Kentucky Law Journal

Volume 76 | Issue 3 Article 10

1988

State Judicial Conduct Organizations

Jeffrey M. Shaman
DePaul University

State Judicial Conduct Organizations*

BY JEFFREY M. SHAMAN**

I. THE COMMISSION SYSTEM OF REGULATING JUDICIAL CONDUCT

In 1960, a new movement was initiated when California became the first state to create a permanent agency charged with the responsibility of regulating judicial conduct. Since then, every state, as well as the District of Columbia, has installed a permanent commission or a board to enforce the Code of Judicial Conduct or to enforce similar rules governing the behavior of judges. These organizations have become an established and an accepted part of government with the function of ensuring that judges maintain high standards of professional conduct.

Although their structure varies from state to state, all judicial conduct systems can be divided into two basic groups: the one-tier commission and the two-tier commission. In a one-tier system, a panel, typically composed of judges, lawyers, and non-lawyer representatives of the public, investigates complaints, files and prosecutes formal charges, holds hearings, makes findings of fact, and either recommends sanctions to the state's highest court or imposes them itself. The one-tier commission works within the state court system to the extent that the state supreme court is normally responsible for the final

---

** Professor of Law, DePaul University College of Law; Director, Center for Judicial Conduct Organizations, American Judicature Society. B.A., Pennsylvania State University, 1964; J.D., University of Southern California, 1967; LL.M., Georgetown University, 1971. This Article is part of a larger project supported by the Chicago Bar Foundation, the American Judicature Society, and DePaul University. The author appreciates this support and also wishes to thank Anita Bolanos, Frederic Cohen, James Holden, and Grant Ward for their valuable research for this Article. James Alfini and Steven Lubet offered perceptive comments about one earlier draft of this article.

disposition of cases and usually has de novo review powers. In a two-tier system, a panel, also usually composed of judges, attorneys, and public members, investigates complaints and files and prosecutes formal charges (tier one), while a select panel of judges or a special court adjudicates the formal charges and determines their final disposition (tier two). Two-tier systems operate independently of the state courts, in that they usually provide for finality at the second tier, thus precluding state supreme court review

Forty-one states and the District of Columbia have adopted the one-tier model, while the remaining nine states have opted for the two-tier system.[1] There are advantages and disadvantages to both systems. The two-tier system follows a due process of law model that separates the prosecutorial and the adjudicative function to avoid biased decision-making. By combining the investigative and the adjudicative functions in a unitary agency, the one-tier system avoids duplicative work and provides more promptness, while guarding against bias by leaving the final disposition of cases to the state supreme court.

Some commentators have suggested that the two-tier system provides more rigorous discipline by virtue of its independence from state supreme court review [2] Still, in a two-tier system, as in a one-tier system, the final disposition of cases is made by judges or by a combination of judges and attorneys, although only in the former system do the judges sit on a panel or a court that is independent of the other courts within the state.

Moreover, in one case, *People ex rel. Harrod v Illinois Courts Commission*,[3] the independence from state supreme court review granted in a two-tier system was not inviolate. *Harrod* involved a state constitutional provision which stated that the decisions of the Illinois Courts Commission (a second-tier body) would be final. Notwithstanding this constitutional mandate of finality, the Illinois Supreme Court ruled that it could review decisions of the Commission to determine whether the Com-

---

[1] I. TESITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 3 (2d ed. 1980).

[2] *See* Cohn, *Comparing One- and Two-Tier Systems*, 63 JUDICATURE 244 (1979); Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.[-]KENT L. REV 69 (1977).

[3] 372 N.E.2d 53 (Ill. 1977).

mission had exceeded its constitutional authority This ruling allowed the supreme court to direct the Commission to expunge an order suspending a judge from office for prescribing sentences that the Commission had found to be unlawful. It has been asserted that the Illinois Supreme Court, despite its protestation to the contrary, engaged in a form of appellate review in *Harrod* that went to the merits of the Commission's decision and that thereby contravened the constitutional mandate of finality [4] On the other hand, it is not uncommon for state supreme courts to review the supposedly final decisions of quasi-courts and administrative agencies, such as judicial conduct commissions, to ascertain whether they are within lawful authority While the decision in *Harrod* remains arguable, it nevertheless illustrates that exceptions to the mandate of finality in a two-tier system may exist.

The size of judicial conduct commissions varies from state to state, ranging from a low of five persons to a high of thirteen.[5] A majority of commissions have either seven or nine members. In the great majority of states, the commissions are composed of a combination of judges, lawyers, and non-lawyer public members. Judges are in the majority on twelve commissions, and public members are in the majority in six. Three states do not have any non-lawyer public members, and five states do not require judges to be on their commissions. Two states specify that their commissions include members of the legislature.

Ordinarily the judges who serve on commissions are appointed by the state supreme court or selected through judges' organizations.[6] The attorneys on commissions typically are appointed by the governor. In twelve states, the legislature participates in either the selection or the approval of some commission members. In the nine states that have adopted two-tier systems, the adjudicative body consists entirely of judges or of a combination of judges and attorneys.

Usually the term of membership on a commission is four or six years, although on a few commissions it is two or three

---

[4] *See* Cohn, *supra* note 2, at 245-46.

[5] *See* I. TESITOR & D. SINKS, *supra* note 1, at 28-39.

[6] *Id.*

years.[7] To ensure continuity, overlapping terms are often utilized. In nine states successive terms are prohibited.

All commissions employ staff members to help conduct their operations. Their staffs usually include a director, attorneys, investigators, and other personnel, although a few commissions retain attorneys or investigators only as needed.

All state judicial conduct organizations have jurisdiction over judges of general trial courts, intermediate appellate courts, and state supreme courts.[8] In two states, Rhode Island and Kansas, supreme court justices are subject to the authority of judicial conduct commissions, but only for discipline short of removal. In some states, the jurisdiction of conduct organizations does not extend to special judges or to judges of limited jurisdiction, such as elected probate judges, who are subject to a separate disciplinary system administered by the state supreme court.

Every judicial conduct organization is authorized to perform three basic functions: (1) to investigate claims of misconduct and to bring and to prosecute formal charges; (2) to hold an adjudicative hearing and to make findings of fact; and (3) to recommend or to order a final disposition.[9] The sanctions that may be ordered or recommended by conduct organizations include (1) private admonition, reprimand, or censure; (2) public reprimand or censure; (3) suspension; (4) mandatory retirement; and (5) removal from office. In some states, the commissions are also authorized (1) to discipline judges as attorneys; (2) to assess costs or fines; and (3) to impose limitations or conditions upon the judicial office. Ordinarily sanctions for judicial misconduct are decided on a case-by-case basis, with the exception of automatic removal for felony convictions that have become final.

II. INVESTIGATORY AUTHORITY

Judicial conduct organizations function as investigatory bodies charged with the responsibility of maintaining account-

---

[7] *Id.*
[8] *Id.* at 4.
[9] *Id.* at 12-18.

ability of the judiciary They possess extensive, although not absolute, investigatory authority Typically, judicial conduct organizations are vested with broad subpoena power to investigate judicial misconduct. Several courts have noted that broad subpoena authority is essential to the proper discharge of conduct organizations' investigatory duties. Ordinarily, the subpoena power vested in a judicial conduct organization includes the power to compel testimony of witnesses and the power to produce books, records, and other material relevant to an investigation.

Notwithstanding the breadth of the investigatory power vested in judicial conduct organizations, several limits on this power have been found. First, a judicial conduct organization's access to particular subject matter may be restricted by a countervailing right of privacy or by a privilege of non-disclosure. Additionally, the specific allegations of misconduct contained in the formal complaint, which serves as the basis of a judicial conduct organization's investigation, may often determine the extent of the inquiry Courts are loathe to permit unbridled inquisitions into a judge's affairs for fear of infringing upon judicial independence. Moreover, a judicial conduct organization generally has no authority to investigate a court qua court; rather its investigatory power is limited to the investigation of particular individual judges.

Courts use various terminology to describe the substantial investigatory power that judicial conduct organizations possess. Because state statutes generally vest judicial conduct organizations with the power to investigate to the extent they deem necessary, courts often adopt similarly expansive language in an effort to give effect to legislative intent. Some courts have likened the investigatory power of judicial conduct commissions to the power of grand juries.

In *Nichols v Council on Judicial Complaints*,[10] a bank challenged the Council's power to subpoena documents relating to the accounts in a bank held by a judge who was under the Council's investigation. In support of its petition for a writ to prohibit the subpoena's enforcement, the bank argued that the

---

[10] 615 P.2d 280 (Okla. 1980).

Council had no authority to direct a subpoena to anyone other than a judge because the Council's regulatory authority extended only to judicial officers.

In rejecting the bank's argument, the Oklahoma Supreme Court stated that, for the Council to fulfill its statutory purpose and to best serve the public's interest in the effective and the expeditious discharge of its duties, the investigatory power of the Council must be as broad in scope as the power of a grand jury While the court implied that an inquest into the general affairs of the bank would exceed the Council's authority, no indication of such an inquest existed in *Nichols*. The scope of the inquiry upon a complaint, the court concluded, need not be confined to an examination of the judge under investigation but may extend to an inquiry of other parties concerning the judge's affairs as well.

