS, *supra* note 8, at Commentary accompanying NO. 5.3.
151. *Id.* at NOS. 7.1-7.13.
152. *Id.* at NO. 5.16; *see* Farnham v. State Bar, 17 Cal. 3d 605, 552 P.2d 445, 131 Cal. Rptr. 661 (1976).

the broadest extent available in the jurisdiction for any kind of judicial proceeding.[153] The breadth of discovery recommended exceeds that now available in most jurisdictions. For example, although the courts that have spoken on the subject have viewed discovery as a matter of discretion to be exercised by the commission,[154] the prevailing practice is to require respondent to demonstrate that he has been prejudiced because of a lack of discovery.[155] If he is persuasive, the denial of discovery may not be sustained.[156]

The respondent failed to meet the burden in *In re Dupont*.[157] In that case, the respondent had been given access to tape recorded conversations on which charges regarding the possession and sale of stolen guns were based. Further, although offered an opportunity to do so, the respondent failed to request an additional hearing to produce evidence in his own defense. The court was not persuaded that the disciplinary hearing denying him prehearing discovery had been unfair.[158]

The failure to allow discovery of the identity of citizen complainants was not deemed error by the Supreme Court of Michigan in *In re Mikesell*[159] which held that the policy of confidentiality with respect to such information should govern.[160] In *Mikesell*, where the judge was charged with lack of judicial temperament, the court approved the commission's limitation to discovery of items other than depositions, even where the statute authorized depositions or, alternatively, written interrogatories.[161]

The judicial discipline decisions do not seem to be concerned with the availability of investigative reports. They are probably not generally discoverable, as work product or as a mere "step in the private deliberations of the fact-finding body" or on analogy to the confidentiality of grand jury proceedings.[162] Consideration, without disclosure, of such reports by the commission, if confined to the probable cause stage, should not be objectionable. The drafters of the Proposed Standards believe that judges threatened with discipline should have the best possible opportunity to prepare a defense.[163] The breadth of discovery suggested is intended so to assist the judge.

153. PROPOSED STANDARDS, *supra* note 8, at NO. 5.7.
154. 12 Cal. 3d 512, 520, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1973).
155. *See, e.g., In re* Dupont, 322 So. 2d 180, 183 (La. 1975).
156. *Id.*
157. *Id.*
158. *Id.*
159. 396 Mich. 517, 243 N.W.2d 86 (1976).
160. *Id.* at 534, 243 N.W.2d at 94.
161. *Id.* at 533-34, 243 N.W.2d at 93-94.
162. Crooks v. State Bar, 3 Cal. 3d 346, 355, 475 P.2d 872, 878, 90 Cal. Rptr. 600, 606 (1970).
163. PROPOSED STANDARDS, *supra* note 8, at Commentary accompanying NO. 5.7.

Availability of discovery, as a matter of right, eliminates the need for motions for discovery and for commission deliberations with respect thereto There seems to be no policy argument denying broad discovery, although it is not required constitutionally for due process.[164] Elimination of the need for motions is expected generally to accelerate the discovery and preparation for hearing. The public, the judge and the commission are, then, all better served by the innovation proposed than by the prevailing method.

The Hearing

A judge who is the subject of disciplinary proceedings is entitled to certain due process protections with respect to the conduct of the formal hearing. The protections should be sufficient to ensure a fair trial.[165] Among those are the right to counsel, the right to respond to charges, which includes the right to produce, examine and cross-examine witnesses, and the right (at least where there are or may be related criminal proceedings) of respondent and his witnesses to claim the privilege against self-incrimination.[166] The full panoply of protection afforded defendants in criminal proceedings is not constitutionally required.[167]

The Proposed Standards provide for the scheduling of the hearing without undue delay and for notification to respondent and counsel of the date, time and place.[168] The hearing is to be conducted in a formal manner, presided over by a judge or attorney.[169] Testimony should be under oath.[170] The rules of evidence applicable to civil proceedings in each respective jurisdiction should apply. The exclusionary rules followed in criminal proceedings do not apply.[171] The burden of proof does not shift to the respondent-judge except that, if the facts justifying disciplinary action are established by clear and convincing evidence, the judge should have the burden

164. Several attorney disciplinary proceeding cases have discussed discovery problems, but in much narrower contexts. *See, e.g.*, Farnham v. State Bar, 17 Cal. 3d 605, 609, 552 P.2d 445, 447-48, 131 Cal. Rptr. 661, 663 (1976); *In re* Logan, 70 N.J. 222, 229, 358 A.2d 778, 791 (1976); Archer v. State, 548 S.W.2d 71, 74-75 (Tex. 1977).

