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MICHIGAN'S UNITARY SYSTEM OF JUDICIAL DISCIPLINE: A COMPARISON WITH ILLINOIS' TWO-TIER APPROACH

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Since 1960, forty-six states have followed California's lead in formulating new administrative systems to deal more effectively with the problem of judicial misconduct and incompetence.¹ On August 6, 1968, Michigan voters ratified a constitutional provision authorizing the Michigan Supreme Court, upon recommendation of a newly created Judicial Tenure Commission,² to "censure, suspend . . . , retire or remove"³ a judge for prescribed misconduct or disability.

Prior to the adoption of the Judicial Tenure Commission, the only method for removing a judge in Michigan was through either legislative impeachment "for corrupt conduct and misdemeanors,"⁴ or removal by the governor for reasonable cause subject to the approval of two-thirds vote in each house of the state legislature.⁵ Both impeachment and removal were impractical and ineffective in handling the widely varying degrees of judicial misconduct. Application of these procedures were limited to instances of outright criminal conduct or corruption.⁶ There were no provisions for handling physical or mental disabilities and misconduct *not* amounting to criminal conduct.⁷

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1. Winters, *Retrospect*, 60 JUD. 361 (1977).

2. MICH. CONST. art. 6, § 30(1) [hereinafter referred to in the text as the Commission].

3. MICH. CONST. art. 6, § 30(2).

4. MICH. CONST. art. 11, § 7.

5. MICH. CONST. art. 6, § 25.

6. This article does not address the procedures and history of impeachment and removal. Both provisions remain in the Michigan Constitution and are mentioned here only for the purpose of background material.

7. The Michigan Supreme Court does have superintending control over the courts and judiciary of the state. MICH. CONST. art. 6, § 4; MICH. GEN. CT. R. 711 and 930. These are procedures that may be used to correct specific injustices, often of the same subject matter as that of a Judicial Tenure Commission proceeding. *Berkley v. Holmes*, 34 Mich. App. 417, 427 n.7, 191 N.W.2d 561, 566 n.7 (1971). The supreme court pursuant to its superintending control powers may recommend removal or impeachment but may not itself remove, retire or suspend a judge. *Ransford v. Graham*, 374 Mich. 104, 131 N.W.2d 201 (1964); *In re Graham*, 366 Mich. 268, 114 N.W.2d 333 (1962). It is interesting to note, however, that under rule 930.8(2), the supreme court may disbar a judge which in most instances makes him or her unqualified to be a judge. MICH. GEN. CT. R. 930.8(2). This would not automatically remove the judge however. See *In re Kapcia*, 389 Mich. 306, 205 N.W.2d 436 (1973).

Generally, the judicial discipline plans adopted by the various states perform three basic functions: (1) investigation and charging; (2) hearing and findings; and (3) final disposition and resolution. Two different systems have evolved for implementing these functions. These are the "unitary" and the "two-tier" systems.

Michigan utilizes the unitary system of judicial discipline which is patterned after the California plan.⁸ The unitary system is designed to operate *within* the state's regular court system and consists of a board or commission which carries out the combined functions of investigation, charging and hearing. Commission findings are then passed on to the state supreme court for final disposition and disciplinary action if necessary.

Illinois, for example, utilizes the two-tier system. This administrative scheme operates *independently* from the state's judicial system and consists of two boards. One board investigates and charges. The second board, the adjudicatory board, makes factual and legal findings and determines the final disposition.

The purpose of this article is to explain Michigan's unitary system of judicial discipline. Primary emphasis will be devoted to a discussion of prehearing stage procedures.⁹ Further, this article will compare and contrast the unitary and two-tier systems. In doing so, it will be concluded that the unitary approach is more effective and efficient. Throughout this comparative analysis, the Illinois and Michigan judicial disciplinary plans will exemplify the two-tier and unitary systems respectively.

BACKGROUND: THE GOALS OF JUDICIAL DISCIPLINE

The goals of any judicial disciplinary system are to insure that the judiciary remains competent and that the public retains confidence in the judiciary. In order to attain these goals, the disciplinary structure must perform its investigation, hearing and disposition functions effectively and efficiently. To be truly effective and efficient, it is submitted that every system must include the following four essential ingredients: (1) conscientious commission members and staff; (2) public awareness of the disciplinary agency; (3) easy access to the discipline board coupled with the swift processing of grievances; and (4) investigatory confidentiality.

8. CAL. CONST. art. 6, § 18. For specific differences in the procedures of Michigan and California compare MICH. GEN. CT. R. 932 with CAL. CT. R. 901-922. Discussions of these differences, where relevant, are contained within various sections of this article.

9. The Michigan court rules pertaining to the hearing (MICH. GEN. CT. R. 930.7) and post hearing stage (MICH. GEN. CT. R. 930.8-930.9) of judicial discipline proceedings are more complete than the rules pertaining to the prehearing stage. For example, methods of investigation are not contained within the court rules.

In order to inform the reader of information possibly unavailable elsewhere, the focus of this article is on the prehearing stage.

Commission Members and Staff

A staff comprised of vigorous public servants can act to deter judicial dishonesty, laziness and prejudice by merely communicating to the bench that it will investigate every complaint. Such participants should be chosen according to the highest standards of legal competence so that the system can effectively implement such a policy. It is also important that these individuals are prepared to accept the possibility that they may alienate judges while serving as an investigator of judicial misconduct. There is no room for a staff member or commissioner who is worried about his or her future contact with the judge under investigation.

Public Awareness

The success of judicial discipline systems depends on information supplied by the public. It is therefore imperative that the general public be informed of the existence of the commission. Without such knowledge, complaints remain unvoiced and the commission becomes dormant.