The New York Court of Appeals suggested an even more expansive interpretation of the investigatory power of judicial conduct organizations. In *In re New York State Commission on Judicial Conduct v Doe*,[11] the court considered a challenge to an extensive subpoena duces tecum of a judge's financial records. The court held that the Commission acts within the scope of its authority so long as it is, in good faith, investigating alleged judicial misconduct. Any subpoena issued pursuant to this broad authority, the court ruled, is not subject to challenge.

The federal Judicial Councils Reform and Judicial Conduct and Disability Act of 1980[12] has been given a similarly expansive reading. In *In re Petition to Inspect and Copy Grand Jury Materials*,[13] the District Court for the Southern District of Florida interpreted the Act as manifesting a congressional intent to vest extensive investigatory power in judicial conduct organizations. Accordingly, the court granted the petition of a federal judicial investigatory committee for records of a grand jury, since discharged, that had returned an indictment against a

---

[11] 459 N.E.2d 850 (N.Y. 1984).

[12] Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. §§ 331, 332, 372, 604 (1982)). The Act's disciplinary provisions are codified at 28 U.S.C. § 372(c) (1982).

[13] 576 F Supp. 1275 (S.D. Fla. 1983), *cert. denied*, 469 U.S. 884 (1984).

judge who was under the committee's investigation. In support of its decision, the court said that Congress had given the federal investigatory bodies wide latitude to investigate without limitation as they consider necessary The express grant of subpoena power was construed by the court as an indication that Congress meant to grant wide-ranging powers to investigatory bodies to secure the materials needed for a comprehensive investigation. Any contrary construction of the Act, the court held, "would be wholly inconsistent with its broad purposes—to preserve the integrity of the judiciary, to maintain public confidence in the judicial process, to protect the wrongfully accused, and to strengthen judicial independence."[14]

Despite the expansive language often used to describe the extent of the investigatory power of judicial conduct organizations, several limitations on that power have been found. In *In re Agerter*,[15] the Supreme Court of Minnesota recognized that the investigatory power of a judicial conduct organization must be balanced against the right of privacy of a judge under investigation. Noting that a subpoena to testify would not be enforced when the ensuing inquiry would violate constitutional rights, the Minnesota Supreme Court stated that "a protectable right of informational privacy depends on a balancing of the competing interests of the individual in keeping his or her intimate affairs private and the government's interest in knowing what those affairs are when public concerns are involved."[16]

In *Agerter*, the Minnesota Board on Judicial Standards issued a subpoena directing a judge to appear before the Board and to testify concerning an alleged drinking problem and an illicit sexual affair The judge challenged the subpoena on the ground that it violated his right to privacy, and the court ruled that the judge could be compelled to testify (at least in a confidential setting) about his drinking habits but could not be compelled to testify about his sexual activities unless a specific allegation of publicly-known sexual misconduct by the judge existed.

---

[14] *Id.* at 1279.

[15] 353 N.W.2d 908 (Minn. 1984).

[16] *Id.* at 913.

In regard to the judge's alleged alcohol problem, the court took the position that the judge's right to privacy did not outweigh the government's interest in obtaining testimony about a matter of public concern. This was especially so, in the court's opinion, because the testimony would be given in a confidential setting. Therefore, any intrusion upon the judge's right to privacy would be limited.

The court struck a different balance regarding the judge's sexual activities. The court stated that "[o]ne's private sex life concerns 'the most intimate of human activities and relationships' " and, therefore, is protected by the fundamental right of privacy [17] Thus, the judge's interest in keeping his sexual affairs private outweighed the government's interest in obtaining his testimony about them, even in a confidential setting in which only a limited intrusion upon privacy would occur The court further noted that the Board had not alleged any specific sexual misconduct, and it was not suggested that the judge's sexual affairs were matters of public knowledge. Either of these might have amounted to a showing of an important governmental interest in compliance with the subpoena, thereby overriding the judge's interest in privacy [18] Thus, it is only when overriding governmental interests are present that the subpoena power may be used concerning matters that are protected by the right of privacy

A judicial conduct organization's investigatory authority may also be restricted by a privilege of non-disclosure. In *In re Petition of Illinois Judicial Inquiry Board*,[19] the Illinois Court of Appeals ruled that the Illinois Inquiry Board's subpoena power did not extend to material concerning the evaluation of judges compiled by the Chicago Bar Association. This case arose when a Chicago newspaper published an article indicating that the bar association's report on the performance of judges recommended that nine judges not be retained. The Illinois Judicial Inquiry Board then directed a subpoena to the bar association, ordering it to submit all information in its

---

[17] *Id.* at 914 (quoting Carey v. Population Serv Int'l, 431 U.S. 678, 685 (1977)).
[18] *Id.* at 914-15.
[19] 471 N.E.2d 601 (Ill. App. Ct. 1984).

possession reflecting any and all actual or potential violations of the Standards of Judicial Conduct.

The privilege of non-disclosure raised by the bar association and upheld by the Illinois Court of Appeals was based upon the confidential nature in which the bar association's evaluations were compiled. Since its establishment, the Chicago Bar Association had conducted judicial evaluations based on confidential responses of practicing lawyers. Members of the committee that organized the evaluation process were sworn to secrecy Absent this element of confidentiality, the court noted, the bar association's useful evaluation process would be impaired.

When subpoenaed material is protected by a privilege of non-disclosure, the government must show a "particularized need" for the material requested. Mere relevance or usefulness of the material is insufficient to establish the requisite level of necessity Rather, the government must show both that it has a compelling need for the material and that it has previously conducted a thorough and exhaustive search of alternative sources and has been unable to obtain the material in question. In *In re Petition of Illinois Judicial Inquiry Board*,[20] the Board had neither established its particular need for the material nor exhausted alternate sources of information. Therefore, the court of appeals ruled that the subpoena exceeded the Board's investigative authority.

A judicial conduct organization's investigative authority may be further limited to the particular subject matter referred to in the formal complaint that serves as the basis of its investigation. For example, Section 44(2) of New York's Judiciary Law predicates the initiation of any judicial conduct commission investigation on the filing of a formal complaint by the commission administrator.[21] This provision has repeatedly been interpreted to restrict the subject matter jurisdiction of the state judicial conduct commission to the particular instances of alleged misconduct mentioned in the complaint. In *Richter v State Commission on Judicial Conduct*[22] and *Darrigo v State*

[20] 471 N.E.2d at 601.

[21] N.Y. JUD. LAW § 44(2) (McKinney 1983).

[22] 430 N.Y.S.2d 796 (N.Y. Sup. Ct. 1980).

Commission on Judicial Conduct,[23] it was twice held in factually identical cases that a subpoena to testify concerning instances of alleged misconduct not mentioned in the formal administrator's complaint was unenforceable because, in issuing such a subpoena, the Commission exceeded its authority

In *Richter*, the Commission's formal complaint referred to possible misconduct of a judge who allegedly requested favorable treatment on behalf of a defendant charged with a traffic violation in a particular case. The complaint referred to no other instances of possible misconduct. Pursuant to that complaint, however, the Commission undertook a preliminary investigation that uncovered forty-nine other instances in which it was alleged that the same judge was influenced in his disposition of cases pending before him by ex parte communications. After being requested to appear before a commission member to testify concerning these additional instances of alleged misconduct, the judge sought a writ of prohibition to restrain the Commission from investigating beyond the single instance of misconduct alleged in the formal complaint. The court granted the writ of prohibition, reasoning that the legislature had intended to predicate the Commission's subject matter jurisdiction on a formal complaint, fearing that "[s]uch unwarranted and unfettered incursions into our judiciary would jeopardize its very independence and integrity "[24] The complaint "sets the parameters of the investigation," the court stated, ruling that the Commission exceeded its investigative authority when it sought the judge's testimony concerning issues not referred to in its formal complaint.[25]

In defense of its subpoena in the earlier case of *Darrigo*, the Commission contended that the formal complaint based on a single instance of alleged misconduct served as the basis for initiating an investigation that led to the discovery of thirty-eight additional instances of possible misconduct. In *Darrigo*, however, the court rejected the Commission's contention, hold-

---

[23] No. 02513-79, slip op. (N.Y. Sup. Ct. May 24, 1979), *cited in* JUDICIAL DISCIPLINE AND DISABILITY DIGEST 279 (Supp. 1979), *aff'd*, 426 N.Y.S.2d 1006 (N.Y. App. Div. 1980), *appeal dismissed*, 449 U.S. 913 (1980).

[24] *Richter*, 430 N.Y.S.2d at 797-98.

[25] *Id.* at 797

ing instead that the legislature's inclusion of the word "complaint" in the Judiciary Law displayed a legislative intent to utilize the complaint as a legal device circumscribing the areas of any authorized investigation.[26]

While the *Richter* court, the *Darrigo* court, and other courts have granted writs prohibiting judicial conduct commissions from investigating instances of alleged misconduct not mentioned in the formal complaint that serves as the basis of its investigation, this limitation on a commission's investigatory authority is readily avoided by amending a complaint or by filing additional complaints covering other instances of judicial misconduct.