165. *In re* Hanson, 532 P.2d 303, 305 (Alas. 1975) (quoting K & L Distribs., Inc. v. Murkowski, 486 P.2d 351, 357 (Alas. 1971)).

166. *Id.* at 305.

167. *Id. But see* Spevak v. Klein, 385 U.S. 511 (1967) (availability of fifth amendment for use in non-criminal proceedings is restricted).

168. PROPOSED STANDARDS, *supra* note 8, at NO. 5.5. *See In re* LaMotte, 341 So. 2d 513 (Fla. 1977), where the Florida Supreme Court found no prejudice to respondent despite claims that the disposition of the proceeding was so expeditious that it did not afford the respondent adequate time to prepare a defense. No disciplinary cases have held that an inordinate delay in proceedings have caused an unacceptable degree of damage to the mental health of the respondent. *But see* United States v. Dreyer, 533 F.2d 112 (3d Cir. 1976), in which a dismissal of an indictment was ordered on such grounds.

169. PROPOSED STANDARDS, *supra* note 8, at NO. 5.10.

170. *Id.* at NO. 5.11.

171. 257 La. at 23, 241 So. 2d at 475.

to go forward.[172] The hearing is public and may be conducted before any one of several suggested factfinders.[173] If the factfinder is not the whole commission, the record, transcripts of the hearings and factfinder's report should be submitted to the commission for action as if the hearing had, in fact, been before it.[174]

A number of courts have considered attacks on disciplinary proceedings on due process grounds where the commission itself has not heard the evidence. The most noteworthy of these cases is *Mildner v. Gulotta*[175] which held that the use of masters or referees was an acceptable technique to be employed by busy appellate courts when exercising original jurisdiction. The court found that the same procedure followed in disciplinary proceedings did not offend due process.[176] In *Mildner*, the New York system in question utilized a factfinder who reported to the court but whose findings were not deemed determinative. The court could and did hold, contrary to the report, that misconduct had been proved and discipline was warranted. The court found no due process problem in such a proceeding where the trier of fact could neither consider for itself the demeanor of witnesses nor hear oral argument.[177]

The Proposed Standards provide that written objections to the factfinder's report may be submitted on behalf of the respondent.[178] The drafters recommend that the deciding body rely on the transcripts and evidence presented at the hearing.[179] This is in accordance with the present prevailing view.[180] The Proposed Standards further provide that amendments to the allegations in the formal statement of charges should be permitted after commencement of the hearing only if merely technical and if the judge is given adequate time to prepare a response.[181]

There is no clear statement in the case literature with respect to the applicability of the fourth amendment[182] to judicial discipline. If there is a

172. PROPOSED STANDARDS, *supra* note 8, at No. 5.13.
173. *Id.* at Commentary accompanying No. 5.9.
174. *Id.* at No. 5.19.
175. 405 F. Supp. 182, 195 (E. D. N. Y. 1975), *aff'd*, 425 U.S. 901 (1976).
176. *Id.* at 195.
177. *Id.*
178. PROPOSED STANDARDS, *supra* note 8, at No. 5.20.
179. *Id.* at No. 5.21.
180. *See In re* Hanson, 532 P.2d 303 (Alas. 1975); Spruance v. Commission on Judicial Qualifications, 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 841 (1975).
181. PROPOSED STANDARDS, *supra* note 8, at No. 5.16.
182. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

criminal offense underlying the disciplinary proceeding, the admissibility of the fruits of a search will have been subjected there to the usual tests, as to whether the search was incident to a lawful arrest,[183] with an adequately supported warrant or on another acceptable basis. In the absence of a criminal proceeding, it would be unlikely that the question of suppression of products of an illegal search would arise. It is suggested, however, that, where a possibility of criminal prosecution exists, in the absence of a waiver by the judge or an agreement not to disclose by the commission, the admissibility of evidence against a respondent judge should be weighed according to the constitutional standard.[184]