The public may be made aware of the existence and functions of their state judicial disciplinary system in various ways. First, the best vehicle for transmitting this information to the public is the state bar association. Often individual complaints are voiced to an attorney at the time of the alleged misconduct or when the grievant telephones an attorney or the state bar seeking a remedy. Various sources could be used to insure that the bar keeps current on the matter of judicial discipline. In Michigan, for example, the bar participates in the election of commission members. Second, media coverage of formal hearings also provides information to the public that a judicial disciplinary system is available in their state by including within such coverage a summary of the proceedings and functions of the disciplinary agency. Third, legal publications and bar journals help to keep attorneys up to date. Fourth, law school ethics courses should also serve to keep future bar members informed of judicial disciplinary boards and the procedures governing them.

Attorneys not only serve to inform the public but they are probably the best source of meritorious grievances. As a professional, the attorney is aware of the distinction between judicial misconduct and judicial discretion. This knowledge serves two purposes. First, it increases the likelihood that a grievance filed by an attorney will be a request for a review of judicial misconduct and not the merits of a case. Secondly, an attorney may notice infractions that a lay person would have overlooked. In addition, many attorneys have occasion to appear before the same judges on a regular basis and have many opportunities to observe their demeanor and conduct. Court employees may also serve as a source since they not only have an opportunity to observe the judge on a continuing basis but frequently communicate and interact with their judge as well.

Access to the Board and Processing of Grievances

In order to achieve public participation, it is necessary that the commission be accessible and that the grievances be processed swiftly. This requires an office staff that is well informed of the procedures to be followed in filing grievances. Standard grievance forms help facilitate participation and processing by providing the grievant with an easy and efficient method of communicating his or her complaint and insuring that all of the essential information is recorded.

In jurisdictions that receive a considerable amount of grievances, people power is important. However, as in most governmental agencies, the problem is that there are not enough people to do the work. Locating the commission office in a large city of the state or in the state capital where the greatest amount of informational resources are readily available might help to ease staff shortage problems. Another timesaving device would be the maintenance of a complete file on every grievance which is cross-indexed according to judge and grievant. These files may help to gather witnesses and establish patterns. They would also indicate whether similar complaints have been made against the particular judge and whether the particular grievant has complained previously, against whom and the disposition of his or her case.

The natural result of public awareness and easy accessibility is an increase in the number of grievances that are filed. Many grievances are frivolous or do not relate to judicial misconduct. For this reason, it is necessary to weed out those types of grievances as quickly as possible in order to leave ample time and staff to investigate the meritorious grievances.

Investigatory Confidentiality

Investigatory confidentiality is required during this weeding out process so that the judge is protected from frivolous attacks and litigants and attorneys are encouraged to report their grievances without fear of reprisal from the judge. If all grievances were publicly announced, meritless complaints could have irreversible ramifications. For example, a grievance made in bad faith might be intentionally timed during the apex of a judge's election campaign; thus, leaving no time before election day to investigate and communicate the truth. The mere allegation of impropriety could have disastrous effects on the judge's reputation then and in the future. The Michigan commission has received unfounded grievances from individuals accusing various judges of running prostitution houses and dope dens.¹⁰

10. Due to the confidentiality of these grievances, specific documentation is not publicly available.

Public knowledge of a disciplinary investigation regarding such matters often cloaks an ill-founded complaint with a veil of credibility regardless of an announcement by a disciplinary body that the grievance was unfounded. Thus, confidential investigations are necessary in order to: (1) protect the judge's reputation until such time as public disclosure is warranted; and (2) avoid burdening such judges with defending against untruthful allegations.

Further, many attorneys, court employees and litigants might refrain from filing grievances out of fear of prejudicing the judge against their case if they are then appearing before that judge or appear before him on a regular basis. The best solution to this problem is to keep the grievant's name confidential until such time as it is necessary to reveal that information.

While investigatory confidentiality applies only to the disciplinary commission and its staff, there is nothing to stop the grievant from disclosing to the press or other sources that he or she has filed a complaint.¹¹ Likewise, a judge cannot be forced to withhold information that he or she has been approached by the commission. It is to the advantage of the grievant, however, to remain silent. In situations in which the judge's courtroom is monitored, the announcement of the investigation by the grievant could easily trigger a temporary change in the judge's courtroom demeanor. In situations where individuals announce grievances or the press somehow receives and prints information regarding an investigation, it may become necessary for a disciplinary commission to break the confidentiality rule and release certain clarifying information. Most jurisdictions, including Michigan, have provisions within their rules as to what type of information may be released in such circumstances.¹²

It is interesting to note that the California Rules of Court provide that all suspect judges shall be: (1) notified of any preliminary investigation in response to an initial grievance; (2) notified of the grievant's name; and (3) given an opportunity to respond at any time during the course of such preliminary investigations.¹³ It is unclear at what point this notice must be given. If it is required that the judge be notified at the initiation of the preliminary investigation, this could hamper the investigation in much the same way as a grievant's public announcement. It is submitted that the

11. *But see* Landmark Communications, Inc. v. Commonwealth, 217 Va. 699, 233 S.E.2d 120, *prob. juris. noted*, 97 S. Ct. 2919 (1977), in which the Virginia Supreme Court upheld against first amendment challenges a statute that makes it a misdemeanor for anyone to breach the confidentiality of proceedings before the Virginia Judicial Inquiry and Review Commission. In that case, the defendant, a publisher of a newspaper, was found guilty of violating the statute because of an article that identified the name of a judge under investigation.

12. MICH. GEN. CT. R. 932.22(a); *see also* *In re Del Rio*, — Mich. —, —, 256 N.W.2d 727, 732-33 (1977).

13. CAL. CT. R. 904(b).

better practice is to notify the judge *after* the preliminary investigation unless circumstances are such that delayed notification would serve no investigatory purpose and equity demands the judge be given an opportunity to be heard at this preliminary stage.