The investigatory jurisdiction of judicial conduct organizations may be further narrowed by the requirement that a commission investigation proceed only following specific allegations of misconduct by a particular judge. Such a requirement appears to serve the same purpose as Section 44 of New York's Judiciary Law by preventing unlimited incursions by a commission into the affairs of the judiciary. This restriction functions in two dimensions. First, by requiring that specific misconduct be alleged, this rule acts to preclude a general investigation. Second, the further requirement that an investigation proceed only against a particular judge precludes the commission from infringing upon the independence of a given court or a group of judges.

For instance, the California Commission on Judicial Performance is authorized to conduct hearings, to make findings of fact, and to recommend to the California Supreme Court that a given judge be censured, removed, or retired by the bench. In *Mosk v Superior Court of Los Angeles County*,[27] the California Supreme Court interpreted this provision to forbid a commission from investigating a court qua court. Therefore, the court ruled that a judicial commission did not possess the authority to investigate media allegations that some supreme court justices had delayed filing controversial opinions until

---

[26] *Darrigo*, No. 02513-79, slip op. at 7

[27] 601 P.2d 1030 (Cal. 1979).

after their reconfirmation election. Rather, the court held, a commission inquiry must be limited to alleged instances of misconduct committed by an individual judge.

To summarize, judicial conduct organizations enjoy broad investigatory authority To a large extent, the subpoena power is a commission's primary investigative tool. While recognizing the breadth of the investigatory power, several courts have formulated limitations on it. Thus, privacy rights and privileges of non-disclosure bar access to some materials and testimony Requirements of formal complaints, the specificity of the investigations, and the particularity of its subjects serve to narrow a commission's subject matter jurisdiction. Though commissions generally maintain sufficient power to investigate, these limitations serve to ensure judges some protection from frivolous or from baseless inquisitions.

III. DISCOVERY, RULES OF EVIDENCE, AND BURDEN OF PROOF

Generally, to be allowed discovery in a civil trial regarding a certain point or issue, the party seeking discovery must show that the information sought is relevant and is not privileged information exempt from discovery [28] In judicial disciplinary proceedings, however, the standards are different; in fact, the party seeking discovery often has to show a need for the information beyond mere relevance.

For example, a judge subject to a disciplinary investigation cannot discover information based on his unsupported belief that it exists. This principle was followed in *In re Coruzzi*,[29] which involved a New Jersey judge who was arrested after accepting a bribe from an attorney This judge confessed to a bribery conspiracy and agreed to cooperate with police. He was convicted of taking a bribe and later removed from office by a decision of a three judge panel of the New Jersey Supreme Court, the body responsible for removal proceedings under New Jersey law [30] On appeal of his removal, the judge maintained that some members of the court should be disqualified

---

[28] *See, e.g.*, FED. R. CIV P 26(b)(1).
[29] 472 A.2d 546 (N.J. 1984).
[30] *Id.* at 550.

for participating in his prosecution. No support for this belief existed, yet the judge sought discovery on the issue.[31]

In rejecting the judge's request for discovery, the court held that, when discovery is sought from persons holding high office, there must be at least a showing of the need for and the relevance of the testimony or the material sought.[32] The court went further in its rejection of the judge's claim, holding that a claim based on the denial of discovery must indicate the matter that the applicant hopes to develop by the material sought to be discovered. Here, by contrast, just a general assertion of involvement in the prosecution existed.[33]

Although discovery sought by judges in disciplinary proceedings is apparently subject to a higher level of need than discovery in civil trials, the application of the work product rule is essentially similar. In civil cases, the work product of an attorney is exempt from discovery unless a substantial need for the information can be demonstrated.[34] The inner workings of a judicial commission are also considered work product and as such are discoverable by an accused judge only upon a showing of substantial need. In *In re Markle*,[35] a judge was accused of violating the West Virginia Judicial Code of Ethics by placing a semiconscious drunken man in a jail cell without contacting his family or without seeking to place him in a hospital or a mental health facility The man later killed himself while in police custody After this incident, the judge was subjected to a formal disciplinary proceeding. Upon being charged, the judge sought to discover the investigative report of the Judicial Investigation Commission. The report contained a summary of the testimony given by the various witnesses to the incident.

In rejecting the judge's request for discovery, the court ruled that to discover factual work product, the party seeking discovery must show either substantial need or undue hardship

---

[31] *Id.* at 554.

[32] *Id.* (citing Hyland v. Smollak, 349 A.2d 541 (N.J. Super. Ct. App. Div. 1975), *cert. denied*, 364 A.2d 1060 (N.J. 1976)).

[33] *Id.* at 554-55.

[34] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495 (1947).

[35] 328 S.E.2d 157 (W Va. 1984).

in discovering the evidence some other way These requirements can be met when a witness is no longer available or when the information sought is in the exclusive control of the opposing party The cost of deposing a witness, standing alone, does not constitute enough of a hardship to meet these standards; however, the court did allow the judge to obtain a summary of his own testimony without a showing of undue hardship.[36]

While the standard of need required to obtain discovery in a judicial disciplinary proceeding is different from that in a civil proceeding, there are also limits to the types of material that are discoverable. For example, internal reports and memoranda of a state judicial commission in preparation for litigation are not discoverable. In *In re Owen*,[37] a New York judge was accused of granting special treatment and of exhibiting favoritism in the disposition of cases. The judge, when subjected to a disciplinary proceeding, attempted to discover the internal reports of the state judicial commission. In rejecting the judge's request for discovery, the court held that the internal reports and memoranda of the commission and the notes of counsel preparing for litigation are work product and are not discoverable. Furthermore, the stipulation by counsel that the judge would be provided with copies of evidence expected to be introduced at trial satisfied the judge's right to discover material.

Work product limitations are not the only limits to material discoverable by judges subject to discipline. Procedural limits to discovery are often contained in the statutes creating judicial disciplinary bodies. In *In re Van Susteren*,[38] a Wisconsin judge subject to discipline sought to discover the minutes of the Wisconsin Judicial Commission's meetings dealing with complaints about the judge as well as the names of persons who attended those meetings. His request was refused, and the judge objected. The court, in reviewing the judge's objection, held that the refusal was proper Only limited discovery is allowed under the Wisconsin procedural rules.[39] In addition, the Code's

---

[36] *Id.* at 163-64.

[37] 413 N.Y.S.2d 815 (Ct. on Jud. 1978); *see In re Markle*, 328 S.E.2d at 157

[38] 262 N.W.2d 133 (Wis. 1978).

[39] The Wisconsin Supreme Court promulgated the Wisconsin Code of Ethics in *In re* Promulgation of a Code of Ethics, 153 N.W.2d 873 (Wis. 1967).

procedural rules clearly state that all papers, transcripts, communications, etc., in the proceedings of the Commission before formal charges have been filed are confidential and not discoverable.[40]

Connecticut, like Wisconsin, also places limits on access to investigative files of judicial conduct commissions. A judge has no right to discover material contained in the investigative files of the Council on Probate Judicial Conduct. In *Council on Probate Judicial Conduct re Kinsella*,[41] a probate judge interfered with the maintenance of a woman's estate by making private rulings contradicting public holdings, by appointing friends to positions in the estate, by personally reviewing estate plans, and by other improper conduct. After being subjected to much criticism, the judge asked to be removed from handling the estate. When the judge was later subjected to a disciplinary hearing, he attempted to discover materials contained in the Council's investigative files.

The court refused the judge's request, holding that the judge had no right to discover the contents of the files. The court noted that, under some circumstances, fundamental fairness would require access to the files. In this case, however, the judge had access to all the information in the files because the events had taken place in his courtroom. Furthermore, the judge had access to court records of the proceedings that were under investigation.

The refusal by some courts and judicial commissions to allow discovery of material by judges under investigation has led to claims of due process violations. The decision to grant discovery or not to grant it, however, in the absence of statutory provisions, is left to the discretion of the trier of fact. In *McCartney v Commission on Judicial Qualifications*,[42] a California judge was accused of "conduct prejudicial to the administration of justice" by consulting with his bailiff about sentencing decisions, by uttering profanities while on the bench, by insulting his clerk, and by other improper acts. The judge

---

[40] *In re Van Susteren*, 262 N.W.2d at 137.

[41] 476 A.2d 1041 (Conn. 1984).

[42] 526 P.2d 268 (Cal. 1974).

objected repeatedly to the procedure of the Commission on Judicial Qualifications, alleging that his due process rights were violated when the Commission limited his discovery rights to items other than depositions. The court ruled, however, that the decision to limit discovery is within the sound discretion of the Commission. To justify any depositions at all, the judge is required to show good cause. In this instance, the judge made no showing of good cause whatsoever, and in fact, he did not even list the names of the persons whose testimony he sought.

