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BURDEN OF PROOF, SANCTIONS, AND CONFIDENTIALITY

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During the past fifteen years, the legal profession has witnessed and participated in a rapidly developing, structured system for the discipline of judges.[1] In response to criticism from both the public and the profession, most states have adopted procedures which permit effective administration of the disciplinary process. However, since the development of these processes has only been effected recently, there has not been developed a uniform set of standards against which an individual state could compare and thereby evaluate its own procedures.

Through the combined efforts of the American Bar Association and the American Judicature Society, the Advisory Committee on Professional Discipline[2] was created to discuss and consider the adoption of uniform standards.[3] The following discussion will explain three areas addressed by the committee and contained in the *Proposed Standards Relating to Judicial Discipline and Disability Retirement*.[4] Those areas include: (1) the standard

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1. *See also* Gillis, *Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois Two-Tier Approach*, 54 CHI.-KENT L. REV. 117 (1977). [hereinafter cited as Gillis]; Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.-KENT L. REV. 69 (1977) [hereinafter cited as Greenberg].

2. Hereinafter referred to in the text as the Committee.

3. The writers were privileged to serve on the Subcommittee on Judicial Discipline and Disability. Justice Todd was a voting member of the subcommittee and Ms. Proctor served as technical counsel. The first task of the subcommittee was to adopt a general outline of topics to be included in any proposed uniform standards. After reaching an agreement concerning the general areas to be covered, specific assignments were made to individual members of the subcommittee to draft the proposed standards within their respective areas. In preparing recommended standards, research was conducted which involved an examination of all available information relating to the particular functions of judicial disciplinary and removal commissions in the various states. The constitutional and statutory provisions, as well as the rules and regulations governing the commissions in over 70% of the individual states, were examined together with appropriate legislation and regulations of the District of Columbia and Puerto Rico. An attempt was made to codify the best features of all the existing applicable information. However, it was the opinion of the Committee that since its task was to adopt model standards rather than to compile and codify existing state rules, it was not necessarily bound to the limits of present provisions.

4. AMERICAN BAR ASSOCIATION, PROPOSED STANDARDS RELATING TO JUDICIAL DISCIPLINE & DISABILITY 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]. See appendix.

and burden of proof required in a disciplinary proceeding; (2) the sanctions that may be imposed upon a judicial officer under the Proposed Standards; and (3) the principles of confidentiality that should be employed in judicial disciplinary proceedings. The discussion of each topic will provide the reader with the reasoning and legitimate concerns that ultimately resulted in the Committee's recommendation of the proposals in their present form.

STANDARD AND BURDEN OF PROOF

The term burden of proof has two separate and distinct meanings.[5] One is the burden of producing evidence of a particular fact in issue. The other is the burden of persuading the trier of fact that the alleged fact is true. The burden of producing evidence may shift to the adversary when the pleader has discharged his initial duty. The burden of persuasion does not shift from party to party because it need not be allocated until it is time for the decision. In the Proposed Standards, the burden of producing evidence has been called the "burden of proof"[6] and the burden of persuasion has been labeled the "standard of proof".[7]

The burden of proof has generally been and should be assigned to the party who seeks to change the present state of affairs.[8] In judicial discipline and disability proceedings, this means that the burden will be upon the commission. There was total agreement among the Committee members favoring the inclusion of a positive statement in the Proposed Standards to clearly exonerate a respondent judge from this burden.[9] Although the Committee was aware that this was merely a restatement of existing law,[10] it believed that the Proposed Standards should contain an adequate statement establishing the responsibility of the accusatory authority of presenting evidence to sustain any charges made against the respondent judge.

The judge is not entirely relieved of every burden, however. Proposed Standard 5.3 clearly contemplates that the judge answer the allegations posed against him.[11] The privilege against self-incrimination is available to a judge in these proceedings, but the privilege does not go so far as complete silence to the charges.[12]

5. 31A C.J.S. *Evidence* § 103 (1964).
6. PROPOSED STANDARDS, *supra* note 4, at NO. 5.13.
7. *Id.* at NO. 5.17.
8. 31A C.J.S. *Evidence* § 104 (1964).
9. PROPOSED STANDARDS, *supra* note 4, at Commentary accompanying NO. 5.13.
10. *Id.* at NO. 1.1.
11. *Id.* at NO. 5.3.
12. In *Spevak v. Klein*, 385 U.S. 511 (1967), the United States Supreme Court held that a lawyer could not be disbarred solely on the grounds of invoking the fifth amendment during disciplinary proceedings. However, the respondent-lawyer does not have the right under *Spevak* to refuse unilaterally to answer questions put to him by a duly authorized disciplinary commission, which do not raise fifth amendment problems. Thus, such respondents are not

Further, the judge does retain the burden of proof for affirmative defenses. If the judge claims that physical or mental disability at the time the act was committed prevented him from acting properly, he still has the burden of showing such disability.[13] Defenses of fraud or duress must also be affirmatively proved by the respondent.[14]

There are three standards of proof used in various judicial proceedings in the country today. Although the exact terminology varies slightly among the jurisdictions, these standards can be summarized as proof: (1) by a preponderance of the evidence,[15] (2) by clear and convincing evidence,[16] and (3) beyond a reasonable doubt.[17] Since judicial discipline and disability proceedings are *sui generis*,[18] it was not obvious which of these standards of proof should be applied.

"Preponderance of the evidence" is the standard used in most civil cases.[19] The most acceptable meaning to be given to the expression seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.[20] This preponderance of probability denotes an element of doubt or uncertainty and recognizes that where there are two choices, it is not necessary that the jury be absolutely certain or doubtless, but that it is sufficient if the choice selected is more probable than the choice rejected.[21]

The "clear and convincing" standard means persuasion that the truth of the allegation is highly probable.[22] This is a higher standard than preponderance which required that the truth of the fact be more probable than not.

protected under *Spevak* from a contempt citation or a finding of uncoooperativeness when they fail to answer the charges or appear before the trier of fact upon an order by the disciplinary body.

13. The respondent judge still has the responsibility to introduce evidence supporting affirmative defenses, such as misconduct due to mental or physical disability at the time the act was committed. Proposed Standard 5.15 states that the raising of a defense of disability waives the doctor-patient privilege of the judge and may subject him to examination by a court-appointed physician. *See* PROPOSED STANDARDS, *supra* note 4, at Commentary accompanying No. 5.13.

14. *Id.*

15. *See* 32A C.J.S. *Evidence* § 1020 (1964).

16. *Id.* at § 1023.

17. *Id.* at § 1024.

18. *See* Peskoe, *Procedures for Judicial Discipline: Type of Commission, Due Process, & Right to Counsel*, 54 CHI.-KENT L. REV. 147 (1977). *See generally* Yokozeki v. State Bar, 11 Cal. 3d 436, 521 P.2d 858 (1974); State v. Posterino, 53 Wisc. 2d 412, 193 N.W.2d 1 (1972).

19. *See* 32A C.J.S. *Evidence* § 1020.

20. *Id.*

21. Norton v. Futrell, 149 Cal. App. 2d 586, 592, 308 P.2d 887, 891 (1957). In *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 417, 146 P. 861, 863 (1915) the court accepted the following instruction regarding this standard: "By preponderance of the evidence the court [means] that evidence which, when fully, fairly and impartially considered by the jury, produces the stronger impression and has the greatest weight, and is more convincing as to its truth, when contrasted or weighed against the evidence in opposition thereto."

22. The clear and convincing standard has been defined in the following ways: "A higher

In most administrative hearings the standard of proof is met by the usual civil standard of preponderance of evidence.[23] However, where issues of personal security are at stake in the proceeding, such as deportation or loss of social security benefits, the United States Supreme Court has imposed the higher standard of clear and convincing.[24]

The standard of proof beyond a reasonable doubt[25] has been applied almost exclusively to criminal proceedings. In the case of *In re Winship*,[26] the United States Supreme Court held that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[27] Society has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free.[28] The consequences to the life, liberty and the good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case.