Both Michigan and Illinois require that the judge be notified of the charges and given an opportunity to respond prior to the filing of the formal public complaint. The Illinois Judicial Inquiry Board Rules mandate that the judge not be informed of the grievant's name unless the circumstances require such disclosure.¹⁴ In Michigan, there is no requirement that the grievant's name be either withheld or disclosed.¹⁵ These authors favor withholding the identity of the grievant in many situations such as when the grievant is an attorney or court employee. If anonymity is not preserved, many individuals might refrain from filing grievances. The temporary withholding of the grievant's name encourages such filing and aids in obtaining evidence during the investigation.

The Illinois and Michigan systems further provide that the investigation remain confidential until the formal complaint is filed by the investigatory commissions¹⁶ while the California system retains confidentiality until the case is later filed with its state supreme court for final disposition.¹⁷ Once a meritorious complaint is made public, public hearings serve two purposes. First they educate the public and second, the announcement of formal charges can spark additional witnesses to come forward. The potential imposition of sanctions, such as removal and suspension, are harsh penalties which require the thorough accountability that only public hearings can provide. The public has a right to know and observe the type of evidence required to remove their judicial officers. Thorough investigations are essential to lessen the likelihood that public charges cannot be sustained.

THE MICHIGAN JUDICIAL TENURE COMMISSION

Jurisdiction and Organization

The Michigan Judicial Tenure Commission¹⁸ has jurisdiction over all judges, magistrates, and referees serving in the Michigan judicial system.¹⁹

14. ILL. JUDICIAL INQUIRY BD. R. 4(e).

15. MICH. GEN. CT. R. 932.7(b).

16. ILL. CONST. art. 6, § 15, ILL. JUDICIAL INQUIRY BD. R. 5(a); MICH. GEN. CT. R. 932.8(b) and 932.22.

17. CAL. CT. R. 902.

18. Hereinafter the Michigan Judicial Tenure Commission will be referred to in the text as the Commission. Pursuant to rule 932.1(4)(d) the Commission is given the power to hire a staff. MICH. GEN. CT. R. 932.1(4)(d). The expenses of the Commission are paid from the Michigan Supreme Court appropriations (MICH. GEN. CT. R. 932.1(4)(b)) and the Supreme Court must approve its budget (MICH. GEN. CT. R. 932.1(4)(a)).

19. The Michigan Constitution provides for the discipline of judges pursuant to Commission recommendations, MICH. CONST. art. 6, § 30. Judge is defined in the court rules as a

The Commission has the authority to discipline a judge for conduct which occurred prior to the taking of judicial office²⁰ and also for grievances filed against part-time judges regarding their private law practices.²¹

The Commission consists of nine commissioners who hold office for three-year terms.²² Four commissioners are judges elected by the judges of the courts in which they serve: one court of appeals judge, one circuit judge, one probate judge, and one judge from a court of limited jurisdiction.²³ The members of the state bar of Michigan elect three commissioners, one judge and two non-judges.²⁴ Two commissioners are appointed by the governor.²⁵ These appointees may not be judges, retired judges or state bar members.²⁶

Since its inception in 1969, 915 grievances have been filed with the Commission.²⁷ During the past year, there has been an upswing in the filing of complaints and the commission now receives approximately twenty grievances per month.

"Justice or Judge of any appellate court or any trial court or a magistrate or referee of any court appointed or elected pursuant to any laws of this State." MICH. GEN. CT. R. 932.3(b). The following table delineates the number of judges in each of the Michigan courts:

Supreme Court	7
Court of Appeals	18
Circuit Court	147
Recorder's Court for City of Detroit	23
Common-Pleas—Detroit	13
Probate Court	105
District Court	188
District Court Magistrates	124
Municipal Court	36
Recorder's Court—Traffic & Ordinance Referees	9
Probate Court Referees	63
	<u>713</u>

All of the judges, referees and magistrates are fulltime judicial officers with three exceptions. Twenty-nine probate judges in rural areas of the state, many probate court referees, and all but one of the municipal court judges are part-time judges, who are permitted to practice law.

All of the judges and traffic court referees must be attorneys. MICH. CONST. art. 6, § 19; MICH. COMP. LAWS §§ 168.391, 168.409, 168.411, 168.425, 168.431, 600.1481, 725.1, 728.3 (1949). The magistrates and probate court referees need not be attorneys. MICH. COMP. LAWS § 600.8507 (1948). The magistrates function in a highly limited capacity. Included within their authority is the power to accept guilty pleas on minor offenses, arraign defendants and set bond in the absence of the district court judge. The magistrates do not conduct trials of any nature. MICH. COMP. LAWS § 600.8511 (1948).

20. *In re Ryman*, 394 Mich. 637, 644, 232 N.W.2d 178, 179 (1975).

21. MICH. STATE BAR GRIEVANCE BD. P. & AD. R. 16.6, § 2.

22. MICH. CONST. art. 6, § 30(1); MICH. GEN. CT. R. 932.1(1).

23. MICH. GEN. CT. R. 932.1(1).

24. *Id.*

25. MICH. CONST. art. 6, § 30(1).

26. *Id.*

27. Annual reports are prepared in June of each year containing the number of grievances filed. This statistic was provided by the executive director of the Commission, Brian J.