The Michigan courts also have found that placing limits on the discovery rights of a judge subject to an investigation does not violate his or her due process rights. In *In re Del Rio*,[43] a Michigan judge was accused of numerous counts of abusing his position, of conduct unbecoming a judge, of arranging for tickets to be fixed, of altering trial schedules, and of other offenses. After an investigation, the Judicial Tenure Commission recommended that he be removed from office and enjoined from holding a judicial position in the future. The judge filed a complaint, alleging, among other things, that his due process rights had been violated by the Commission when he was not allowed discovery during the judicial investigation. The court found that the judge's due process rights had not been violated. The provision in Michigan law creating the Commission made no provision for either pre-hearing or pre-complaint discovery in judicial fitness proceedings. In addition, the record indicated that the judge had in fact been allowed discovery during the hearing, despite the judge's claims that it had been denied.

Although most discovery disputes arise when the judge subjected to an investigation seeks information as part of his defense, disputes also occur when discovery is sought from the judge. A judge who is under investigation is expected to cooperate with investigators. In *In re Jordan*,[44] a New York judge was charged with requesting special treatment from other judges and with failing to cooperate with the Commission on Judicial Conduct. The judge denied the Commission access to court

---

[43] 256 N.W.2d 727 (Mich. 1977).

[44] 47 N.Y.2d xxx (Ct. on Jud.) (opinion for suspension), *cited in* JUDICIAL DISCIPLINE AND DISABILITY DIGEST 280 (Supp. 1979), *appeal dismissed*, 397 N.E.2d 1333 (1979).

documents, and he argued that he was entitled to a presentation of written charges before allowing the records in question to be examined. The court, however, disagreed with the judge's position, pointing out that state statutes authorized the Commission to investigate possible cases of judicial misconduct. In addition, even though the judge was not an attorney, he was charged with the knowledge of his responsibilities, which included cooperating with authorized investigations.

Judges also have opposed discovery in judicial conduct proceedings on constitutional grounds aside from due process of law claims. It has been held, however, that a judge may assert his privilege against deposition and testimony only if the proceeding is criminal in nature. In *McComb v Superior Court*,[45] an eighty-two-year-old judge was subjected to an inquiry into his fitness as a judge by the California Commission on Judicial Qualifications. The judge refused to submit to a deposition and was found in contempt of court. As grounds for his refusal, the judge asserted his constitutional privilege not to be called as a witness or to testify in proceedings against himself. In rejecting the judge's assertion of this privilege, the court held that, while the privilege did exist in judicial fitness proceedings, it could be asserted only in a proceeding of a criminal nature. The judge was being investigated merely to determine his fitness as a judge; therefore, he could not claim the privilege against being deposed, and he was required to comply with the discovery request.

Occasionally parties other than judges oppose discovery on privilege grounds. In *In re Petition of Illinois Judicial Inquiry Board*,[46] the Chicago Bar Association issued a report to the Chief Judge of the Cook County Circuit Court that evaluated judges who were subject to a retention election. Three judges whose integrity was questioned were named in a local newspaper report, prompting Board attorneys to subpoena all documents relating to the search.

The Bar Association objected to the subpoena, arguing that its information was obtained in confidence and that disclosure

---

[45] 137 Cal. Rptr. 233 (Cal. Ct. App. 1977).

[46] 471 N.E.2d 601 (Ill. App. Ct. 1984).

of the sources of information would destroy the service that the Bar Association was providing to voters. The court agreed with this argument, noting that a privilege against disclosure exists if the communication of information originated in confidence, if confidentiality was essential in maintaining the relationship between the parties, if the relationship was one that should be fostered, and if the injury to the relationship would be greater than the benefits of disclosure.[47] The Bar Association provided a service to voters regarding the fitness of judges; therefore, the privilege against disclosure was granted.

While there are some instances of discovery disputes involving non-judge parties, most judicial discipline cases involve discovery disputes by judges under investigation for wrongdoing. The standards that must be met to allow discovery vary from state to state, but generally these standards appear to be more stringent than those in civil trials. In addition, judges are generally allowed discovery only at the times and in the form allowed by statute. Thus, discovery for a judge under investigation is more limited than discovery that parties enjoy in a civil suit.

While judicial disciplinary proceedings are unquestionably of a legal nature, disagreement exists regarding the extent that the proceedings must comply with the rules of evidence. Some states are more strict than others in applying the rules of evidence to judicial conduct proceedings.

The rules of evidence were followed strictly in a Pennsylvania case, *In re Dalessandro*,[48] in which a judge was under investigation regarding his position as an officer in a family corporation, his participation in an extra-marital affair, and his use of automobiles equipped with dealer license plates. The rules of the Pennsylvania Judicial Inquiry and Review Board provide that "only legal evidence shall be received, and oral evidence shall be taken on oath or affirmation." Applying that provision in *Dalessandro*, the Pennsylvania Supreme Court ruled that statements made by a judge to the Board in a private, prehearing meeting were not binding on the judge in a later formal proceeding.

---

[47] *Id.* at 603.

[48] 397 A.2d 743 (Pa. 1979).

Although Pennsylvania holds its judicial conduct organization to the standard rules of evidence, other jurisdictions do not. Louisiana, for example, has held that the Louisiana Judiciary Commission is not bound by the rules of evidence. In *In re Whitaker*,[49] a Louisiana judge was charged with using illegal drugs and intimidating witnesses in his court. The Commission found the judge guilty of the charges and recommended that he be removed from office.

On appeal, the Louisiana Supreme Court ruled that the Commission was not bound by the technical rules of evidence. In addition, the court held that evidence of misconduct prior to entering office was relevant to the proceedings for two reasons. First, such evidence could be probative in determining whether improper conduct continued once the judge assumed his office. Second, such evidence was relevant in determining the sanction to be imposed.

The consideration of evidence of prior misconduct also has been disputed by judges. In *In re Martin*,[50] a judge was found guilty of misconduct for making overt sexual advances towards two women appearing before him in court and for improperly hearing a case involving himself. The judge argued that, in reaching its decision, the North Carolina Commission improperly considered evidence of misconduct from a prior term of office. To support this proposition, the judge cited several authorities which indicated that re-election after misconduct is evidence of public forgiveness of the misconduct.

The court rejected this argument, however, by noting that North Carolina judges removed for misconduct are no longer eligible to hold judicial office. In addition, the court noted that, while re-election may pardon prior acts of misconduct that were public knowledge, in this instance, the judge's misconduct during the prior term was not public knowledge. Therefore, the court held, the evidence of misconduct during the prior term was properly considered by the Commission.

Evidentiary standards, as well as evidentiary rules, are also a frequent object of dispute. In *In re Bennett*,[51] a judge was

---

[49] 463 So. 2d 1291 (La. 1985).
[50] 275 S.E.2d 412 (N.C. 1981).
[51] 483 A.2d 1242 (Md. 1984).

charged with using his office to benefit a campaign supporter The Maryland Commission on Judicial Disabilities recommended that the judge be removed from office. The Maryland Supreme Court analogized this situation to an attorney grievance proceeding in which the standard of evidence is "clear and convincing." The court also adopted this standard as it applied to the judge. In addition, the court noted that circumstantial evidence is separate from direct evidence, and merely goes to the total weight of the evidence.

Many of the arguments raised by judges concerning evidentiary matters are not directed at broad policy statements, however, but at rulings as to the admissibility of certain kinds of evidence. In *In re Inquiry Concerning a Judge, Leon*,[52] a judge was found guilty by the Florida Judicial Qualifications Commission of engaging in improper ex parte communications on several occasions, of selling property for financial gain to close relatives of parties appearing before him in court, and of responding untruthfully to inquiries before him.

In his appeal, the judge argued that all of the testimony admitted into evidence was improper because it was either confidential or hearsay The court rejected his arguments, noting that the reason for confidentiality no longer existed since formal charges had been filed. Further, the hearsay testimony was for identification only and otherwise was not admitted into evidence. The court also rejected the judge's recantation defense against the perjury, holding that the integrity of the judicial system is affected by this perjury "Recantation does not remove the impression that the judge attempted to use the prestige of his office to influence the outcome of a case pending in his court and, when discovered, lied about his involvement."[53]

Courts have also upheld the discretion of judicial commissions in determining what to admit as evidence. For example, in *State v Tedesco*,[54] a judge was convicted of falsely certifying that he had administered an oath to an applicant for a liquor

---

[52] 440 So. 2d 1267 (Fla. 1983).

[53] *Id.* at 1269.

[54] 397 A.2d 1352 (Conn. 1978).

license. In fact, the judge had administered the oath to a person claiming to be an agent for the applicant. Testimony by witnesses indicated that the judge may have realized his error after the application had been signed. The court held that evidence which is independently probative is not inadmissible even though it may tend to prove the commission of other crimes. Although allowing such evidence may be prejudicial, the trial court must determine in its discretion whether such prejudice outweighs the value of the evidence. The court further stated that, in determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the original ruling.

Although most opposition to evidentiary rulings comes from judges, other parties also raise questions about the admissibility of materials in judicial discipline cases. For example, in *In re Terry*,[55] an Indiana judge was subject to a disciplinary hearing after being charged with several counts of misconduct. A potential witness at the hearing was unable to testify, but this witness had given testimony at a prior custody hearing unrelated to the disciplinary action. The state disciplinary commission sought to have the former testimony admitted at the hearing because the judge had had an opportunity to cross-examine the witness at the earlier hearing. The court, however, disagreed with the position of the commission. Instead, the court held that the testimony of the witness was not admissible under the prior testimony exception to the hearsay rule because the judge, although present at the custody hearing, had no motive to develop the testimony by cross-examination.