> Where one party has at stake an interest of transcending value—as a criminal defendant has his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.[29]

The reasoning for the imposition of such a strict standard in a criminal case is very compelling, but those interests are not present in judicial discipline and disability proceedings. Protection of liberty is guaranteed by the United States Constitution;[30] the privilege of a judgeship is not. The individual criminal case has priorities focusing upon fairness to the accused, deterrence, and rehabilitation.[31] These factors take precedence. Although the protection of society is also an important priority, the determination of

degree of proof than the weight of the evidence." Snyderwine v. McGrath, 343 Pa. 245, 251, 22 A.2d 644, 647 (1941) (quoting Taylor v. Paul, 6 Pa. Super. Ct. 496, 501 (1898)); "[T]hat degree of proof which will produce in the mind of the court a firm belief or conviction." *In re* Chappel, 12 Ohio Op. 499, 502, 33 N.E.2d 393, 397 (1938); Evidence that "convinced a presumably unbiased and unprejudiced jury," Pegues v. Dilworth, 134 Tex. 169, 178, 132 S.W.2d 582, 586 (1939); The proof "need not be conclusive," Hobart v. Hobart Estate Co., 26 Cal.2d 412, 446, 159 P.2d 958, 976 (1945).

23. *See* Jaffe, *Administrative Law: Burden of Proof & Scope of Review*, 79 HARV. L. REV. 914, 916 (1966).

24. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 286 (1966).

25. The beyond a reasonable doubt standard has been defined in the following ways: "Fully satisfied, entirely convinced, satisfied to a moral certainty." State v. Harris, 223 N.C. 697, 703, 28 S.E.2d 232, 237 (1943): "[t]he facts proven must, by virtue of their probative force, establish guilt." People *ex rel.* Schubert v. Pinder, 170 Misc. 345, 9 N.Y.S.2d 311 (1938).

26. 397 U.S. 358 (1970).

27. *Id.* at 364 n. 85.

28. *See generally* Speiser v. Randall, 357 U.S. 513, 525-26 (1958); *In re* Winship, 397 U.S. 358, 369-72 (1970) (Harlan, J., concurring).

29. Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

30. U.S. CONST. PREAMBLE.

31. D. NEWMAN & F. REMINGTON, CRIMINAL JUSTICE ADMINISTRATION, chs. 11, 12, 18 (1969).

which acts are crimes and the determination of punishment is the way society's interest is ultimately fulfilled.

In judicial discipline cases, the foremost and primary obligations of the whole judicial disciplinary system are the protection of the public and the administration of justice.[32] The interests of the individual judge are considered but they are not foremost. The primary purpose of discipline is not punishment, even though it may impose a penalty upon the individual judge. The proceedings are not criminal and the criminal standards of due process do not apply.[33]

Although there is some risk that the lesser standard may cause imposition of sanctions upon judges importunely, the interests of the administration of justice demand that the error be on that side rather than on the side of retaining without forfeiture a judge whose effectiveness is damaged in the public view. As unfair as this may seem in the abstract, there are positions of authority in society which demand such treatment, where sanctions are imposed and accepted without imposition of the beyond a reasonable doubt standard.[34] The privilege of serving in these positions carries concurrent responsibilities to avoid misconduct and interference in the administration of justice so that confidence in the system is maintained. Certainly, the position of judge is one of these.

The criminal standard of proof having been eliminated, the Committee had to decide between the standards of "clear and convincing" and "preponderance".[35]

Research and discussion of the Committee relating to the adoption of a standard indicated that "clear and convincing" was the majority rule among the states that have dealt with the topic. Further, by addressing for a second time many of the issues by which the "beyond a reasonable doubt" standard was rejected as demanding too much, the Committee found the "preponderance" standard asked too little. The Committee chose to adopt the clear and convincing test as the recommended standard of proof to be employed in

32. *See* PROPOSED STANDARDS, *supra* note 4, at Commentary accompanying No. 1.1.

33. *See In re* Ruffalo, 390 U.S. 544 (1968). In *Ruffalo*, the United States Supreme Court struggled with the question of the nature of disciplinary proceedings, finally labeling the proceedings "quasi-criminal." The fact that the court stopped short of calling the proceedings criminal when faced with the question, indicated that discipline is reviewed as a unique kind of proceeding.

34. Familiar examples are the resignation of Richard Nixon from the Presidency of the United States, the withdrawal of Ramsey Clark from consideration as Director of the Central Intelligence Agency, and, more recently, the resignation of Bert Lance as Director of the Office of Management and Budget. The position which these people held exposed them to a higher standard of propriety than the ordinary citizen.

35. For a discussion of the preponderance standard see *In re* Trask, 46 Haw. 404, 410-11, 380 P.2d 751, 755-56 (1963). For a discussion of the clear and convincing standard see *In re* Farris, 229 Or. 209, 219, 367 P.2d 387, 392 (1961).

judicial discipline and disability proceedings.[36] The rationale is adequately summarized by the South Dakota Supreme Court in *In re Heuerman*:[37]

> The first issue we consider is appropriate standard of proof in proceedings under the Act. We note that it would be inapposite to require proof 'beyond a reasonable doubt' as this is not a criminal prosecution. Proof by a mere preponderance of the evidence is also inapposite because of the severity of the sanction which can be imposed. We conclude that the proper standard of proof is by 'clear and convincing evidence.' Such a standard provides adequate protection for the party subject to charges, but at the same time does not demand so much evidence that the ability of the Commission and this court to effectively oversee the judiciary is impaired.[38]

In adopting the clear and convincing standard, the Committee did not determine exactly what quantum of proof was required in terms of the actual amount of evidence necessary to sustain a complaint. The state courts that have considered the matter have interpreted the term "clear and convincing" to mean evidence which is greater than a fair preponderance but less than proof beyond a reasonable doubt in accordance with the general rules regarding these terms.[39] The ultimate determination as to whether the evidence has been clear and convincing remains a question for judicial resolution. Thus, the clear and convincing standard was unanimously adopted by the Committee.[40]

Research by the Committee revealed that very few states specifically addressed the issue through constitutional, statutory or regulatory procedures. In fact, the most notable discovery was that most states have failed to adopt any standard.

Those states which have adopted a standard follow one of four distinct approaches to the issue. Consistent with the majority rule and the proposed standards, the State of Illinois applies the clear and convincing test in all judicial disciplinary proceedings.[41] However, most of the states that have a clear and convincing standard have adopted the standard by judicial decision rather than by statute or rule.[42]

Ohio appears to have adopted a dual standard of proof in judicial disciplinary proceedings. The retirement, removal, or suspension of a judge

36. PROPOSED STANDARDS, *supra* note 4, at No. 5.17.

37. 240 N.W.2d 603 (S.D. 1976).

38. *Id.* at 605-06.

39. *See, e.g.*, Kavanagh v. The Golden Rule, 226 Minn. 510, 33 N.W.2d 697 (1948); *In re* Estate of Fifi's, 164 Ohio St. 449, 132 N.E.2d 185 (1956); Kohler v. May, 76 Ohio L. Abs. 1, 145 N.E.2d 211 (1955); Cromwell v. Hosbrook, 81 S.D. 324, 134 N.W.2d 777 (1965).

40. PROPOSED STANDARDS, *supra* note 4, at Commentary accompanying No. 6.1.

41. ILL. CONST. art. VI, §§ 15(e)-15(g).

42. *See, e.g.*, *In re* Haggerty, 257 La. 176, 241 So. 2d 532 (1970); *In re* Diener, 268 Md. 659, 304 A.2d 587, *cert. denied*, 415 U.S. 689 (1973); *In re* Heuerman, 240 N.W.2d 603 (S.D. 1976).

is mandated by statute when the complaint is supported by substantial, credible evidence.[43] At the same time, the Rules of Practice of the Supreme Court of Ohio[44] provide for identical sanctions when the allegations contained in a complaint are established by clear and convincing evidence.[45] Thus, although Ohio has two independent evidentiary standards to be employed in disciplinary proceedings, it appears that the Ohio Supreme Court regards the terms "clear and convincing" and "substantial, credible evidence" as synonymous.