Filing Grievances and Initiating Investigations

A Commission investigation concerning the conduct or disability of any judge may be triggered in one of four ways. First, an individual may file a verified complaint or grievance.²⁸ Second, the State Bar Grievance Board may request investigation.²⁹ Third, the Chief Justice of the Michigan Supreme Court³⁰ or State Court Administrator may request an investigation.³¹ Finally, the Commission on its own motion may begin an investigation.³²

An individual grievance is usually initiated by phone or letter.³³ Often the commission receives telephone calls or letters in which the communicator refuses to reveal his or her name. Anonymous tips and grievances are investigated by the Commission on its own motion. Other sources also initiate sua sponte Commission investigations. For example, a newspaper article stating that a certain judge was arrested for drunk driving would prompt a Commission inquiry into the matter. It is the policy of the Commission to investigate every complaint.³⁴

Any judge who is the subject of such an investigation may be mailed a copy of the grievance prior to investigation.³⁵ This procedure is used most often in a situation involving only the grievant and the judge in which no third party has any information regarding the matter. To illustrate, if an individual litigant files a grievance stating that a judge privately pressured him into settling a case and no one else was present during the conversation or knew that there was a private conference, a copy of the grievance might be mailed to the judge and the judge would be given an opportunity to respond. The practice of notifying the judge of a grievance is not utilized if the commission is of the opinion that such communication might hamper further investigation or if the grievant does not wish the judge to be aware of his or her identity at that time.

Preliminary Investigation

Once a grievance has been filed or one of the other triggering mechanisms has occurred, a preliminary investigation is initiated.³⁶ In Michigan,

McMahon, in an interview on May 4, 1977, because the 1976-77 report was not available on that date.

28. MICH. GEN. CT. R. 932.7(a)(i).

29. MICH. GEN. CT. R. 932.7(a)(ii).

30. MICH. GEN. CT. R. 932.7(a)(iii).

31. *Id.*

32. *Id.*

33. Upon receiving the communication, the Commission mails a standard grievance form to the grievant. The form is filled out under oath and mailed back to the Commission. Seldom do individual grievants appear personally to file a grievance.

34. MICH. GEN. CT. R. 932.7(a).

35. There is no specific court rule for this practice. However, rule 932.7(b), although usually used for the "15-day letter" discussed (*see* text accompanying notes 45-47 *infra*), could be used in this situation. MICH. GEN. CT. R. 932.7(b).

36. MICH. GEN. CT. R. 932.7(a).

the Commission investigations are usually conducted by the executive director and the staff attorneys. Other investigative sources, such as governmental agencies and task forces, have on occasion aided the Commission in its investigations. However, no formal relationship exists between those agencies and the Commission. In addition, the Commission has the authority to hire private investigators,³⁷ but thus far this method has been used only on rare occasions.

An investigation may involve a variety of techniques and resources. Some of the more commonly used investigative methods include interviewing witnesses, criminal defendants, court personnel, police officers and others who may have knowledge on the subject of the grievance. The Commission may also examine documents including court files and transcripts. It may further monitor the judge's courtroom by sitting in and observing the way in which the judge conducts his or her court. The monitoring technique is used most often in a court that is not a court of record and when there is some allegation of offensive courtroom behavior. Courtroom monitoring has never been conducted at random in Michigan. It has always been initiated pursuant to a specific allegation or grievance against a particular judge.³⁸

Commission Consideration of Investigative Findings

Following the preliminary investigation, the Commission staff prepares a written report. A copy of this report is submitted to each commissioner by mail along with a form ballot. If all of the commissioners vote to dismiss the case, it is dismissed.³⁹ The vote of one commissioner to hold the case is sufficient to invoke a meeting of all commissioners to discuss the matter.⁴⁰ If, at such a meeting, the commissioners determine that the preliminary investigation does not establish sufficient cause to warrant the filing of a formal complaint against the judge, the Commission may terminate its investigation upon a majority vote of five commissioners⁴¹ or recommend to the state supreme court private censure stating the reasons for such censure.⁴² Upon dismissal of the case, the grievant is notified of the commission's decision and its reasoning.⁴³

37. See MICH. GEN. CT. R. 932.1(4)(d).

38. MICH. GEN. CT. R. 932.7(a).

39. MICH. GEN. CT. R. 932.21(a).

40. This procedure has been adopted by the Commission in Michigan under its independent rule-making authority. MICH. GEN. CT. R. 932.2.

41. MICH. GEN. CT. R. 932.7(c); JUDICIAL TENURE COMM'N ADMIN. R. 2.

42. MICH. GEN. CT. R. 932.7(c). It should be pointed out that private supreme court censure has never been recommended by the Commission.

43. According to administrative rule 4(1) the grievant must be notified of any disposition of the grievance. JUDICIAL TENURE COMM'N ADMIN. R. 4(1). If the judge had been given notice of the charges pursuant to rule 732.7(b) (MICH. GEN. CT. R. 932.7(b)), he or she should be

Oftentimes such grievances appear to be complaints of misconduct when in actuality they are requests for the rehearing of a case in which the grievant was dissatisfied with the judge's decision. For example, a criminal defendant may claim that Judge Y was biased and prejudiced against him, while the record reveals that the judge merely expressed his intolerance for violent crimes while sentencing the defendant. In such cases, a letter is mailed to the grievant explaining that the Commission does not review cases but investigates only misconduct or incompetence and why his or her particular grievance fits into the former category.

Written notice of the charges is sent to the judge if at least a majority of five commissioners determine that the investigation discloses a reasonable basis for the filing of a complaint.⁴⁴ This notice contains a comprehensive statement of the charges against the judge. It is also called the "15-day letter" since the letter requests the judge to respond in writing or appear before the Commission within fifteen days.⁴⁵ However, it is not mandatory that the judge respond or appear at this time.⁴⁶

A copy of the written response, if submitted, is given to each commissioner. A meeting is then called for the purpose of discussing everything that has occurred thus far, i.e., the investigation, the charges, the judge's response and personal communication with the judge. A vote is then conducted to determine whether the Commission should issue a formal public complaint.⁴⁷ In making that decision, the commissioners consider: (1) the appropriateness of other disciplinary alternatives such as Commission-ordered, non-public private reprimands for minor misbehavior;⁴⁸ (2) the sufficiency of available evidence to support a formal complaint; and (3) whether the judge's behavior or disability falls within the scope of the Commission's jurisdiction.⁴⁹

Formal complaints may be issued upon a majority vote of five or more commissioners.⁵⁰ If the commission so approves, the complaint is drafted,

notified of termination of the investigation or of the recommendation of private censure pursuant to rule 932.7(c) (MICH. GEN. CT. R. 932.7(c)). In addition, the judge may be advised of the disposition if not previously notified of the charges. JUDICIAL TENURE COMM'N ADMIN. R. 4(2).