Although most court rulings have focused on evidence that was omitted from the proceedings, several court opinions also have dealt with consideration of evidence after a decision has been reached. In *Spector v Commission on Judicial Conduct*,[56] a New York judge was accused of improper conduct and nepotism for hiring the sons of other judges while these judges were hiring his relatives. The judicial commission administrator, while arguing motions in connection with consideration of

---

[55] 394 N.E.2d 94 (Ind. 1979), *cert. denied*, 444 U.S. 1077 (1980).

[56] 418 N.Y.S.2d 565 (N.Y. 1979).

the sanctions to be imposed, introduced evidence of additional alleged misconduct. The issues contained in the allegations had not been raised previously before the commission referee or included in the charges as originally made. Even though the administrator gave the judge's attorney notice of his intention to refer to these allegations, the court held that unproved charges have absolutely no place in the commission's consideration of sanctions. Sanctions must be based on findings of fact and conclusions of law drawn from proof in the record; sanctions cannot be based on unsubstantiated allegations.

In another example of an attempted late addition to the record, *In re Kivett*,[57] a judge sought to include some papers originally furnished to the North Carolina Judicial Standards Commission as part of the record on appeal after he was found guilty of several counts of misconduct. The court rejected the judge's request, however, noting that the substance of the evidence contained in the papers had been introduced as evidence before the Commission by other parties, but the evidence had not been considered by the Commission in arriving at its recommendation. Therefore, the court concluded, the judge could not have been prejudiced by the absence of the papers. In addition, fairness required that rebuttal evidence also be allowed into the record. Accordingly, the judge's request was denied.

The cases illustrate that there is a fair degree of variety from state to state in using the rules of evidence in judicial conduct proceedings. Some states take an extremely pragmatic approach to this matter, departing from the rules of evidence whenever it is practical to do so. In fact, it could well be asserted that some departures from the rules of evidence in disciplinary proceedings have been unfair to judges accused of misconduct. In other states, more rigorous adherence to the rules of evidence has not appreciably weakened the disciplinary process and has ensured fairness to all concerned parties.

In determining what burden of proof must be met in judicial conduct proceedings, many courts base their decisions on whether or not the proceeding is criminal in nature. Most courts

---

[57] 309 S.E.2d 442 (N.C. 1983).

categorize judicial misconduct proceedings as non-criminal; therefore, the proceedings need not comply with procedural or evidentiary requirements of a criminal trial.[58] In these jurisdictions, the charges against a judge may be proven by only a preponderance of the evidence.[59] If a court categorizes judicial misconduct proceedings as quasi-criminal, however, the facts necessary to prove the misconduct offense must be established by clear and convincing evidence.[60] Regardless of the standard, judicial disciplinary bodies act as investigative agencies with respect to the courts and have the burden to prove their allegations before a full court in a trial of first impression.[61]

In *Geiler v Commission on Judicial Qualifications*,[62] the Supreme Court of California addressed the issue of what burden of proof must be met in inquiries concerning judges. In this case, the California Commission on Judicial Qualifications recommended that a judge be censured for using crude and offensive conduct in public places, and for the indiscreet use of vulgar, unjudicial, and inappropriate language toward court personnel and lawyers. The court held that the burden of proof standard in inquiries concerning judges should be the same standard used in state bar disciplinary proceedings. In those proceedings, charges of misconduct must be sustained by convincing proof to a reasonable certainty, and all reasonable doubts operate in favor of the accused. Consequently, the court declared the standard of proof in judicial disciplinary proceedings to be proof by evidence clear enough to sustain the charges to a reasonable certainty.

In *In re Brown*,[63] the Supreme Court of Texas adopted the California Supreme Court's reasoning in the *Geiler* decision. The Texas Judicial Qualifications Commission in *Brown* recommended that a judge be removed from office. The court appointed a master who found by a preponderance of the

---

[58] *See infra* text accompanying notes 66-82.

[59] *See, e.g.*, Geiler v. Comm'n on Judicial Qualifications, 515 P.2d 1, 4 (Cal. 1973), *cert. denied*, 417 U.S. 932 (1974); *In re* Brown, 512 S.W.2d 317, 319-20 (Tex. 1974).

[60] *See, e.g., In re* Inquiry Concerning Garner, 466 So. 2d 884, 886 (Miss. 1985).

[61] *See, e.g., In re* Ross, 428 A.2d 858, 860 (Me. 1981).

[62] 515 P.2d 1 (Cal. 1973).

[63] 512 S.W.2d 317 (Tex. 1974).

evidence that the judge did not engage in conduct clearly inconsistent with the proper performance of his judicial duties. The Commission objected to the finding and filed its objection. Before evaluating the evidence, the Texas Supreme Court stated that the Commission's function is not to punish but to maintain the high quality of the judiciary Consequently, judicial disciplinary proceedings are not of a criminal nature. Therefore, the court ruled, the examiner has the burden to establish the allegations against the judge by a preponderance of the evidence.

In contrast, the Supreme Court of Mississippi, in its decision in *In re Inquiry Concerning Garner*,[64] categorized judicial disciplinary proceedings as quasi-criminal in nature. In this case, the Mississippi Commission on Judicial Performance recommended that a judge be removed from office based on findings that she failed to report fines and that she used a highly irregular system of accounts, receipts, reporting, and check cashing. Prior to considering the evidence presented by the Commission, the Supreme Court of Mississippi stated that judicial disciplinary proceedings, like bar disciplinary matters, are of a quasi-criminal character. As a result, the Commission had to prove by clear and convincing evidence each fact necessary to prove the occurrence of misconduct.

Regardless of what standard of proof is used in a particular jurisdiction, a disciplinary body always has the burden to prove its allegations to a court of law In *In re Ross*,[65] the Maine Committee on Judicial Responsibility and Disability filed a report alleging that a judge engaged in conduct violative of the Code of Judicial Conduct and recommended that discipline be imposed. The judge claimed that he was denied due process of law because the Committee combined its investigative, prosecutorial, and adjudicative responsibilities. In an original proceeding before the Supreme Court of Maine, counsel for the judge conceded that the Committee had not violated the due process clause. The court then clarified that the Committee acts as an investigative agency and is similar to a grand jury in a

---

[64] 466 So. 2d 884 (Miss. 1985).

[65] 428 A.2d 858 (Me. 1981).

criminal proceeding. As such, a Committee report is only a charging document that enumerates allegations regarding a judge's conduct. In keeping with this function, the Committee has the burden to prove its allegations before the full court in a trial of first impression rather than in an appellate proceeding.

The burden of proof to be satisfied in judicial disciplinary proceedings will vary from state to state depending upon whether the proceedings are viewed as criminal or as non-criminal in nature. However, the states are uniform in requiring judicial disciplinary bodies to prove their allegations before a court in an original proceeding.

IV. NATURE OF DISCIPLINARY PROCEEDINGS AND DUE PROCESS OF LAW

It has been argued that judicial disciplinary proceedings should be considered quasi-criminal in nature so that accused judges may be afforded the due process rights that are available to criminal defendants, such as the right to a jury trial, to confront one's accusers, and to refuse to testify Nevertheless, the majority of courts have rejected this argument.[66] Most courts take the position that judicial disciplinary proceedings are neither criminal nor civil in nature, but rather they are sui generis.[67] Some courts have said that judicial disciplinary proceedings are not criminal in nature because they do not involve the imposition of imprisonment or fines.[68] Other courts have said that judicial conduct proceedings are not criminal because their purpose is not to punish but to maintain the honor and dignity of the judiciary and to uphold the administration of justice for the benefit of the public.[69] Judicial disciplinary pro-

---

[66] *See, e.g., In re* Hadad, 627 P.2d 221 (Ariz. 1981) (en banc); *In re* Winton, 350 N.W.2d 337 (Minn. 1984); Board of Chosen Freeholders v. Conda, 396 A.2d 613 (N.J. Super. Ct. Law Div. 1978); *In re* Van Susteren, 262 N.W.2d 133 (Wis. 1978).

[67] *See, e.g., In re Hadad*, 627 P.2d at 223; *In re Winton*, 350 N.W.2d at 342.

[68] *See, e.g., In re Hadad*, 627 P.2d at 223; *In re* Kelly, 238 So. 2d 565 (Fla. 1970), *cert. denied*, 401 U.S. 962 (1970); *In re* Stone, 574 S.W.2d 369 (Mo. 1978) (en banc).