Two other unique approaches by individual states to the standard of proof issue are notable. First, the Michigan Constitution provides for censure, suspension, retirement, or removal of a judge if it is substantiated that the judicial duties have been carried out in such a manner so as to be *clearly* prejudicial to the administration of justice.[46] Second, New Jersey has adopted a statute which requires the removal of a judge from office if that state's supreme court determines beyond a reasonable doubt that there is cause for removal.[47] The "reasonable doubt" standard does not exist in any other state, nor does the New Jersey statute particularly address the question of judicial discipline short of removal. Thus, while New Jersey arguably requires a greater quantum of proof to discipline a judge, this approach is apparently directly related to the absence of any intermediate sanctions except the rather harsh remedy of removal.

SANCTIONS

The development of the concept of judicial discipline and disability commissions[48] as a parallel method for removal of a judge other than by impeachment proceedings has allowed greater flexibility in the imposition of sanctions than formerly existed.[49] Since impeachment under constitutional provisions was an all or nothing proceeding, it was complex and subject to political pressures in the legislature.[50] From their inception, most commission procedures have contemplated numerous methods of sanctioning a judge short of removal from the bench.[51] Some states still limit the recom-

43. OHIO REV. CODE ANN. § 2701.11 (Baldwin 1971).
44. OHIO SUP. CT. R. V(1)-VI (1971).
45. *Id.* at V(6).
46. MICH. CONST. art. VI, § 30(2).
47. N.J. REV. STAT. ANN. ch. 1B, § 2A:1B-2A:7 (West 1970).
48. Hereinafter referred to in the text as the commission. *See* PROPOSED STANDARDS *supra* note 4, at No. 1.4 and accompanying Commentary.
49. A discussion of commission procedures in two states, Illinois and Michigan, can be found in Gillis, *supra* note 1, at 128-35.
50. PROPOSED STANDARDS, *supra* note 4, at No. 1.8.
51. For a discussion of the implementation of lesser sanctions than removal in both the two-tier and unitary systems see Gillis, *supra* note 1, at 132-35.

mendation of such commissions to the sanction of removal.[52] However, many commissions have broader powers.[53]

The primary function of these commissions under the Proposed Standards is to adequately and fairly discipline judges where appropriate and to dispose of improper and frivolous charges against the judge.[54] Additionally, the commissions provide a means whereby a judge who is physically or mentally incapable of continuing in service can be impassionately and fairly removed from office.[55] Since the commissions do operate in a plural nature, the term "sanction" is somewhat inappropriate to cover the variety of remedies available to the commission. Nevertheless, the Committee has adopted the use of this term to cover the wide assortment of appropriate remedies and dispositions which should be available to a commission.

Normally, the commissions function as a recommending body to the highest court in each state.[56] However, when considering whether to sanction a judge and the particular penalty to be imposed, certain actions of the commission are final and no report or recommendation is made to the court.[57] Thus, it is the proper function of the commission to receive any and all complaints against any judge and it is granted discretionary power to summarily dispose of those complaints which it determines to be frivolous or which subsequent investigations prove to be frivolous.[58] Where particular actions of a judge reflect unfavorably on the integrity of the judicial system, the commission may issue private reprimands and private probationary orders so as to enable the judge to carry out his responsibilities while adequately protecting the public from a potentially harmful situation.[59]

Proposed Standard 6.6 lists the dispositions which may be imposed by the commission without order of the court.[60] The intent of this standard was a sympathetic one, that is, some offenses are so minor that reminding the judge of the correct behavior is sufficient to avoid repetition of his offense.[61] However, the wording of Proposed Standard 6.6(c) is troublesome. That

52. *See* note 67 *infra*.

53. *See, e.g.*, ALAS. CONST. art. IV, § 3; ARIZ. CONST. art. VI.1, § 3; CAL. CONST. art. VI, § 18; FLA. CONST. art. V, § 12(a); ILL. CONST. art. VI, § 15(e); MICH. CONST. art. VI, § 30(2); PA. CONST. art. 5, § 18(f); TEX. CONST. art. V, § 1-1(a)8; WYO. CONST. art. V, § 6(e).

54. PROPOSED STANDARDS, *supra* note 4, at No. 1.1 and 4.3 to 4.4.

55. *Id.* at No. 6.5.

56. *Id.* at No. 1.1.

57. *Id.* at No. 5.23.

58. *Id.* at Nos. 2.8 and 6.6.

59. *Id.* at No. 6.6(a).

60. *Id.* at No. 6.6.

61. *Id.* at Commentary accompanying No. 6.6. Some allegations are too trivial to even notify the judge. Many of these minor problems may be disposed of before a public hearing is necessary. It should be noted that private disposition does not preclude the use of evidence obtained in the investigation of the events leading up to the imposition of the sanction, or the use of the event itself as evidence of impropriety in a subsequent proceeding. *Id.* at No. 4.15.

proposed provision states that "[t]he commission may by informal adjustment dispose of a complaint by: (1) Informing or admonishing the judge that his conduct is or may be cause for discipline; (2) Directing professional counseling and assistance for the judge; or (3) Imposing conditions on a judge's conduct."[62] Granting that the intent was to save unnecessary embarrassment as long as the situation was remedied, the result is a granting of a peculiarly wide scope of discretion to the commission. Thus, without the requirement of court approval, the commission can impose conditions on the judge's conduct and mandate personal counseling. Unless the judge wanted to appeal the commission decision, and thus make public the situation, he would get no review.[63]

The Proposed Standards also provide for formal proceedings wherein the commission recommends to the state's highest court that certain action be taken against an individual judge alleged to have engaged in improper conduct.[64] Upon completion of a formal hearing of the case, the commission may recommend removal from office, disbarment, limitations and conditions on the performance of judicial duties, reprimand or censure, imposition of a fine, assessment of costs, or any combination of these sanctions.[65] After the recommendation has been made, the court must determine whether to follow the commission's recommendation or to impose a different sanction. The court is not bound by the recommendation, but may impose a lesser or a greater sanction.[66]

These sanctions represent a compilation of sanctioning practices in all of the states. No individual state employs all of these sanctions and in some states the power of the commission to recommend sanctions is limited to instances which call for the removal or retirement of the judge.[67]

Proposed Standards 6.1 to 6.5 address the situation of alleged misconduct so serious that suspension is warranted before final disposition of the disciplinary case. In three situations, the court imposes the suspension summarily, without petition by the commission: (1) felony indictment;[68] (2)

62. *Id.* at No. 6.6(c).

63. Even the court does not have authority to interfere in the private life of the judge under the Proposed Standards. Proposed Standard 6.8(d) allows the court to impose limitations on judicial duties but does not mention private affairs. *Id.* at No. 6.8(d).

64. *Id.* at Nos. 6.8(a)-6.8(c).

65. *Id.*

66. *See In re* Robson, 500 P.2d 657 (Alas. 1972) (more severe sanctions were imposed than those recommended by the commission); McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974) (the court imposed a lesser sanction); *In re* Diener, 268 Md. 659, 304 A.2d 587, *cert. denied*, 415 U.S. 689 (1973) (the court imposed a lesser sanction).

67. *See, e.g.*, COLO. CONST. art. VI, § 23(3)(b); LA. CONST. art. 9, § 4(c); MD. CONST. art. IV, § 4(B)(b); OKLA. CONST. art. VII-A, § 1; S.C. CONST. art. V, § 13.