44. MICH. GEN. CT. R. 932.7(b).

45. MICH. GEN. CT. R. 932.9(a).

46. This court rule only states that the judge be given a reasonable opportunity to respond, not that he or she must respond. MICH. GEN. CT. R. 932.7(b).

47. MICH. GEN. CT. R. 932.8(a).

48. This refers to private reprimands. See text accompanying notes 76-108 *infra*.

49. This article does not address what constitutes misconduct. That subject is best left to specific cases and other articles. The reader is directed, however, to MICH. CONST. art. 6, § 30(2); MICH. GEN. CT. R. 932.4; *In re Ryman*, 394 Mich. 637, 232 N.W.2d 178 (1975); *In re Kapcia*, 389 Mich. 306, 205 N.W.2d 436 (1973); *In re Heideman*, 387 Mich. 630, 198 N.W.2d 291 (1972), for the general description of what constitutes misconduct and specific Michigan examples.

50. MICH. GEN. CT. R. 932.8(a), JUDICIAL TENURE COMM'N ADMIN. R. 2.

filed in the commission's office and served upon the judge.⁵¹ Up until this point, the investigation and communications are kept confidential.⁵² After a formal complaint is issued, it is publicly announced and made available for public inspection.⁵³ The judge has fifteen days to answer the formal complaint.⁵⁴

Upon filing of the complaint, the Commission either sets a time for a hearing before itself⁵⁵ or petitions the state supreme court to appoint a master to preside over a hearing.⁵⁶ At this time, the Commission may also request that the state supreme court suspend a judge pending final adjudication of the complaint.⁵⁷ In Michigan, the Commission rarely presides over the hearing. So far, the only time that this has occurred was when the Commission determined that the facts were clearly not in dispute and the only questions remaining after investigation were ones of law.⁵⁸

The Hearing and Final Disposition

The hearing is public whether conducted before a master or the Commission.⁵⁹ One or more examiners (usually Commission staff attorneys) are appointed by the Commission to present the evidence in support of the charges.⁶⁰ The charges must be established by clear and convincing evidence.⁶¹ The hearing is conducted and recorded pursuant to the civil rules of evidence and procedure.⁶² The judge is entitled to be represented by counsel⁶³ but has no right to discovery proceedings.⁶⁴

If the hearing has been conducted before a master, the master is to submit a report along with a copy of the hearing transcript to the Commission within thirty days after the conclusion of the hearing.⁶⁵ This report contains a statement of the proceedings and findings of facts and conclu-

51. MICH. GEN. CT. R. 932.8(b).

52. MICH. GEN. CT. R. 932.22.

53. MICH. GEN. CT. R. 932.8(b).

54. MICH. GEN. CT. R. 932.9(a).

55. MICH. GEN. CT. R. 932.10(a).

56. MICH. GEN. CT. R. 932.10 and 932.10(b).

57. MICH. GEN. CT. R. 932.20.

58. 389 Mich. 306, 309-10; 205 N.W.2d 436, 437-38 (1973).

59. MICH. GEN. CT. R. 932.11(a) and 932.22(b).

60. MICH. GEN. CT. R. 932.3(f) and 932.11(a); JUDICIAL TENURE COMM'N ADMIN. R. 5. These examiners are usually Commission staff attorneys.

61. MICH. GEN. CT. R. 932.4. A disciplinary proceeding is civil rather than criminal in nature. However, most jurisdictions require the evidence to be greater than a preponderance. 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); *In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970); *In re Diener*, 304 A.2d 587 (Md. 1973).

62. MICH. GEN. CT. R. 932.11.

63. MICH. GEN. CT. R. 932.11(a).

64. MICH. GEN. CT. R. 932.13(a). See *In re Del Rio*, — Mich. —, —, 256 N.W.2d 727, 734-36 (1977); *In re Mikesell*, 396 Mich. 517, 531-33, 243 N.W.2d 86, 92-95 (1976).

65. MICH. GEN. CT. R. 932.15.

sions of law.⁶⁶ The Commission then sends the judge a copy of the report and transcript.⁶⁷ The examiner and the judge are given an opportunity to file objections to the master's report with the Commission.⁶⁸

The Commission then reviews the master's report and the objections and either prepares written findings of fact and conclusions of law or adopts the master's report in whole or in part.⁶⁹ The agreement of a majority of five commissioners is required before a recommendation of discipline, removal, retirement or suspension may be made to the state supreme court.⁷⁰ Lacking the necessary votes, the Commission enters an order dismissing the case.⁷¹

If the Commission recommends discipline, removal, retirement or suspension, the entire record along with the Commission's recommendations is submitted to the state supreme court.⁷² The judge is given an opportunity to petition the supreme court to reject or modify the recommendation of the Commission.⁷³ The supreme court makes an independent review of the record and issues a written opinion directing the type of disciplinary action, if any, that it deems proper.⁷⁴

THE TWO-TIER SYSTEM: SUMMARY OF ITS PROCEDURES AND DIFFERENCES FROM THE UNITARY SYSTEM

The Illinois two-tier system consists of two boards which are independent of the state's court system: the investigative Judicial Inquiry Board⁷⁵ and the adjudicatory Courts Commission.⁷⁶ The Judicial Inquiry Board is composed of a total of nine board members: four lawyers and three laymen

66. *Id.*

67. *Id.*

68. MICH. GEN. CT. R. 932.16.

69. MICH. GEN. CT. R. 932.21(b).

70. MICH. GEN. CT. R. 932.21(a).

71. *Id.*

72. MICH. GEN. CT. R. 932.23.

73. MICH. GEN. CT. R. 932.24.

74. Whether the state supreme court may increase the Commission's recommendation is an open question. It appears from the court rule that once the case goes to the supreme court, it can order any form of discipline:

The Supreme Court shall review the record of the proceedings on the law and facts and shall file a written opinion and judgment directing censure, removal, retirement, suspension, or other disciplinary action as it finds just and proper, or reject or modify, in whole or in part, the recommendations of the commission.