This constitutional standard was explained in *In re Haggerty*[185] which involved a motion to suppress recordings of conversations made by a police informer, who attended a celebrated "stag" party. The motion was deemed properly denied (on the basis of a constitutionality test) because the use of an eavesdropping device is not barred as an unlawful entry in judicial disciplinary proceedings.[186] The Louisiana court concluded that exclusionary evidence rules were only designed for proceedings before juries and did not affect the degree of reliability or relevance of the material. The court found that a rule had evolved to permit the use of recorded testimony obtained without a trespass or unlawful entry and that the recordings were admissible to corroborate a witness' testimony.[187]

The Proposed Standards provide that a recommendation for discipline must be concurred in by a majority of all members of the commission.[188] If there is a dissent, it must be transmitted with the majority decision and the record to the court.[189] Provision is also made for the use of alternates to

183. *See, e.g., In re* Haggerty, 257 La. 1, 23, 241 So. 2d 469, 475 (1970).

184. *See* text accompanying notes 122-152 *supra*.

185. 257 La. 1, 241 So. 2d 469 (1970).

186. *Id.* at 25, 241 So. 2d at 477.

187. The Louisiana Supreme Court, in explaining this exclusionary rule, relied on relevant United States Supreme Court authority when it concluded that:

> the exclusionary rules of evidence, which have been tailored to the peculiar needs of juries, were designed for guiding admission or exclusion of evidence, not for weighing its reliability. Nor were they designed for quasi-judicial or administrative proceedings. In proceedings such as this, the reliability of evidence should be determined in light of the circumstances of each case, without regard to whether it should be considered inadmissible (as, for instance, hearsay) before a jury. Under (this exculsionary rule), the Commission is free to rely upon any evidence, if under the circumstances the evidence is found reliable, as well as relevant material.

Id. at 26, 241 So. 2d at 477. *See In re* Duncan, 541 S.W.2d 564, 571 (Mo. 1976), for an aberrational situation involving a search by the respondent judge. The claim that the search of a neighbor's house and the removal from the premises of an axe handle and a piece of pipe were defensible acts under the "exigent circumstances" exception was given no credence by the court. Since the judge performed these acts as a private person, he could not even arguably claim justification under that theory or under any species of self-defense or defense of his family.

188. PROPOSED STANDARDS, *supra* note 8, at NO. 5.23.

189. *Id.* at NO. 5.24.

ensure the participation in a proceeding of the required number of commission members.[190]

The degree to which procedures of the commission should be set forth by rule or regulation has not been the subject of extensive litigation. Judicial review of procedural questions has focused on the presence or absence of due process elements.[191] Even where certain procedures were specified by local rule, special ones could be utilized as long as they withstood the due process tests.[192]

For the guidance of commission members and staff, and to enable respondents properly to prepare responses and otherwise defend against charges, each state should adopt rules governing disciplinary proceedings. The Proposed Standards provide sufficient flexibility to permit some variation among jurisdictions, without violating traditional notions of procedural due process. The requirements of due process are few and simple.[193] Regularity of procedures will assist all concerned to ensure that the requirements are met. Regularity need not be equated with rigidity, however.

No attempt has been made to set forth a detailed procedure for situations in which it appears necessary for the protection of the public or of the judge for immediate action to be taken. In such circumstances, the administrative authority of the state's highest court can be invoked. Provision may be made by rule or by ad hoc order to take the indicated action. It is assumed that, in the event a temporary suspension or other expedient solution is deemed immediately necessary,[194] a hearing will follow as soon thereafter as possible under the circumstances and the judge will be accorded due process.