68. PROPOSED STANDARDS, *supra* note 4, at No. 6.1. Generally, states that utilize judicial

filing of certain misdemeanor charges;[69] and (3) disability which prevents the preparation of a defense.[70] Another standard allows the commission to petition for an interim suspension in situations other than the three mentioned above.[71]

A judge placed on an interim suspension by reason of the filing of misdemeanor charges may petition the court for review.[72] Interim suspension on other grounds is not reviewable. The reasoning seems to be that since not every misdemeanor invokes that sanction, the respondent judge ought to have an opportunity to be heard on the peculiarities of his case. There is no review of interim suspension imposed from petition by the commission because the judge may present arguments to the court at the time the petition is heard.[73]

It was the concensus of the Committee that the integrity of the judicial system requires immediate action in certain cases. Consequently, a judge should be suspended immediately by the court upon the filing of a charge against him if the charge constitutes a felony in the state in which the judge is serving or under federal law.[74] Interim suspension for a felony is limited to situations in which the charge constitutes a felony in the state where the judge is sitting.[75] Without such a limitation, a very real possibility exists of suspending a judge for felony charges arising in one state which do not constitute a felony within the state where he is serving. In the latter situation, immediate action is not always necessary.

Interim suspension is imposed to minimize damage to the administration of justice and the public when a serious allegation is made against the judge. It is not the ultimate discipline, however, and does not dispose of the case. If the indictment or charge is withdrawn, or the judge withdraws his claim of inability to defend by reason of disability, the basis for the imposition of the interim suspension disappears and the suspension should be lifted. The same is true if the criminal case is resolved by acquittal or reversal; the interim suspension should be vacated.

The commentary to the Proposed Standards tries to make this clear,

removal commissions empower them either by constitution or by statute to order the interim suspension of a judge who has been charged with committing a felony. Such interim suspensions are always with pay and thereby avoid the constitutional problem attendant to the sanction of suspension without pay. *See* PROPOSED STANDARDS, *supra* note 4, at NO. 6.1 and accompanying Commentary. *See, e.g.*, ARIZ. CONST. art. VI 1, § 2; WYO. CONST. art. V, § 6(c). *See, e.g.*, ALASKA STAT. § 22.30.070 (1976).

69. PROPOSED STANDARDS, *supra* note 4, at NO. 6.2.

70. *Id.* at No. 6.5.

71. *Id.* at NO. 6.4. One such situation is an allegation of misconduct in another state constituting a felony in that state.

72. *Id.* at No. 6.3.

73. *Id.* at No. 4.2.

74. *Id.* at No. 6.1.

75. *Id.* at Commentary accompanying No. 6.1.

even though the Proposed Standards do not.[76] Since neither the Proposed Standards nor the commentary suggest that the interim suspension is *automatically* lifted in such cases, the only conclusion to draw is that the court must be petitioned to so order. In almost every case, it is the respondent judge himself, the most interested party, who is likely to make this petition.

It is important to note that since an interim suspension does not dispose of the case, the normal disciplinary process must be going on at the same time. The dropping of criminal charges, or an acquittal or reversal, does not preempt these proceedings.[77] The commission should have full authority to investigate allegations without regard to the conclusion of another tribunal. Since disciplinary proceedings are not criminal, double jeopardy does not attach.[78] The fact that evidence of certain improper conduct may not prove the guilt of a judge beyond a reasonable doubt does not automatically mean that the clear and convincing evidence standard necessary to impose a sanction for the same conduct cannot be satisfied. The rationale for this authority rests primarily upon the difference in the standard of proof necessary to sustain a disciplinary charge and to obtain a criminal conviction.[79] This principle does not exist as a rule or statute in any jurisdiction.

Noticeable by its absence from the Proposed Standards is the sanction of suspension with or without pay. Many states, either by their state constitution[80] or statutes,[81] provide for suspension of a judge as a permissable sanction. Despite the prevalence of the sanction of suspension, the Committee considered it to be ineffective and inadvisable for two reasons. First, constitutional problems are created by the sanction of suspension without pay in many states which have constitutional provisions prohibiting the reduction of a judge's salary during his term of office.[82] Second, members of the Committee believed that the sanction inflicted greater harm on the system of justice than it provided benefits. The problems incurred when this sanction is imposed include reassigning the work load of the suspended judge which is difficult and imposes a burden on the effective administration of justice.

76. *Id.*

77. *Id.*

78. The double jeopardy clause of the fifth amendment has been deemed to apply only in criminal situations. *See* H. CHASE & C. DUCAT, THE CONSTITUTION AND WHAT IT MEANS TODAY 1,317 (Rev. 1974). *See also* United States v. Hees, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938). Disciplinary proceedings are not criminal. *See* note 33 *supra*.

79. *See* text accompanying notes 26-40 *supra*.

80. ALA. CONST. amend. CCCXVII, § 3; ALAS. CONST. art. IV, § 10; ARIZ. CONST. art. VI.1, § 3; CAL. CONST. art. VI, § 18(b); ILL. CONST. art. VI, 15(e); MICH. CONST. VI, § 30(2); MO. CONST. art. V, 27.3; MONT. CONST. art. VII, § 11(3)(b); OKLA. Const. art. VII-A, 4(d); WYO. CONST. art. V, § 6(c)-6(d).

81. *See, e.g.*, ALASKA STAT. § 22.30.070 (1976); IND. CODE § 33-2.1-6-4 (1973).

82. *See generally* Gillis, *supra* note 1, at 134-35.

In the final days of drafting and approving the Proposed Standards, the area which caused the longest and most heated debate related to the imposition of discipline on the judge as a lawyer. There is no question that the court, having inherent power to discipline lawyers and inherent power to discipline judges, may impose discipline on an erring judge that affects his license to practice.[83] The point of dissension was the degree of input the lawyer disciplinary agency would have in cases in which lawyer discipline of the judge was recommended by the commission or being considered by the court.

Some members of the Committee strongly advised leaving the matter to the court, the ultimate decisionmaker. If the court wanted assistance from the lawyer disciplinary agency, it could request briefs. In cases in which the lawyer disciplinary agency was particularly interested, the agency could petition for permission to file briefs on the issue of lawyer discipline.

Other members of the Committee argued that the lawyer disciplinary agency is the one entity with specific expertise in the field of lawyer discipline. Judicial disciplinary commissions do not gain the same degree of expertise as lawyer disciplinary agencies because: (1) they deal with kinds of conduct peculiar to judges which are not violations for non-judge lawyers; (2) they do not have the volume of cases handled regularly by the lawyer disciplinary agency; and (3) some jurisdictions prevent the judicial disciplinary commission from wielding the same breadth of authority as the lawyer disciplinary agency.

Unless the issue of lawyer discipline is adequately considered by the court in cases of judicial misconduct, a judge removed from the bench may continue to practice law. Although every case in which a judge is removed from the bench may not warrant restriction of his license to practice, there are obviously many situations which do. A judge removed for criminal conduct, for example, still poses a threat to prospective clients. The removed judge is no longer within the jurisdiction of the judicial disciplinary commission; therefore, it has no further interest. The lawyer disciplinary agency has no jurisdiction over the removed judge for acts committed while he was a judge.[84] Thus, no action can be taken against the former judge until he commits another improper act at the expense of a client who trusted in the former judge's qualifications to practice. In order to guard against this risk, these members of the Committee wanted the Proposed Standards to afford the lawyer disciplinary agency the opportunity to be heard on the issue of lawyer discipline *as of right*.

83. *See, e.g.*, Louisiana Bar v. Funderburk, 284 So. 2d 564 (La. 1973); *In re* Troy, 306 N.E.2d 203 (Mass. 1973); *In re* Watson, 286 P.2d 254 (Nev. 1955).