[69] *See, e.g., In re* Diener & Broccolino, 304 A.2d 587 (Md. 1973), *cert. denied*, 415 U.S. 989 (1973); *In re* Coruzzi, 472 A.2d 546 (N.J. 1984); Sharpe v. State *ex rel.* Oklahoma Bar Ass'n, 448 P.2d 301 (Ct. on Jud. App. Div. 1968), *cert. denied*, 394 U.S. 904 (1968).

ceedings also have been described as regulatory in nature,[70] and in states that have adopted the two-tier model of judicial conduct organizations,[71] it has been said that proceedings in the first tier, in which no adjudication occurs, are merely investigatory or quasi-administrative.[72] It should be noted, however, that a minority of courts do characterize judicial conduct proceedings as quasi-criminal in nature, and on that basis, require the application of due process standards.[73]

The most logical and enlightened approach to this question has been taken by the Supreme Court of Washington. This court has held that, even though a judicial disciplinary proceeding is not criminal in nature, certain due process protections are required because of the potentially severe consequences to a judge.[74] These include, according to the Washington high court, the right 1) to notice of the charge and the nature and the cause of the accusation in writing; 2) to notice, by name, of the person or persons who brought the complaint; 3) to appear and to defend in person or by counsel; 4) to testify on his own behalf; 5) to confront witnesses face to face; 6) to subpoena witnesses in his own behalf; 7) to be apprised of the intention to make the matter public; 8) to appear and to argue orally the merits of the holding of a public hearing; 9) to prepare and to present a defense; 10) to have a hearing within a reasonable time; and 11) to appeal.[75]

On the other hand, some courts, in rejecting the argument that judicial disciplinary proceedings are quasi-criminal in nature, have held that judges in discipline cases have no right to a jury trial,[76] to prior notice,[77] to confront one's accusers and

---

[70] *See, e.g., In re* Hyland, No. ACJC 83-25, slip op. at 14 (N.J. Sept. 25, 1985); *In re Coruzzi*, 472 A.2d at 546.

[71] *See* I. TESITOR & D. SINKS, *supra* note 1, at 83-85.

[72] *See, e.g.,* Keiser v. Bell, 332 F Supp. 608 (D. Pa. 1971); *In re* Benoit, 487 A.2d 1158 (Me. 1985); *In re* Cieminski, 270 N.W.2d 321 (N.D. 1978); *In re* "Judge Anonymous", 590 P.2d 1181 (Okla. 1978).

[73] *See, e.g., In re* Garner, 466 So. 2d 884 (Miss. 1985); *In re* Dalessandro, 397 A.2d 743 (Pa. 1979); *In re* Dandridge, 337 A.2d 885 (Pa. 1975).

[74] *In re* Deming, 736 P.2d 639 (Wash. 1987).

[75] *Id.* at 650.

[76] *See, e.g., Sharpe*, 448 P.2d at 301.

[77] *See, e.g., In re* Storie, 574 S.W.2d at 369.

to cross-examine adverse witnesses,[78] or to bar an amendment in the pleadings.[79] These courts have taken the position that the accused judges should not be allowed the traditional rights of criminal defendants because the proceedings are not truly criminal in nature.[80]

Despite rejecting the notion that judicial disciplinary proceedings are quasi-criminal in nature, some courts have afforded qualified procedural rights to judges. In *In re Storie*,[81] the Supreme Court of Missouri rejected the notion that disciplinary proceedings are quasi-criminal and ruled that a judge is not entitled to notice of a commission investigation against him. Nevertheless, the court went on to state that, in the future, the commission would be expected to provide notice to judges. Similarly, in *In re "Judge Anonymous,"*[82] the Supreme Court of Oklahoma ruled that, although a judge under investigation by a commission is not entitled to the privileges and immunities guaranteed a criminal defendant, the judge does have a limited right to refuse to testify, and he cannot be required to make incriminating statements. Although the due process rights attendant upon criminal proceedings may not be available in judicial disciplinary proceedings, other due process rights outside of the criminal process may be available.

V PROCEDURAL DUE PROCESS RIGHTS OF JUDGES

The fourteenth amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[83] Application of the due process clause involves a two-step analysis: first, it must be determined if the government action affects an interest in life, liberty, or property; second, it must be determined what procedural requirements of due process of law extend to the interest affected by the government action. Parties often contest

---

[78] *See, e.g., In re* Sawyer, 594 P.2d 805 (Or. 1979).

[79] *See, e.g., In re* Laughlin, 265 S.W.2d 805 (Tex. 1954).

[80] *Sharpe*, 448 P.2d at 301; *In re Sawyer*, 594 P.2d at 805; *In re Laughlin*, 265 S.W.2d at 805.

[81] 574 S.W.2d 369 (Mo. 1978) (en banc).

[82] 590 P.2d 1181 (Okla. 1978).

[83] U.S. CONST. amend. XIV, § 1.

whether the due process clause protects the interest of judges in their judicial offices, and if so, what procedural process is required.

Obviously, judicial disciplinary proceedings do not involve a deprivation of life; therefore, to invoke the procedural requirements of the due process clause in a judicial disciplinary proceeding, it must be shown that a property or a liberty interest is at stake. While property and liberty are broad concepts, the range of interests protected by them is not infinite.

Property interests protected by procedural due process extend beyond actual possessory rights to real estate and chattels or money, and the protected interests may include contractual and intangible interests. However, an abstract need, an abstract desire, or a unilateral expectation does not suffice to establish a procedurally protectable property interest. Rather, procedural protection attaches to claims of entitlement grounded in existing statutes, rules, regulations, or understandings stemming from sources independent of the Constitution, such as state law A unilateral expectation of a benefit does not amount to a property interest, but a property interest will be recognized when a state has acted in such a way as to create an objective, reasonable expectation of a benefit, such as continued employment.[84]

Liberty denotes an individual's interest in the enjoyment of privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons. When an individual's good name, reputation, honor, or integrity is at stake because of governmental action, some procedural protections are essential, at least when some more tangible interest such as employment is also affected.[85] Government actions that might seriously damage an individual's standing and associations in the community similarly would require some form of procedural due process.[86]

Once it is established that a due process property or liberty interest is present, next it must be determined exactly what sort

---

[84] *See* Bishop v. Wood, 426 U.S. 341 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

[85] *See* Paul v. Davis, 424 U.S. 693 (1976).

[86] *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

of process is due. Due process of law is not a fixed concept; it is affected by time, place, and circumstances.[87] The specific procedural protections afforded an individual whose interest is threatened by government action may vary from situation to situation.

Courts are divided on the issue of whether judges have a sufficient interest in their offices to invoke the protection of the due process clause when disciplinary proceedings are initiated by judicial conduct organizations. The majority of courts would take the position that judges possess a property or a liberty interest in the judicial office,[88] and this seems to be the better view Except for those few judges who serve "at the pleasure" of some appointing authority, the vast majority of judges serve for designated terms in which they have a continued expectation of office that should give rise to a property interest. Moreover, disciplinary action against a judge can affect not only employment but also reputation and standing in the community, thus giving rise to a liberty interest.

Nevertheless, some courts have taken the position that judges enjoy neither a property nor a liberty interest in their judicial offices.[89] One court has stated as a general proposition that judges possess neither contractual nor vested interests in their offices because public offices are created for the benefit of the public and not the office holder [90] The logic of the court's rationale, however, is questionable; that judicial offices are created for the benefit of the public does preclude the possibility that judges have a liberty or a property interest in their offices. Taken to its logical extreme, this rationale would allow the summary removal of judges without a good reason.

It also has been held that judicial officers who sit "at the pleasure" of an appointing authority have neither a property interest nor a reasonable expectation in the office that is suf-

---

[87] *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

[88] *Cf.* Washington v. Kirksey, 811 F.2d 561 (11th Cir. 1987), *cert. denied,* 108 S. Ct. 96 (1987).

[89] *See, e.g.,* Gruenburg v. Kavanagh, 413 F Supp. 1132 (E.D. Mich. 1976); *In re* Del Rio, 256 N.W.2d 727 (Mich. 1977); O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978).

[90] *See O'Neil,* 568 S.W.2d at 786.

ficient to require due process protection.[91] Accordingly, one court has ruled that a magistrate may be removed from office by abolishing his position, even during midterm, if he was appointed to serve at the pleasure of the appointing authority.[92] This rationale is debatable because the appointment was for a designated term of one year; therefore, the appointment was not entirely at the pleasure of the appointing authority. At any rate, this decision applies only to those judicial officers whose appointments are designated to be at the pleasure of an appointing authority

Several cases also have held that an interim suspension of a judge does not involve a sufficient employment interest to require due process protection because temporary suspension does not amount to a deprivation of a property or a liberty interest protected by the due process clause.[93] While these decisions are probably correct, the reasoning is suspect; that a deprivation of a liberty or a property interest is temporary rather than permanent does not nullify the presence of the interest. The same result could have been reached in these cases on more acceptable grounds by recognizing the presence of a due process interest in the judicial office but then holding that due process does not require a hearing be held prior to a temporary suspension from office. Due process requirements vary according to circumstance; therefore, due process may be satisfied by a subsequent hearing in the case of an interim suspension from office.

Most courts would hold that removal from judicial office or other disciplinary action against judges affects either a property or a liberty interest protected by the due process clause; therefore, the removal or the discipline must comply with the due process requirements.[94] One noted commentator has stated that there is "no doubt that a judge, whether elected or appointed, serving a fixed term of office or an indefinite term,

---

[91] *See, e.g.,* Field v. Boyle, 503 F.2d 774 (7th Cir. 1974).