The effect of discipline in a foreign jurisdiction has not been considered by the courts, nor was it discussed by the drafters. Provision for some reciprocity or comity or full faith and credit as to attorney discipline is appropriate and has been approved,[195] although not unreservedly, by the courts.[196]

Since one cannot hold a judicial position in more than one state, the only foreign discipline relevant to a judge would be his conduct as an attorney. Whether a state's highest court would approve judicial discipline based on out-of-state attorney misconduct should not be speculated upon

190. *Id.* at No. 2.5.
191. *See* text accompanying notes 122-152 *supra*.
192. *See In re* Shigon, 462 Pa.1 , 329 A.2d 235 (1974).
193. *See* text accompanying notes 122-152 *supra*.
194. *See* PROPOSED STANDARDS, *supra* note 8, at NOS. 6.4 and 6.5.
195. *Id.* at No. 7.12.
196. *See In re* Weiner, 530 S.W.2d 222 (Mo. 1975). *But see In re* Kimball, 40 App. Div. 2d 252, 339 N.Y.S.2d 302, *rev'd on other grounds*, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973).

here. It is likely, however, that the test sought to be applied would be that relating to the bringing of disrepute upon the office.

There is no constitutional requirement, as there is in criminal trials,[197] that disciplinary hearings be public. Nor does the respondent have a right to trial by jury.[198] Somewhat aberrationally, however, Texas provides for a jury trial in attorney discipline but characterizes the proceedings as civil since they are conducted in accordance with the Rules of Civil Procedure.[199] In a disciplinary matter involving an attorney who was suspended for two years for various improprieties involving clients' funds he held in trust, the Court of Civil Appeals of Texas specifically found that the court could disregard the jury's answer to a special question because, although the accused has the right to trial by jury in the county of his residence, the Rules of Civil Procedure, not criminal law, governed.[200]

There seems to be an unspoken requirement for proof of some degree of scienter which is more analogous to civil tests of liability than to criminal culpability. The usual test is clear and convincing evidence.[201]

FINAL DISPOSITION: THE ROLE OF THE STATE'S HIGHEST COURT

In most states, the responsibility for the discipline of judges is vested in the highest court.[202] The Proposed Standards implement such a system and the drafters recommend that states not now following the prevailing pattern do so.[203] The highest court is, in fact, the court of original jurisdiction in these matters. The commission may be viewed as discharging the court's delegated responsibility as to all matters except the actual imposition of discipline as to which it serves in an advisory capacity.[204] The commission's recommendations for discipline are received and acted upon by the court.

The Proposed Standards provide that the high court have complete discretion in imposing discipline. It may, when it deems appropriate: (1) remand for further findings or for expansion of the record;[205] (2) permit supplementary filings or presentation of oral argument;[206] (3) hold a pending

197. *See generally* text accompanying notes 122-152 *supra*.
198. *See In re* Daly, 284 Minn. 567, 171 N.W.2d 818 (1969); *In re* Northwestern Bonding Co., 16 N.C. App. 2d 272, 192 S.E.2d 33, *appeal dismissed*, 282 N.C. 426, 192 S.E.2d 837 (1972); Sharpe v. Oklahoma, 448 P.2d 301 (Okla. 1968), *cert. denied*, 394 U.S. 904 (1968).
199. Archer v. State, 548 S.W.2d 71, 76 (Tex. 1977).
200. *Id.*
201. *See* Todd & Proctor, *supra* note 5, at 178-83.
202. *See* Gillis, *supra* note 6, at 122-28.
203. PROPOSED STANDARDS, *supra* note 8, at Commentary accompanying Nos. 7.9 and 7.11.
204. *Id.* at No. 7.11.
205. *Id.* at Nos. 7.4 and 7.5.
206. *Id.* at No. 7.6.

matter to await the outcome of a related proceeding;[207] and (4) consider imposing discipline as an attorney in addition to that as a judge.[208] Where there are special circumstances the court should be deemed to have the flexibility to accommodate them.[209]

The imposition of discipline is subject to review only upon issuance of a writ of certiorari by the United States Supreme Court.[210] It is a state interest, that of the integrity of the court system, which is served by judicial disciplinary proceedings. Barring such considerations as harassment, bad faith, or constitutional irregularities inherent in the procedures, the federal courts will refrain from intervention either at an intermediate stage, by way of injunction, or upon final disposition. Due process challenges are not foreclosed.[211]