84. PROPOSED STANDARDS, *supra* note 4, at No. 3.1 and 3.2.

As these divergent views were reduced to writing, much debate ensued. The initial compromise drafts seemed to require a second separate hearing on the issue of discipline after the adjudication of the misconduct, a situation that was thought to be wasteful and unnecessary, as well as undesirable. The final version was not entirely pleasing to anyone, but all members of the Committee believed its terms were manageable.[85]

CONFIDENTIALITY

The adoption of proposed standards concerning confidentiality of disciplinary proceedings provoked the most debate among the Committee members. The initial presentation on this topic indicated that confidentiality was the cornerstone of the commissions.[86] The opinion of most members of the Committee was that strict confidentiality was required until formal charges against the judge were presented to the court in the form of a recommendation by the commission.[87] The rationale supporting this belief was that public disclosure of a pending charge against a judge will undoubtedly damage his career even though he is subsequently exonerated of any wrongdoing by the commission or investigating court. As the discussion progressed, however, substantial doubt was cast upon the foundation of this belief. Initially, it was observed that a determination of probable cause leading to formal charges against a judge would comprise only a small percentage of the total complaints received by any commission. In the final analysis, the members of the Committee altered their earlier stance in favor of changing the rule of strict confidentiality in order to meet the realities and circumstances of our present society. Up to the time of determination of probable cause, no basic changes have been made in the present rules of confidentiality, with the exception of some limited disclosure rights for both the commission and the judge.[88]

Although the term "confidentiality" is a familiar one, it contains nuances and degrees of meaning that make it complicated. Issues of confidentiality are inextricably intertwined with issues of privacy and public access. It has been interpreted to mean accessible to the data subject[89] and inaccessible to the data subject.[90] In court opinions, it has been used

85. *Id.* at No. 7.12. The lawyer disciplinary agency has a right to be heard in cases of removal of the judge and may petition for an opportunity in other cases.

86. *Id.* at Commentary accompanying No 4.6. *See also* notes 137-138 *infra*.

87. *Id.* at No. 4.6.

88. *Id.* at No. 4.9.

89. *See In re* Mellion, 58 Misc. 2d 441, 295 N.Y.S.2d 822 (1968); Stivahtis v. Juras, 13 Or. App. 579, 511 P.2d 421 (1973).

90. *See* Turner v. Barbaro, 56 Misc. 2d 53, 287 N.Y.S.2d 542 (1967); *See also* MINN. STAT. ANN. § 15.162(2a) and 15.162(5a) (West 1977).

interchangeably with "secret,"[91] "privileged,"[92] and "private."[93] It also has been used in combination with other terms, such as "private and confidential,"[94] seeming to indicate that one term has some characteristic not present in the other, making the use of both necessary.

This motley assortment of terms, all tending to prohibit disclosure to some degree, did not cause much problem until the recent emergence of two trends. First, federal and state governments have proposed and passed a significant number of statutes during the 1970's designed to open up the governmental process to the public. The public has demanded a right of access to information held by public entities through open meetings laws,[95] sunshine laws or freedom of information acts,[96] and freedom of the press.[97] Second, there is an increasing concern for the right to withhold information which is not relevant to the purpose for which it is requested, and over which the individual has no control as to future dissemination. This concern has manifested itself in the rejection of the social security number as

91. Wong v. Schorr, 51 Haw. 608, 466 P.2d 441 (1970); McGregor v. State, 483 S.W.2d 559 (Tex. 1972).

92. Wong v. Schorr, 51 Haw. 608, 466 P.2d 441 (1970); Fitzgerald v. Wynne, No. 72-173 (D. Mass. Aug. 28, 1972).

93. McGregor v. State, 483 S.W.2d 559 (Tex. 1972).

94. Chronicle Publishing Co. v. California, 54 Cal. 2d 548, 354 P.2d 637, 7 Cal. Rptr. 109 (1960).

95. *See* ALA. CODE tit. 14, §§ 393-394 (1959); ALASKA STAT. §§ 44.62.310-44.62.312 (Cum. Supp. 1976); ARIZ. REV. STAT. §§ 38-431-38-431.08 (Supp. 1975); ARK. STAT. ANN. §§ 12-2801-12-2807 (1968); CAL. GOV'T CODE §§ 11120-11131 (West Supp. 1975); COLO. REV. STAT. § 29-9-101 (Cum. Supp. 1976); FLA. STAT. ANN. § 286.011 (West 1975); GA. CODE §§ 40-3301-40-3303 (1975); HAW. REV. STAT. §§ 92-1-92-13 (Supp. 1975); IDAHO CODE §§ 67-2340-67-2346 (Supp. 1975); ILL. ANN. STAT. ch. 102, §§ 41-46 (Smith-Hurd Supp. 1977); IND. CODE ANN. §§ 5-14-1-1-5-14-1-6 (Burns 1974); IOWA CODE ANN. ch. 28A.1-28A.8 (West Cum. Supp. 1977); KAN. STAT. §§ 75-4317-75-4320 (SUPP. 1976); KY. REV. STAT. ANN. §§ 61.805-61.850, 61.991 (Baldwin Cum. Supp. 1976); LA. REV. STAT. ANN. § 42.52 (West 1977); ME. REV. STAT. tit. 1, §§ 401-410 (Supp. 1975); MD. ANN. CODE art. 41, § 14 (1971); MASS. GEN. LAWS ANN. ch. 30A, 11B (West Cum. Supp. 1977); MICH. COMP. LAWS ANN. §§ 15.251-15.275 (Supp. 1977); MINN. STAT. ANN. § 471.705 (West Supp. 1977); MISS. CODE ANN. §§ 25-41-1-25-41-15 (Supp. 1977); MO. ANN. STAT. §§ 610.010-610.030 (Vernon Cum. Supp. 1977); MONT. REV. CODES ANN. §§ 82-3401-82-3403 (1975); NEB. REV. STAT. §§ 84-1408-84-1414 (1976); NEV. REV. STAT. §§ 241.010-241.040 (1973); N.H. REV. STAT. ANN. §§ 91-A:1-91-A:8 (Supp. 1975); N.M. STAT. ANN. §§ 5-6-23-5-6-26 (Supp. 1975); N.C. GEN. STAT. §§ 143-318.1-143-318.7 (Cum. Supp. 1975); N.D. CENT. CODE § 44-04-19 (Supp. 1977); OHIO REV. CODE ANN. § 121-122 (Page Supp. 1976); OKLA. STAT. ANN. tit. 25 § 201-202 (West Supp. 1976); OR. REV. STAT. §§ 192.610-192.690 (1975); PA. STAT. ANN. tit. 65 § 261-269 (Purdon Supp. 1977); S.C. CODE §§ 30-3-10-30-3-50 (1977); S.D. COMPILED LAWS ANN. §§ 1-25-1-1-25-5 (1974); TENN. CODE ANN. §§ 8-4402-8-4406 (Cum. Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1976); UTAH CODE ANN. §§ 52-4-1-52-4-9 (Supp. 1977); VT. STAT. ANN. tit. 1, §§ 312-313 (Supp. 1977); VA. CODE §§ 2.1-340-2.1-346.1 (Cum. Supp. 1976); WASH. REV. CODE §§ 42-30.010-42-30.920 (Supp. 1977); W. VA. CODE §§ 6-9A-1-6-9A-6 (Cum. Supp. 1977); WIS. STAT. ANN. §§ 19.81-19.98 (West Supp. 1977); WYO. STAT. §§ 9-692.10-9-692.16 (Cum. Supp. 1975).

96. *See* 5 U.S.C. § 552 (Supp. IV 1974). For a compilation of state public records acts, see *Project: Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1169 n.1202 (1975) [hereinafter cited as *Project*].

97. *See* ABA Legal Advisory Comm. of Free Trial & Free Press, THE RIGHTS OF FAIR TRIAL & FREE PRESS (1969); 29 VAND. L. REV. 1431 (1976).

universal identification,[98] the adoption of the Fair Credit Reporting Act[99] and the Privacy Act of 1974,[100] and the establishment of the Federal Privacy Protection Study Commission.[101] As these trends in widespread disclosure and the protection of privacy continue to mature, they will inevitably clash, making a balancing of interests mandatory.