MICH. GEN. CT. R. 932.25. However, the constitution states that "[o]n recommendation of the judicial tenure commission, the supreme court may censure, suspend . . . , retire or remove a judge" MICH. CONST. art. 6, § 30(2). The question remains, if the Commission recommends suspension, does the supreme court have the power to remove.

Of course, if the Commission dismisses the case, the supreme court never obtains jurisdiction under rule 932. MICH. GEN. CT. R. 932.21, 932.23 and 932.24. *But see* note 7 *supra* for other possible alternatives that the supreme court may utilize.

75. ILL. CONST. art. 6, § 15(b).

76. ILL. CONST. art. 6, § 15 (e).

appointed by the governor and two circuit court judges selected by the state supreme court.⁷⁷ Its functions are to conduct investigations, receive or initiate complaints and file and prosecute formal complaints against judges.⁷⁸ As in Michigan, a majority vote of five members is required in order to invoke formal proceedings.⁷⁹ The Courts Commission consists of five judges: one state supreme court justice, two circuit court judges chosen by the state supreme court, and two appellate judges appointed by the appellate court.⁸⁰ The Courts Commission presides over the formal hearing and renders a final decision which is nonappealable.⁸¹ A majority vote of three members is necessary to invoke disciplinary action which can range from suspension to removal.⁸²

Both the Judicial Inquiry Board and the Courts Commission are required by the Illinois Constitution to adopt rules governing their procedures.⁸³ Most of the differences between the Michigan and Illinois procedures are not due to inherent distinctions between the two-tier and unitary systems of judicial discipline. Investigatory methods, rules of evidence and burden of proof are matters to be decided within the particular jurisdiction regardless of the model system implemented. For example, both the Illinois two-tier plan and the Michigan unitary plan provide for confidential investigations to be made public upon the filing of the complaint,⁸⁴ while the California unitary system provides that confidential investigations and hearings must be made public only when the record is filed with its state supreme court.⁸⁵ Similarly, the composition of commission membership, methods of appointment or election, and length of terms are specifications to be made within the rules and constitutional provisions of each state. The unitary and two-tier systems do not demand different regulations regarding those matters and most decisions on those issues are applicable in either type of system.

There are two major differences inherent in the structural framework and philosophy of the two-tier system which distinguishes it from the unitary system. These are: (1) the *segregation* of the judicial discipline process from the state court system; and (2) the *separation* of the two boards from each other.

77. ILL. CONST. art. 6, § 15(b).

78. ILL. CONST. art. 6, § 15(c).

79. *Id.*

80. ILL. CONST. art. 6, § 15(e).

81. ILL. CONST. art. 6, §§ 15(e) and 15(f).

82. ILL. CONST. art. 6, § 15(f).

83. ILL. CONST. art. 6, §§ 15(d) and 15(g).

84. ILL. CONST. art. 6, §§ 15(c), 15(e); ILL. JUDICIAL INQUIRY BD. R. 5(a); MICH. GEN. CT. R. 932.8(h) and 932.22(b).

85. CAL. CT. R. 902.

Segregation From The Court System

The two-tier system stresses independence of judicial discipline procedures from the regular court system while the unitary plan works within the court system of the state. For example, the Illinois Courts Commission is not accountable to the courts of Illinois.⁸⁶ Its decisions are neither appealable nor reviewable.⁸⁷ Michigan, typical of unitary plan jurisdictions, requires its state supreme court to independently review and rule on Commission recommendations for discipline resulting from the hearings.⁸⁸ Such review is conducted as part of the regular supreme court docket.

Both the Illinois Judicial Inquiry Board and the Michigan Commission consist of lawyers and lay people.⁸⁹ Also, final disciplinary actions are made by boards entirely comprised of judges in both Illinois and Michigan. In Illinois it is the independent Courts Commission⁹⁰ while in Michigan it is the state supreme court.⁹¹ Two-tier advocates argue that the feature of being detached facilitates more objective decision making than the unitary approach of keeping judicial discipline within the court system.

It is submitted that segregation is the pitfall of the two-tier system. Perhaps the most highly publicized and criticized judicial disciplinary case is *In re Harrod*.⁹² In that case, the independent Illinois Courts Commission suspended a trial judge for one month upon a finding that the judge was imposing improper probation conditions. The central issue in *Harrod* was the question of when judicial discipline may be imposed with respect to conduct reviewable in the normal appellate process. The Illinois Courts Commission held that it would review such cases when, in their opinion, there was a gross abuse of judicial power.⁹³

The *Harrod* case demonstrates that issues involving judicial misconduct are oftentimes interrelated with questions of judicial discretion; traditionally legal questions that can be resolved through the normal court process. Because legal and disciplinary issues occasionally overlap and conflict, it is submitted that state supreme courts should review such decisions. Public confidence in the courts is premised somewhat on legal

86. As pointed out in note 26, *supra*, the Commission is funded with supreme court appropriations. In Illinois, the General Assembly appropriates funds for both the Illinois Inquiry Board and the Courts Commission. ILL. CONST. art. 6, §§ 15(d) and 15(g). Of course, there is no requirement that a unitary system be funded by the court system.