The only recommended exception to the exercise of disciplinary power by the state's highest court is where the judge charged is a member of that body. The drafters suggest that each state provide by rule for an alternate body, composed of the same number of members as the court, to sit in such matters.[212]

The Proposed Standards provide for discipline as an attorney in connection with disciplinary proceedings against a judge.[213] "[A] judge is required to conduct himself under standards which are much higher than those required of an attorney."[214] Therefore, where misconduct so requires, sanctions both as judge and as attorney should be imposed by the state's highest court and should be based on a single disciplinary proceeding.[215] An additional consideration is the possibility that factual findings in a prior attorney disciplinary proceeding might be viewed as binding upon the judicial disciplinary factfinder where the charges arose from the same conduct. It is conceivable that an estoppel argument could be made based on

207. *Id.* at No. 7.4.

208. *Id.* at No. 7.12.

209. *See In re* Hanson, 532 P.2d 303, 310-11 (Alas. 1975); *In re* Diener, 268 Md. 659, 682, 304 A.2d 587, 599 (1973), *cert. denied*, 415 U.S. 989 (1974).

210. *See* MacKay v. Nesbette, 285 F. Supp. 498, 503 (D. Alas. 1968), *cert. denied*, 397 U.S. 1004 (1969). See also Gipson v. Supreme Ct. of N.J., 416 F. Supp. 1126 (D.N.J. 1976), for a discussion of non-interference.

211. *See* cases cited in note 209 *supra*.

212. PROPOSED STANDARDS, *supra* note 8, at No. 7.13.

213. *Id.* at No. 7.12.

214. *In re* LaMotte, 341 So. 2d 513, 517 (La. 1977).

215. PROPOSED STANDARDS, *supra* note 8, at No. 7.12. The drafters would not recommend permitting the judge the "right" to choose by what disciplinary body his conduct is to be reviewed, or even, by which of two it would first be reviewed. The impact of disciplinary proceedings on the judicial systems is such that allowing the indignity of proceeding against a judge first as an attorney, by attorneys is most inappropriate. His presence on the bench during such proceedings would embarrass the system. A judge is initially answerable to the public and to the courts for conduct which might affect his ability to continue to serve in that capacity. *See* Cincinnati Bar Ass'n. v. Heitzler, 32 Ohio St. 2d 214, 291 N.E.2d 477 (1972).

the dismissal of charges heard in the context of an attorney disciplinary proceeding.

CONCLUSION

The procedures discussed above and those expressed as standards by the drafters of the Standards Relating to Judicial Discipline or Disability are intended to ensure that due process requirements are incorporated in the operation of state judicial disciplinary systems. The purposes of these systems have been described in terms of the needs of the public, the court system and the judges proceeded against.

Each system must have public credibility. Provision for public adjudicatory hearings and for final action by the state's highest court should make it apparent to the public that the system can work, that tax expenditures to maintain it are justified, and that the judiciary takes the conduct standards seriously and is willing to enforce them.

The systems must demonstrate that they operate fairly and with due concern for the reputation of each respondent judge. The confidentiality required of proceedings, except for those reaching the adjudicatory stage, the provision for prompt dispelling of unsupported allegations, the broad opportunity for respondent to have discovery, and, where possible, the professional experienced staff to sift out the chaff at a preliminary stage should merit the trust of all judges.

In the light of increased judicial discipline experience and the development of decisional law in the area, these procedures should permit reasonable accommodation among competing considerations. The fact that the high court is the ultimate decision-maker in each state enables the judges to take cognizance of special problems of judicial service of which the public cannot be aware. The opportunity to present evidence in mitigation where discipline may be deemed appropriate also permits judicial weighing and balancing. Where masters or small hearing panels are used, the commission's initial review and the court's ultimate review ensure uniformity on a statewide basis.

The promulgation of rules in accordance with the Proposed Standards will permit commissions and respondents to plan their cases. Predictability, with respect to the standards of conduct required and the method by which they are enforced, will ultimately reassure the public that the judicial branch is meeting its responsibilities in the disciplinary area.