[92] *See id.*

[93] *See, e.g., Gruenburg,* 413 F Supp. at 1132; *In re Del Rio,* 256 N.W.2d at 727

[94] *Cf.* Kennedy v. Robb, 547 F.2d 408 (8th Cir. 1976), *cert. denied,* 431 U.S. 959 (1976).

has that 'claim of entitlement' to his office which constitutes a property interest within the protection of the Fourteenth Amendment.'"[95] Therefore, the more serious question concerns what due process requirements are necessary in the judicial disciplinary process.

A. The Right to Notice

The issue of whether a judge has received sufficient notice in disciplinary proceedings arises at the investigative and the adjudicative stages of the review process. When considering questions of notice during the investigative stage, courts seldom hold disciplinary bodies to strict compliance with procedural guidelines.[96] During the investigative stage, however, when the notice provisions of other agencies of government are at issue, prescribed notice procedures must be followed.[97] Occasionally, courts have found violations of procedural due process resulting from improper notice that arose during adjudication.[98] Most courts, however, have not been sufficiently sensitive to the need for notice in judicial disciplinary actions. In fact, in most cases the courts have been unduly grudging in recognizing any due process requirements of notice when judges are charged with misconduct.

In *McCartney v Commission on Judicial Qualifications*,[99] the California Commission recommended that a judge be removed from office. The Commission's decision was based on an investigation conducted in response to letters from private citizens and from attorneys alleging improper conduct in a welfare fraud case. After informal inquiries, a formal investigation, and consideration of a master's report, the Commission found that the judge had engaged in willful misconduct and prejudicial conduct.

---

[95] Cohn, *The Limited Due Process Rights of Judges in Disciplinary Proceedings*, 63 JUDICATURE 232, 233-34 (1979-80).

[96] *See In re* Storie, 574 S.W.2d 369, 372 (Mo. 1978).

[97] *See* Nichols v. Council on Judicial Complaints, 615 P.2d 280, 283-84 (Okla. 1980).

[98] *See, e.g., In re* Gillard, 260 N.W.2d 562, 563 (Minn. 1977).

[99] 526 P.2d 268 (Ca. 1974).

The judge, in addition to challenging the recommendation on the merits, objected to the proceedings on the ground that he was denied due process by the Commission's failure "to accord him proper notice of its preliminary investigation under [Commission] rule 904(b)."[100] This rule states that a judge should be given "a reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose."[101] In this case, the Commission notified the judge that it was charging him with seven general counts of willful misconduct in office and of prejudicial conduct, but it did so only after the formal preliminary investigation had been completed.

The Supreme Court of California pointed out that the Commission performs no adjudicative function during its investigation; therefore, Commission rule 904 provides more procedural protection than the due process clause requires. The court stated further that it would grant relief only if the Commission's deviation from the procedures was deleterious and resulted in actual prejudice. The court then held that the Commission's failure to inform the judge of the preliminary investigation did not threaten the fundamental fairness of the proceedings because the judge failed to prove the existence of actual prejudice.

The Supreme Court of Missouri relied on the *McCartney* ruling in its decision in *In re Storie*.[102] The Missouri Commission on Retirement, Removal and Discipline found that a judge violated the Code of Judicial Conduct and Missouri law by running a library fund that operated on contributions received from criminal defendants in exchange for reduced charge dismissals or for holdings of nolle prosequi. Based on this conclusion, the Commission recommended that the judge be suspended from office for sixty days without pay

On January 4, 1977, the Commission had sent the judge a letter of inquiry He responded the following day detailing the operation of the fund and indicating his willingness to cooperate with the Commission. The Commission then issued inter-

---

[100] *Id.* at 272.
[101] *Id.* at 273.
[102] 574 S.W.2d 369 (Mo. 1978).

rogatories on September 1, 1977, which the judge answered after requesting one continuance. Subsequently, formal charges were filed with a hearing set for January 4, 1978.

The judge filed three motions to dismiss the charges complaining of lack of notice of investigation, arguing that the formal charges did not detail specific violations, and asserting that the proceedings denied him due process. He pointed out that the letter he received in January omitted any reference to an investigation, it did not indicate that the Commission suspected any impropriety, and it was not sent by registered or by certified mail. He contended that the Commission's violation of its own procedural rules worked to deprive him of due process. He maintained that, as a result of these shortcomings, he had no chance to present relevant material for his defense, and he also asserted that the court should require strict compliance with procedural requirements because judicial disciplinary actions are quasi-penal in nature.[103]

In response, the court noted that the procedural rule at issue had been modeled after the California provision for judicial disciplinary proceedings. It then cited that portion of the *McCartney* opinion which stated that notice of investigation need not be given as a matter of due process. Consequently, the judge's complaint that he received "informal notice" could only be justified by a showing of actual prejudice. Without prejudice, there was no need to grant relief. The court reiterated that removal and disciplinary proceedings are not quasi-penal because their aim is "not to punish criminal conduct but rather to maintain standards of judicial fitness."[104] Finally, the court stated that, in the future, the Commission would be expected to provide judges with notice of the matters at issue in its investigations to enable judges to present evidence to the Commision before formal charges are made. Consequently, the court declined to grant relief, despite its disapproval of the failure to give notice, and limited itself to urging the Commission to follow the procedures set out in the rules pertaining to disciplinary actions.

---

[103] *Id.* at 372-73.

[104] *Id.* at 373.

In subsequent cases involving possible prejudice resulting from departures from procedural notice requirements, the courts have engaged in ad hoc analyses of the particular facts of each case. *In re Kirby*[105] is a paradigmatic example. The Minnesota Board of Judicial Standards requested that a judge be suspended from office pending a final decision on its recommendation that he be permanently removed from office. The Board served the judge with a statement of allegations referring to his disposition of traffic cases, his excessive use of alcohol, and his lack of respect for female attorneys. In reply, the judge filed a motion asking either for a dismissal or for a more definite statement of the facts constituting the allegations. The Board replied that he would receive the facts or the charges would be dropped. Neither was done. Nonetheless, the Board later issued formal charges alleging improper disposition of traffic cases, habitual tardiness, three instances of public intoxication, one instance of conducting judicial business after consuming intoxicants, and instances of discourtesies to female attorneys, such as calling them "lawyerettes" and asking them why they did not wear neckties. In response, the judge moved for a dismissal on the ground that the case violated his "right to due process of law and fundamental fairness."[106] He claimed that the Board's neglect in failing to provide him with specific facts or to inform him of the charges of habitual tardiness precluded him from answering the charges with any specificity, violated the Board's own rules, and thereby deprived him of due process.

Although the court acknowledged that the Board did not comply with its own procedural regulations concerning notice, the court held that there was no due process violation. Specifically, the court stated that the allegations of intoxication and discourtesy "were not so vague as to mislead him or prevent him from preparing an adequate defense."[107] The court refused to grant a dismissal because the evidence and witnesses presented to support the tardiness charge were abundant. As a

---

[105] 354 N.W.2d 410 (Minn. 1984).

[106] *Id.* at 413.

[107] *Id.* at 416.

result, the Board's actions, in the court's opinion, did not violate the Board's procedural rules to the degree that the interests of fundamental fairness were compromised.

Although courts have not required judicial disciplinary organizations to adhere strictly to their own notice procedures, they have required strict compliance with legislative notice procedures governing other areas. In *Nichols v Council on Judicial Complaints*,[108] the Oklahoma Council on Judicial Complaints served a subpoena duces tecum commanding a bank official to produce data and papers pertaining to the transaction of a judicial officer currently under investigation. The bank objected to the subpoena and sought a writ to block its enforcement.

One of the bank's objections to the subpoena hinged on the Council's failure to comply with Oklahoma's Financial Privacy Act. The Act stipulates that a subpoena issued to a financial institution by any government authority should be served on the customer whose records are affected or should be mailed to the customer prior to being served on the financial institution. This notice safeguards the due process rights of customers by allowing them fourteen days to challenge requests for access to financial information, an area in which an individual can reasonably expect privacy

The Oklahoma Supreme Court held that the subpoena had to be reissued in compliance with the Act if the Council desired the records; however, the court declined to decide the issue of whether the judge's due process rights were violated. The court pointed out that the bank had no standing to invoke protection of the fifth amendment for the judge as a depositor. The court based its decision to require strict compliance with the Act's notice procedures entirely on the Council's violation of the Act; however, the court's holding cannot be totally divorced from due process requirements because the portion of the Act in question was designed to protect the due process rights of bank customers against unwarranted invasions of privacy Although a request for financial information itself might not violate the due process clause, it should not be assumed that

---

[108] 615 P.2d 280 (Okla. 1980).

procedural irregularities in obtaining the information will be ignored.

Cases in which the violations of notice occur in the adjudicative stage differ only slightly from cases in which the violations occur in the investigative stage because courts acknowledge the need to provide a certain degree of notice during adjudication. In *Gruenburg v Kavanagh*,[109] a Michigan judge filed suit alleging that the proceedings of the Michigan Judicial Tenure Commission deprived him of due process on the ground that the factual allegations of the Commission's complaint were insufficient to allow him to prepare his defense. He based his due process objection on the Commission's failure to follow its own procedural rules for disciplinary actions.