Until the enactment of recent legislation giving statutory remedies for violation of laws which restricted dissemination,[102] damaged parties were left with tort remedies. William L. Prosser's characterization of the tort of invasion of privacy[103] is inadequate to deal with the interests raised in these cases.[104] For recovery under this tort, an injured party must show harm and prove damages,[105] show that the disclosure was to more than a small group,[106] and that the information disclosed was in fact private.[107] These elements were to be judged by a reasonable person standard[108] and there was

98. Section 7(a)(1) of the Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896, states: "It shall be unlawful for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." *See also* ARK. STAT. ANN. § 16-807 (Supp. 1975); OKLA. STAT. ANN. tit. 74, § 311 (West 1976); VA. CODE § 2.1-385 (Cum. Supp. 1976).

99. 15 U.S.C. § 1681 (1970).

100. 5 U.S.C. § 552a (Supp. IV 1974). Six states have enacted privacy statutes: ARK. STAT. ANN. §§ 16-801–16-810 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 66A, §§ 1-3 (West 1975); MINN. STAT. ANN. § 15.165 (West 1977); OHIO REV. CODE ANN. §§ 1347.01–1347.99 (Page Supp. 1966); UTAH CODE ANN. §§ 63-501–63-50-10 (Supp. 1977); VA. CODE §§ 2.1-377–2.1-386 (Cum. Supp. 1976).

101. Privacy Act of 1974, Pub. L. No. 93-579, § S, 88 Stat. 1896.

102. *See, e.g.*, 5 U.S.C. § 552a(g)(1), (i)(1) (Supp. IV 1974).

103. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 802-18 (4th ed. 1971) [hereinafter cited as PROSSER].

104. *See generally* PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 6-13 (1977) [hereinafter cited as PRIVACY STUDY].

The Privacy Protection Study Commission made the following observations about the situation of a person confronted with extensive record-keeping systems over which he has almost no control:

> The fifth and last characteristic—that neither law nor technology gives an individual the tools he needs to protect himself from the undeserved difficulties a record can create for him—may also leave him helpless to stop damage once it has started. Current law is neither strong enough nor specific enough to solve the problems that now exist . . . .
>
> The Commission also found numerous examples of situations in which decisions of judgments made on the basis of a record about an individual can matter to the individual very much but in which he has no substantive or procedural protection at all. The law as it now stands simply ignores the strong interest many people have in records about them.
>
> . . . .
>
> . . . The lack of a legal interest for the individual in the records organizations maintain about him has put him in an extremely vulnerable position.

Id. at 10-11, 20.

105. PROSSER, *supra* note 103, at 815; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974) (the Supreme Court required a showing of damages or actual malice for recovery).

106. Virgil v. Time, Inc., 527 F.2d 1122, 1126 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

107. PROSSER, *supra* note 103, at 808, 810.

108. *Id.* at 811.

an exception for persons and events of public interest or which were newsworthy.[109]

Privacy interests today demand different protections. An individual should have control over data disseminated about him[110] because such data defines his individuality.[111] If taken out of context or released without his

109. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (private person, not a public figure, involved in event of public interest); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (former football coach employed by private corporation is a public figure for first amendment purposes); Associated Press v. Walker, 388 U.S. 130 (1967) (citizen who takes controversial position in public is a public figure for first amendment purposes). *But see* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (wife of a well known person who is a party in a divorce proceeding is not a public figure for first amendment purposes).

110. The credo of the Privacy Protection Study Commission has been used in the analysis of every privacy or data disclosure issue before that commission. The following criteria have been recommended as guiding principles in its final report:

> [1.] There must be no personal data record-keeping system whose very existence is secret.
> [2.] There must be a way for an individual to find out what information about him is in a record and how it is used.
> [3.] There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.
> [4.] There must be a way for an individual to correct or amend a record of identifiable information about him.
> [5.] Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability [*i.e.*, accuracy, relevance, timeliness, and completeness] of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

PRIVACY STUDY, *supra* note 104, at 501.

111. *Project*, *supra* note 96, at 1225. *See also* A. MILLER, ASSAULT ON PRIVACY (1971); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y. L. REV. 962 (1964); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, & Intimate Decision*, 64 CAL. L. REV. 1447 (1976); Note, *Informational Privacy: The Concept, Its Acceptance & Affect on State Information Practices*, 15 WASHBURN L.J. 273 (1976).

The Privacy Protection Study Commission pointed out:

> Since so much of an individual's life is now shaped by his relationships with organizations, his interest in the records organizations keep about him is obvious and compelling. . . .
>
> . . . .
>
> . . . [M]ore and more records about an individual are collected, maintained, and disclosed by organizations with which the individual has no direct relationship but whose records help to shape his life.
>
> . . . .
>
> What two people divulge about themselves when they meet for the first time depends on how much personal revelation they believe the situation warrants and how much confidence each has that the other will not misinterpret or misuse what is said . . . .
>
> . . . .
>
> Once an individual establishes a relationship with a record-keeping organization, he has even less practical control over what actually gets into a record about him, and almost none over how the record is subsequently used. In contrast to his face-to-face relationships with other individuals, he can seldom check on the accuracy of the information the organization develops about him, or discover and correct errors and misperceptions, or even find out how the information is used, much less participate in deciding to whom it may be disclosed.

PRIVACY STUDY, *supra* note 104, at 8, 13, 14.

Because of the inadequate tort remedies and the high risk of harm to the individual, successful litigation of these issues has often depended upon statutory interpretation, both to determine whether a violation has occurred and the remedy to be derived. For all of these reasons, the Committee paid scrupulous attention to detail in the writing of the confidentiality

knowledge and consent, it damages that right to define one's own individuality. Thus, the reasonable person standard is supplanted by the individual standard. The fact of dissemination is a violation,[112] whether or not it is truthful, whether communicated to one person or many, and no matter what the data is. The data need not be published, but merely disseminated, to be a violation. Since the dissemination is the violation, there is no need to show damage.

When the Committee dealt with the confidentiality problem, it became evident that the tension was not merely between an individual's right to privacy and the public's right to know.

When a complaint is filed with the commission, there are three confidentiality interests: the commission, the judge and the complainant. The complainant wants his identity protected so that there will be no reprisals taken against him by the judge. Protection for the complainant will help persuade attorneys and other judges who would not want to be tattling on one of their colleagues to give appropriate information to the commission. To afford some protection to the complainant, Proposed Standard 4.2 grants absolute privilege[113] to the complainant and the complaint. This Proposed Standard is not a confidentiality provision. Its language indicates that its thrust is toward privilege from *suit* and not privilege from disclosure.[114] If this were not so, a complainant could require release of information about a case by waiving his privilege. That this was not intended is shown in Proposed Standard 4.8.[115] The interests of the complainant are protected in Proposed Standards 4.1 and 4.5 which state that the judge does not automatically receive notice of a complaint in the proceedings before probable cause hearings.[116] Further, the commentary to Proposed Standard 4.1 clarifies that

provisions. The balancing of interests of confidentiality and disclosure by the Committee remains an important part of the Proposed Standards.

112. MINN. STAT. ANN. §§ 15.166-15.167 (West 1977).

113. "Absolute privilege" is a term of art to be contrasted with "qualified privilege." In jurisdictions which have adopted the qualified privilege, a suit may be filed against a complainant to a disciplinary agency on the grounds that the disciplinary complaint was filed with malice. Conly v. Southern Import Sales, Inc., 382 F. Supp. 121, 124-25 (M.D. Ala. 1974).

The better reasoned approach is absolute privilege. *See* Kerpelman v. Bricker, 23 Md. App. 628, 329 A.2d 423 (1974); Wiener v. Weintraub, 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968); Baggott v. Hughes, 34 Ohio Misc. 63, 296 N.E.2d 696 (1973); Ramstead v. Morgan, 219 Or. 383, 347 P.2d 594 (1959).

114. Some courts have great difficulty making this distinction. Wong v. Schorr, 51 Haw. 608, 466 P.2d 441 (1970). *But see* Fitzgerald v. Wynne, No. 72-173 (D. Mass. Aug. 28, 1972) for the correct analysis.