87. ILL. CONST. art. 6, § 15(f).

88. See text accompanying note 75 *supra*.

89. ILL. CONST. art. 6, § 15(b); MICH. CONST. art. 6, § 30(1).

90. ILL. CONST. art. 6, § 15(e).

91. MICH. CONST. art. 6, § 30(2).

92. No. 76 CC 3 (Ill. Cts. Comm'n Dec. 3, 1976).

93. *Id.* at 8.

consistency and the unitary system contributes to this end by eliminating the potential for conflict.

Recently, the Illinois Supreme Court mandated a reversal of Harrod's suspension.⁹⁴ The court held that "only conduct violative of the Supreme Court Rules of Judicial Conduct may be the subject of a complaint before the Commission."⁹⁵

Although the Illinois Supreme Court heard Harrod's case, it is submitted that the potential for conflict is lessened when the court is involved directly in the procedure as in the unitary system. The friction resulting from the *Harrod* case illustrates the impracticality of the two-tier system which is segregated from the courts.

The only situation where state supreme court review is not preferable is when a supreme court justice is the respondent in a discipline action. The closeness of the members of the court and the great possibility that the other justices may know facts in addition to the evidence presented subject such disciplinary decisions to possible conflict of interest problems. To remedy this problem, California has added a constitutional provision creating a panel of randomly selected appellate judges to review recommendations regarding discipline of its state supreme court justices.⁹⁶ To preserve objectivity, these authors agree with and support the California provision.

Public hearings are time consuming. Because the two-tier philosophy segregates the disciplinary proceedings from the court, the Courts Commission must hear all testimony. All judges serving on the Illinois Courts Commission must find substitutes to cover their normal courtroom responsibilities while presiding over these trial-like hearings. The unitary system of review of testimony seems to be more economical because the hearings are usually conducted before *one* judge or master appointed by the supreme court. Any formal complaint passed on to the supreme court for final disposition is placed on the court's docket and decided in the same fashion as any other appeal.

Separation of Authority Under Two-Tier Systems

The two-tier plan requires that there be a division of power between its independent, investigative Judicial Inquiry Board and its adjudicatory Courts Commission.

[T]he Judicial Inquiry Board has neither the right nor the responsibility for determining the guilt or innocence of a judge of any

94. *People ex rel. Harrod v. Illinois Courts Comm'n*, No. 49118 (Ill. Nov. 30, 1977).

95. *Id.*

96. CAL. CONST. art. 6, § 18(e) (amended 1976).

particular charges which may be brought against him, or to impose sanctions upon any member of the judiciary Only the five-judge Courts Commission is empowered to take disciplinary action against a judge. It is the sole arbiter of whether sanctions shall be imposed on a judge.⁹⁷

This separation feature distinguishes the two-tier system from the unitary system with respect to whether two important disciplinary sanctions can be effectively enforced, those two being private reprimands and interim suspensions.

Private Reprimands

This sanction is a confidential admonishment directed at a judge by the Commission prior to the filing of the formal public complaint. Under Michigan's unitary system, the Commission has jurisdiction to issue private warnings for minor infractions after the "15-day" letter.⁹⁸ In issuing such minor sanctions the Commission does not have to seek the approval of the state supreme court. This practice aims to correct minor infractions without proceeding to the public hearing stage.

The two-tier system, on the other hand, is not designed for easy implementation of such private reprimands. The problem is that the separation factor leaves neither the Judicial Inquiry Board nor the adjudicatory Courts Commission with sufficient jurisdiction to implement a private reprimand while preserving confidentiality at the same time. The Judicial Inquiry Board's functions are limited to investigating and *not* sanctioning.⁹⁹ The adjudicatory Courts Commission is empowered to issue sanctions but only after the Judicial Inquiry Board has filed a formal public complaint.¹⁰⁰

Critics of private reprimands argue that proof of misconduct should be made public.¹⁰¹ If the proof is insufficient, then the case should be dismissed. It is also argued that private admonishments serve little purpose because it is not needed or, if required, the judge is rarely willing to admit a mistake and correct the problem.

97. ILL. JUDICIAL INQUIRY BD. ANN. REP. 1-2 (1974-1975).

98. This rule was adopted by the Commission pursuant to its independent rule-making authority. MICH. GEN. CT. R. 932.2(a). The Commission may adopt such procedures so long as they do not conflict with the formal rules and procedures. See MICH. CONST. art. 6, § 30.

99. See text accompanying note 79 *supra*.

100. ILL. CONST. art. 6, § 15(e).

101. This article treats private reprimands, private admonishments and station house adjustments interchangeably. In Michigan, the procedure is informal; there is no requirement that guilt be found. There are also no specific rules regarding the procedure. California has recently amended its court rules to provide specifically for private admonishments. CAL. CT. R. 904(d). See Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.-KENT L. REV. 69 (1977).

It is submitted, however, that formal hearings are frequently impractical and unnecessary. Oftentimes a judge is unaware of his or her objectionable behavior and will correct it upon a suggestion from the disciplinary Commission.¹⁰² Normally, although a judge may disagree with either the Commission's opinion of what constitutes misconduct or whether he or she in fact committed such misconduct, the judge will agree to assure the Commission that it will not happen again. For example, consider the situation of a very competent, dedicated and fair-minded judge who is in the habit of taking two-hour lunch breaks and consequently falls unnecessarily behind on his or her docket. This practice can easily be privately corrected with a warning from the Commission. If all misconduct required either dismissal of the case or formal (public) complaint, this type of misconduct might be dismissed as one of low priority due to the harshness of the remedy and the problem might be allowed to continue uncorrected. The public is better served by the Commission discussing the matter with the judge, admonishing him or her of such behavior and the judge correcting the problem by shortening the lunch breaks and returning to the business at hand.

Another common problem is the judge who improperly participates in questioning of witnesses or inadvertently makes gestures during an attorney's examination or argument. If the judge has the matter brought to his or her attention by the discipline Commission, he or she is usually quite willing to make a deliberate effort to avoid such conduct even if the judge is of the opinion that the alleged misconduct did not overstep the bounds of proper judicial decorum.