115. PROPOSED STANDARDS, *supra* note 4, at No. 4.8.

116. *Id.* at No. 4.2 and 4.5. Proposed Standard 4.5 states:"Notice that a complaint has been made may be given to the judge." The commentary accompanying this provision clarifies the situations in which the executive officer may wish to defer this notice. If the complaint is dismissed before the probable cause stage is reached, the judge is given notice of the dismissal, but he still is not necessarily given the identity of the complainaint. *Id.* at Commentary accompanying No. 4.5.

complaints may be anonymous, a further protection to the reluctant complainant.[117]

The respondent judge's interest in confidentiality is respected and protected in several standards. When a complaint is received, the investigation and evaluation to determine whether there is sufficient cause to proceed is confidential.[118] However, if information about the complaint or the case somehow is made public, by the complainant, the press, or other means such as a criminal conviction, the judge may waive his right to confidentiality and request that the commission release certain information about the case[119] to protect his right to a fair adjudication and to ensure that the public understands the proceeding.[120] The judge may also waive his right of confidentiality by his own release of information to the public.[121]

In the early stages of investigation, the commission also has an interest in confidentiality. If the commission is to do a thorough job in determining whether there has been misconduct and whether to proceed to probable cause, its investigation must be protected.[122] In later stages, this interest is balanced by a need to show the public what has been done in a particular case in order to maintain public confidence in the effectiveness of the process.[123]

When the judge seeks discovery in preparation of his defense, the commission's interest in confidentiality gives way.[124] Presumably, the commission's work product would be protected under the prevailing discovery rules but liberal construction of those rules is recommended.[125]

At times, parties with no connection to the disciplinary proceeding will seek information about the case. Requests for information may be directed to the commission during a preliminary investigation, after probable cause has been found, or after the disposition of the case.[126] The interest of the judge to control the dissemination of information about him *which has not been made public* should be tantamount in these situations.

After final disposition of a case, the commission has no interest in either disseminating or withholding the information from selected disclosure. Since the Proposed Standards establish a general rule of confidentiality until the probable cause hearing,[127] such selected disclosure should not be

117. *Id.* at No. 4.1.
118. *Id.* at Commentary accompanying No. 4.4.
119. *Id.* at Nos. 4.8 and 4.9.
120. *Id.* at No. 4.9.
121. *Id.*
122. *Id.* at Commentary accompanying No. 4.4.
123. *Id.* at Nos. 4.6 and 4.9.
124. *Id.* at Nos. 4.19, 5.7 and 5.8.
125. *Id.* at Commentary accompanying Nos. 4.19, 5.7 and 5.8.
126. *Id.* at Commentary accompanying No. 4.6 and No. 4.10.
127. *Id.* at Commentary accompanying No. 4.6.

made solely in the discretion of the commission.[128] This principle should be followed for disclosure of nonpublic information at any time before, during or after the proceedings.

Proposed Standard 4.14 allows the commission to release to the complainant information of the dismissal of a case for lack of sufficient cause to proceed.[129] Because the probable cause stage has not been reached, this information is not public. However, the complainant's interest in knowing how his complaint was disposed of is related to the commission's interest in portraying to the public that it is working for the best interests of justice. The interests of confidentiality are still served because the commission is restricted in what information may be released to the complainant at that stage.

Proposed Standard 4.9 allows the commission to release information to the public before the probable cause stage when certain special circumstances are present.[130] One circumstance is waiver of confidentiality by the judge.[131] There seems to be no valid reason for the commission to refuse to release information when the judge has waived his right. Another circumstance is when the case has already received some level of notoriety, because of a leak of information, a criminal conviction, or behavior under investigation that was public.[132] In all of these cases the commission has the authority to release only the information listed in Proposed Standard 4.9. As to that information, the commission has some discretion, but the interests of confidentiality demand that no more information than that listed be released by the commission prior to the finding of probable cause.

Proposed Standard 4.10 is an exception to the confidentiality rule because it permits the commission to answer a request about the disciplinary record of a person under investigation by a judicial selection or appointment agency.[133] The fact that there is only one such exception indicates the esteem in which the confidentiality rule is held. The detailed nature of Proposed Standard 4.10 indicates that even this exception must withstand many challenges before it is acceptable. First, the request must come from an official agency, not merely one interested in a particular judge for an appointment. Second, disclosure must meet the procedures prescribed by the court or the judge must sign a waiver. Since the procedures promulgated by the court must include reasonable notice to the judge of the intended disclosure, the judge may act to prevent disclosure if he does not want to be

128. *Id.* at Nos. 4.9-4.11.
129. *Id.* at No. 4.14.
130. *Id.* at No. 4.9.
131. *Id.*
132. *Id.* at Commentary accompanying No. 4.9.
133. *Id.* at No. 4.10.

considered for appointment or does not want the information released.[134] The same criteria applies in the reassignment of a retired judge to judicial duties.[135]

These exceptions apply only to information that is indeed confidential.[136] Information made public after a finding of probable cause remains public and will be accessible without resort to these criteria.

After probable cause has been found, the interests in confidentiality must be rebalanced. Since at this point there is no danger of an unfounded complaint, and complaints beyond the jurisdiction of the commission have been screened out, the interest of the judge in keeping the matter confidential is much weaker. In contrast, the interest of the public in the possible misconduct of its public officers is stronger. The public also needs to be assured that the commission is doing its job.

The Committee found that a number of states provide for confidentiali-

134. The judge should be allowed to petition to quash the order, request to be heard on the issue, file for an injunction prohibiting the disclosure, or any other method that may be available in the jurisdiction.

135. PROPOSED STANDARDS, *supra* note 4, at NO. 4.10.

Another exception to confidentiality, but one not mentioned in the Proposed Standards, is disclosure to state legislative and congressional investigative committees. Since the Proposed Standards recommend that impeachment be retained (PROPOSED STANDARDS, *supra* note 4, at NO. 1.8), there is at least one obvious reason that commission records would be sought by the legislative branch. Access to records by a legislative investigating committee would probably be compelled. As long as the investigation is not a fruitless search into private lives of individuals but is capable of resulting in valid legislation, disclosure to the legislative branch would be proper. The permissible area of inquiry is at least as broad as the power to legislate and the possibility of valid legislation emerging is given liberal interpretation. Although the Committee did not squarely address the issue, it seems appropriate for the commission served with a congressional subpoena to give notice to the judge whose records are sought, even if the judge has no means to prevent the disclosure to the legislature under its broad investigative powers. Such notice should be required in the rules promulgated by the court for the commission.

In *Forbes v. Earl*, 298 So. 2d 1 (Fla. 1974), disclosure of law files of the Judicial Qualification Commission relating to an officer who may be the subject of an impeachment investigation was permitted only in a restricted manner. Release was permitted to the Speaker of the legislature or his designate, *in camera*, and only in the presence of judicial officers.

In *Kusak v. Howlett*, 44 Ill. 2d 233, 254 N.E.2d 506 (1969) an Illinois House Resolution required the Speaker to begin investigation of charges of judicial impropriety of members of the supreme court. The General Assembly sought information necessary for legislative action in the field of judicial ethics. The court found that the power to remove officers of the judiciary had been transferred from the legislature to the judiciary, which had sole control. Since the General Assembly no longer had power to enact legislation in the field, its request for information was denied.

136. There is no interest in need of protection after information is made public because any harm that was suffered from the act of making the information public is already risked. There is some authority that passage of time will protect even public information from further dissemination, but those cases involved dissemination to the public at large through publication and not a limited disclosure to one party. *See* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). The better rule is that public information remains public and therefore accessible no matter when it is requested.

ty of disciplinary proceedings by constitution[137] or by statute.[138] In those states, the rules of procedure mandate the confidentiality of proceedings against a judge. Although a majority of the states adhere to the rules of strict confidentiality, the Committee concluded that the uniform standards should provide for a public hearing after an initial determination was made that the matter could not be disposed of prior to the issuance of a formal charge against the judge.[139] Inherent in the adoption of a dividing line between confidentiality and public hearings was a determination by the commission that probable cause exists to support the issuance of a formal charge against the judge under Proposed Standard 5.1.[140]

In arriving at its determination, the Committee evaluated both policy and practical considerations. The policy considerations primarily concerned the fact that there did not appear to be a valid reason why the conduct of judges, as distinguished from other public servants, should be hidden from the electorate where probable cause exists that the charges of impropriety can be substantiated. The Committee believed that the process involved in establishing commission memberships[141] provides an adequate safeguard against the filing of improperly motivated charges against a judge. Likewise, the Committee was of the opinion that the electorate generally functions in a responsible manner and can discern the truth and substance of allegations against a particular judge.

The practical consideration involved a realistic assessment of the capabilities of an investigative media or press reporter. In a number of cases examined by the Committee, the respondent judge's name and the fact that he was being formally charged by the commission was disclosed publicly by the press and media prior to the filing of any recommendation of action by the commission.[142] Thus, it seemed both logical and practical to recommend as a model standard that the confidentiality of commission proceedings terminate upon the issuance of a formal charge based on probable cause against a judge.

137. *See, e.g.*, ALA. CONST. amend. CCCXVII, § 3; COLO. CONST. art. 6, § 23(3)(d); DEL. CONST. art. 4, § 37; FLA. CONST. art. 5, § 12(d); LA. CONST. art. 5, § 25; MD. CONST. art. 4, § 4B(a); MONT. CONST. art. 7, § 11; NEB. CONST. art. 5, § 30(3); N.M. CONST. art. 6, 32; PA. CONST. art. 5, § 18(h); S.D. CONST. art. 5, § 9; TEX. CONST. art. 5, § 1-a(10); VA. CONST. art. 6, § 10.

138. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 51-51(d) (West Supp. 1977); HAW. REV. STAT. § 610-3 (Supp. 1975); IDAHO CODE § 1-2103 (Cum. Supp. 1977); IND. CODE ANN. §§ 33-2.1-5-3 and 33-2.1-6-6 (Burns 1975); IOWA CODE ANN. § 605.28 (West 1975); N.C. GEN. STAT. § 7A-377 (Cum. Supp. 1975); OR. REV. STAT. § 1.420(2) (1975); TENN. CODE ANN. § 17-811(2) (Cum. Supp. 1976).

139. PROPOSED STANDARDS, *supra* note 4, at NOS. 4.6 and 5.1.

140. *Id.* at NO. 5.1.

141. *Id.* at NOS. 2.1-2.5.

142. *See, e.g.*, *In re* Anderson, 252 N.W.2d 592 (Minn. 1977).

Such a position is not without present support among the states. The rules of the Michigan Supreme Court, adopted pursuant to its constitution, provide for public hearings after the filing of a formal complaint against a judge.[143] The Wisconsin Supreme Court, in establishing a commission, also included a provision for public hearings after the issuance and filing of a complaint against a judge.[144] Finally, in a rather unique constitutional provision, Oklahoma establishes a court of judiciary to hear petitions, publicly filed by that state's supreme court, the governor, attorney general, or the executive secretary of the state bar association against a judge.[145]

It was the considered opinion of a majority of the Committee that the proper line of demarcation between confidentiality and public hearings was at the point when probable cause exists sufficient to issue a formal charge against a judge before the commission.[146] The Committee is aware that such a proposal if adopted by some states will require constitutional revisions. Nevertheless, an adoption of a lesser standard would be a departure from the charge of the Committee to adopt model standards which reflect the optimal procedures to be followed giving due consideration to both the right of the judge and the public.

The nature of the confidentiality issue demanded that the Committee add a Proposed Standard to provide a method of enforcement.[147] The Committee could not determine the best method, since jurisdictions vary, but has acknowledged that some jurisdictions use contempt citations successfully to deter breaches of confidentiality.[148] At least one jurisdiction has made violation of confidentiality a criminal offense. In *Landmark Communications Inc. v. Virginia*,[149] a newspaper was found guilty under a criminal statute which made the divulging of any information about the commission's work a violation. The court found clear and present danger in the fact that the legislature had seen fit to pass the statute in the first place.[150] Another method of enforcing a confidentiality provision would be to allow the judge to sue the party who made the breach.[151] An earlier draft of the

143. MICH. GEN. SUP. CT. R. 932.22(b).
144. WISC. STAT. ANN. § 256 (West 1974), WISC. SUP. CT. R. 21.
145. OKLA. CONST. art. 7-A, § 4.
146. *See* PROPOSED STANDARDS, *supra* note 4, at Commentary accompanying No. 4.6.
147. *Id.* at No. 4.7.
148. *See, e.g.*, KAN. STAT. ANN. § 20-175, R. 607 (Vernon 1973); MINN. CT. R. S(2) (1976).
149. 233 S.E.2d 120 (Va. 1977), *argued* 46 U.S.L.W. 3451 (Jan. 11, 1978).
150. *Id.* at 126.
151. The Privacy Act of 1974 grants standing to any individual who has suffered an adverse effect to bring a civil action in federal court. *See* 5 U.S.C. § 552a(g)(1) (Supp. IV 1974). Remedies are an injunction (5 U.S.C. § 552a(g)(2) (Supp. IV 1974)) or damages (5 U.S.C. § 552a(g)(4) (Supp. IV 1974)). Criminal penalties are imposed for violations that are key to any effective protection for privacy and confidentiality (5 U.S.C. § 552 a(h)(i)(l) (Supp. IV 1974)).

Other acts providing for confidentiality have had the same problems in dealing with a violation. For example, the Minnesota Data Maintenance Act provides for an injunction (MINN.

Proposed Standards provided that a breach of confidentiality would waive the immunity of the commission and its staff provided in Proposed Standard 2.9.[152] This was discarded in later versions of the Proposed Standards in favor of letting the various jurisdictions develop their own solutions.[153]

Most jurisdictions do not deal with the problem at all. This may be because they did not see the issue, it so seldom arose that it was not a problem, or some other remedy was applied.[154] The Proposed Standards assure that the issue is squarely presented and that the adopting jurisdiction deals with the problem.[155]

CONCLUSION

The recommendations of the Committee concerning the proper standard of proof to govern in disciplinary proceedings establish the clear and convincing evidence test as the standard. This action reflects the majority view of those jurisdictions which have considered the issue.

The Proposed Standards involving the possible sanctions that may be imposed against a judge charged with improper conduct represent a collection of existing state standards. The one notable exception is the Committee's decision to exclude the sanction of suspension with or without pay.

Those Proposed Standards which concern the relative confidentiality of disciplinary proceedings represent a substantial departure from the majority opinion in most states today. It is the considered opinion of the Committee that adoption of these Proposed Standards will best fulfill the purpose of a system for the enforcement of standards for judicial conduct. This purpose is to protect both the public and the integrity of the judicial process.[156]

STAT. ANN. § 15.166(2) (West Supp. 1977)), a civil remedy including punitive damages (MINN. STAT. ANN. § 15.166(1) (West Supp. 1977)) and a criminal penalty (MINN. STAT. ANN. § 15.167 (West Supp. 1977)). Since the Minnesota act applies to government employees and entities, there is also an explicit waiver of immunity (MINN. STAT. ANN. § 15.166(1) (West Supp. 1977)).

152. The commentary to the earlier draft stated that: Whoever breaches confidentiality should not be entitled to any of the immunities and privileges recommended by the standards.

153. *See* PROPOSED STANDARDS, *supra* note 4, at No. 4.7 and accompanying Commentary.

154. Violations of the confidentiality provisions committed by court personnel, commission staff, or the commission could be handled administratively, by disciplining by fine, reassignment of duties, or firing of the offending officer. Minnesota suggests suspension without pay or dismissal for willful violations. MINN. STAT. ANN. § 15.167 (West Supp. 1977).

155. PROPOSED STANDARDS, *supra* note 4, at No. 4.7.

156. *Id.* at Commentary accompanying No. 1.1.