Of course, disciplinary Commissions should continue to monitor such situations to insure that the judge lives up to his or her promise to conform to proper standards of conduct. If the problem persists or the judge is unwilling to assure cooperation with the Commission, formal complaints may become necessary. In Michigan, however, private admonishments in these situations have proven to be most successful.¹⁰³ Most judges have demonstrated a willingness to cooperate. Follow-up investigations by the Commission have shown that problems such as the ones described in the above examples have been swiftly corrected through the use of private reprimands.¹⁰⁴

In short, judicial discipline frequently involves conduct that is neither illegal nor immoral. It must be remembered that the purpose of judicial discipline is not to punish but to maintain a high degree of integrity in our judiciary. It is therefore unnecessary for the judge to be announced to the

102. Citations omitted due to the confidential nature of the proceedings.

103. *Id.*

104. *Id.*

public as being found guilty of misconduct for such minor infractions. Private admonishments have proven to be a swift and effective alternative to formal complaints. It is strongly recommended, however, that these private corrections should only be considered in situations involving correctable conduct such as laziness, tardiness and intemperance. If the grievance hints at dishonesty or corruption, then it is urged that private reprimand not be utilized.

Interim Suspension

This procedural sanction involves temporarily suspending a judge from his or her adjudicatory responsibilities until final disposition of the case. The Illinois two-tier system makes no express provision for interim suspension.¹⁰⁵ Under the Michigan unitary system, however, the Commission may request such temporary suspension at the time it files its formal complaint with the state supreme court.¹⁰⁶

It is not suggested that interim suspension is an impossibility under a two-tier structure. However, it seems unlikely that the Judicial Inquiry Board could request an interim suspension since its authority is strictly limited to investigatory matters.¹⁰⁷ Furthermore, the Courts Commission has no authority to order suspension prior to hearing the merits of the case. The Illinois Constitution specifically states that the Courts Commission shall have the authority to remove, suspend, censure, reprimand or retire a judge *after notice and public hearing*.¹⁰⁸ Thus, a provision allowing the Courts Commission to order interim suspension on its own motion might appear as a predetermination of guilt.¹⁰⁹ Alternatively, since two-tier disciplinary procedures are separated from the court system, the state supreme court would not be able to intervene and order an interim suspension.¹¹⁰

105. Neither the rules of the Judicial Inquiry Board nor the Courts Commission contain a provision for a request or order for interim suspension. It is possible that within the court system of the state, a superior judge could relieve a charged judge of his or her duties pending final disposition. *But see* note 7 *supra*. However, this separate determination of interim suspension forces the disciplinary system to depend on the court system of the state and may itself turn into a time consuming fact finding procedure apart from the disciplinary proceedings.

106. MICH. GEN. CT. R. 932.20.

107. *See* text accompanying note 79 *supra*.

108. ILL. CONST. art. 6, § 15(e).

109. The rules could provide for automatic interim suspension, thereby absolving discretionary decisions; however, it may not always be desirable. Interim suspension is with pay and, if a judge is relieved of duty temporarily, someone must be paid as a replacement, meaning that two salaries are being paid. Many situations may not warrant relief of duties and double payment of salaries. For instance, a complaint made concerning a judge's practice of law prior to his or her taking the bench may have nothing to do with his or her capabilities as a judge and would not require that the judge be suspended temporarily. *See* text accompanying notes 104-108 *supra* for a discussion of when interim suspension is necessary.

110. *See* note 103 *supra*. The disciplinary procedure must depend on the court system for interim suspension because it has no procedure within itself.

The fact that interim suspension is more workable within the unitary framework contributes to the preference for unitary plans. For example, interim suspension is often necessary in situations involving mental incompetence in order to insure that possible incompetence is not unnecessarily continued.

Although the filing of the complaint is in no way a determination of misconduct, it must be remembered that the mere announcement of discipline proceedings could have a significant impact on trials in progress plus the judiciary's public image. In situations where the allegations involve criminal activity or severe judicial misconduct, it is wise to suspend the judge until a final determination is made. This is necessary to preserve the public's respect for the judicial system.¹¹¹ For example, litigants and witnesses might lose sight of the seriousness of a court proceeding in front of a judge who has been charged with instances of perjury.

Interim suspension might also be necessary in situations where the judge devotes excessive time to the preparation of a case or is under such great private pressure that it interferes with the performance of his judicial duties.

Interim suspension aims at preserving judicial integrity and maintaining public respect pending the outcome of a case involving severe judicial misconduct or disability. A disciplinary system should have interim suspension as an option within its own procedure for two reasons: (1) so the system does not have to rely on other bodies to do the task; and (2) because such a remedy must be accomplished expeditiously without unnecessary waiting for the determination to be made elsewhere. In this regard, the unitary system is more favorable than the two-tier system.

CONCLUSION

Judicial disciplinary systems were formed to provide a continuing judicial overseer. The goals of such systems are to see that the judiciary retains its integrity and to preserve public confidence in our judicial system. In order to achieve such goals it is imperative that these systems are designed to operate efficiently and effectively.

Two types of disciplinary schemes have evolved among the forty-six states that have adopted such plans since 1960. The fundamental distinction between the unitary and the two-tier systems is that the unitary is incorporated into a state's established court system while the two-tier consists of two separate boards which function independently of the state court system. The unitary system, unlike the two-tier system, affords the state the built-in

111. See *In re Del Rio*, — Mich. —, —, 256 N.W.2d 727, 734 (1977).

flexibility to implement two methods of sanctioning: (1) private (confidential) reprimands; and (2) interim suspensions. The two-tier system does not facilitate the use of these very important procedural sanctions. The unitary system is the more efficient and effective approach since it is better able to achieve the goals of judicial discipline.