The Michigan Supreme Court held that due process calls for different degrees of procedural protection in each case based on time, place, and circumstance. In general, the court found that the Commission had provided enough procedural protection to ensure due process. The notice that the judge received in this case contained sufficient facts and was timed so that the judge had an ample chance to respond to the complaint and to the petition for interim suspension.

As in investigative matters, there must be a showing of actual prejudice in adjudicative matters to grant relief. *In re Robson*[110] was a suit instituted by an Alaskan judge after the Alaska Commission on Judicial Qualifications recommended that he be censured for his conduct. The judge conceded that he was not prejudiced by the pre-hearing irregularities, and he stated that his purpose in bringing suit was to clarify the proper procedures in Commission proceedings. Although the Alaska Supreme Court did not mention the type or the quality of notice given, the court stated that the Commission gave the judge adequate notice of the charges and a reasonable opportunity to be heard. Moreover, it cautioned that, even if the Commission operated without any procedural rules or if it neglected to follow established rules, that alone would not indicate a *per se* violation of the due process clause. The judge

---

[109] 413 F Supp. 1132 (E.D. Mich. 1976).

[110] 500 P.2d 657 (Alaska 1972).

admittedly could not prove that the Commission's action resulted in actual prejudice; therefore, no relief was granted.

When complaints have alleged that the verbal expression of the charged violations were inadequate to provide proper notice, courts have given wide latitude to disciplinary bodies. The Supreme Court of Indiana decided whether a complaint filed by the state Disciplinary Commission gave a judge sufficient notice to satisfy the due process clause in *In re Wireman*.[111] The complaint alleged seven counts of misconduct by combining the functions of an attorney with the role of a judicial officer The Commission urged that the judge be disbarred as an attorney The judge claimed that the wording of the grievance did not comport with the requirements of Indiana's Admission and Discipline Rule 23, section 10(a)(2). That section states that grievances should contain allegations of misconduct following the Code of Professional Responsibility In this case, the Commission worded its complaint according to the terms of the Judicial Canons. The judge asserted that this departure from established procedure denied him due process with regard to those charges based on the Code of Professional Responsibility

The court sided with the Commission, observing that "it would be absurd to hold that the grievance must be strictly construed [because the] vast majority of grievances are filed by persons not skilled in the law "[112] It is for this reason that the Commission reviews grievances, dismisses baseless complaints, and then frames a complaint that avers the alleged misconduct in the proper form. In this case, the court found that the wording did not prevent the judge from understanding the substance of the charges. Accordingly, the court held that the notice given to the judge satisfied the spirit, if not the letter, of the rule at issue; therefore, the notice did not result in a denial of due process of law

Despite all of the allowances courts have made for disciplinary bodies in adjudication proceedings, they have not tolerated a total absence of notice. In *In re Gillard*,[113] the Lawyers

---

[111] 367 N.E.2d 1368 (Ind. 1977), *cert. denied,* 436 U.S. 904 (1978).

[112] *Id.* at 1369 (quoting *In re* Murray, 362 N.E.2d 128, 130 (Ind. 1977)).

[113] 260 N.W.2d 562 (Minn. 1977).

Professional Responsibility Board began proceedings against a judge on the strength of allegations of professional misconduct. The Minnesota Supreme Court asked the state Board on Judicial Standards to file a brief on the subject. Thereafter, the Lawyers Professional Responsibility Board filed a petition recommending disbarment, and the court appointed a referee who conducted hearings and agreed that disbarment was warranted. The Board on Judicial Standards took the position that, if the judge was disbarred, he should be removed from his judicial office.

The Supreme Court of Minnesota declined to act on the referee's recommendations because it found that the judge did not receive adequate notice or a chance to be heard regarding his fitness to retain his office. Consequently, the court decided to place the matter in the hands of the Board on Judicial Standards with the expectation that the judge be afforded all the procedural rights under state statutes and the Rules of the Board on Judicial Standards; however, the court did allow the Board on Judicial Standards to consider, along with all the other appropriate evidence, the findings and the conclusions of the referee.

Recently, in *In re Deming*,[114] the Supreme Court of Washington stated that, because of the potentially severe consequences to a judge in a disciplinary proceeding, certain due process protections are required, including written notice of the charge, of the nature and the cause of the accusation, and of the name of the person or the persons who brought the complaint. In contrast, most courts usually have not allowed errors in prescribed notice procedures to nullify the validity of investigations and hearings conducted by disciplinary organizations. Most courts have held that virtually no notice is required by the due process clause in investigatory proceedings. In adjudicative proceedings, due process demands only the notice that is necessary to give the judge a general idea of the charges against him. That the courts have taken such a parsimonious view of the due process notice requirements is distressing, es-

[114] 736 P.2d 639 (Wash. 1987).

pecially in allowing commissions to violate their own rules of notice.

B. The Right to Counsel

Courts have recognized that the right to counsel in judicial disciplinary proceedings is an essential element of due process.[115] Most courts agree that a judicial disciplinary proceeding is subject to the same rights and restrictions concerning the benefit of counsel as any other proceeding that threatens to deprive a person of a livelihood or a good reputation. "Since disqualification [from office] is a serious penalty it can be constitutionally imposed only when the adjudication of guilt meets the fundamental requirements of due process."[116] Due process includes the right to counsel.[117] Some courts have explained that, because judicial disciplinary proceedings are quasi-criminal in nature, a judge is entitled to the due process right to be represented by counsel.[118] Whatever the reasoning, courts agree that judges have a right to counsel in judicial conduct proceedings.

The right to counsel in a judicial conduct proceeding may be waived or lost. In one case,[119] for example, it was held not to violate the due process clause when a commission refused to grant a continuance to a non-lawyer judge who had retained counsel with a conflicting court engagement on the date set for the judge's misconduct hearing. In denying the accused judge's request for a continuance, the Commission forced the judge to proceed in a hearing without representation by counsel. Nevertheless, it was held that the Commission had not denied the judge the right of counsel; rather the judge gave up his own right to counsel by knowingly selecting an attorney who had a conflicting court engagement.

---

[115] *See, e.g., In re* Kelly, 238 So. 2d 565 (Fla. 1970), *cert. denied,* 401 U.S. 962 (1970); *In re* Haggerty, 241 So. 2d 469 (La. 1970); *In re* Peoples, 250 S.E.2d 890 (N.C. 1976), *cert. denied,* 442 U.S. 929 (1978).

[116] *In re Peoples,* 250 S.E.2d at 923.

[117] *See, e.g., id.*

[118] *See, e.g., In re Haggerty,* 241 So. 2d at 469.

[119] *In re* Inquiry Concerning a Judge (Taunton), 357 So. 2d 172 (Fla. 1978).

While the right to counsel ordinarily includes the right to obtain an attorney of one's own choice, this right is not absolute. Thus, it has been held that an accused judge does not have the right to be represented by her lawyer-husband who was also a witness and, therefore, disqualified under the Code of Professional Responsibility from representing a party in the proceeding. In the court's opinion, the judge demonstrated no showing of prejudice by the fact that she could not be represented by her husband, and the court ordered her to retain other counsel.[120]

Although the right to counsel may be waived or lost, the courts are virtually uniform in their agreement that the right to counsel applies to the judicial conduct process. Many courts have held that the right to be represented by counsel in a judicial disciplinary proceeding is an aspect of fundamental fairness protected by the due process clause.[121]

C. The Right to Confront and to Cross-Examine Witnesses

It has been held that, during the investigative stage of judicial disciplinary proceedings, there is no right to confront and to cross-examine witnesses, or even to be present while they are questioned.[122] Even during the adjudicative stage of the proceedings, several courts have held that, because disciplinary proceedings are not criminal in nature, no right to confront one's accusers exists.[123] In fact, several courts have held that a judge has no right to know the identity of the person who filed a complaint against him or her [124] Some courts have said that the party filing a complaint against a judge is unlike a victim charging someone with a criminal offense because, in the disciplinary process, a commission has the re-

---

[120] Sims v. New York State Comm'n on Judicial Conduct, 441 N.Y.S.2d 806 (N.Y 1981).

[121] *See, e.g., In re Haggerty*, 241 So. 2d at 469.

[122] *See, e.g., In re* Whitaker, 463 So. 2d 1291 (La. 1985); *In re* Troy, 306 N.E.2d 203 (Mass. 1973).

[123] *See, e.g.,* Keiser v. Bell, 332 F Supp. 608 (E.D. Pa. 1971); *In re Wireman*, 367 N.E.2d at 1368; *In re* Mills, 539 S.W.2d 447 (Mo. 1976).

[124] *See, e.g., In re Wireman*, 367 N.E.2d at 1368, *cert. denied,* 436 U.S. 904 (1977); *In re* Daniels, 340 So. 2d 301 (La. 1976).

sponsibility of making an independent judgment of misconduct; the commission, rather than the grievant, acts as the complainant.[125]

Still, the better view, and the one followed by some courts, is that disciplinary proceedings can penalize a judge seriously Therefore, during the adjudicative stage the fundamental requirements of due process, including the right to confront and to cross-examine witnesses, must be met.[126]

D Combining Investigative and Adjudicative Functions in One Body

It is well-settled that an impartial adjudicator is an essential element of due process.[127] Therefore, a question may be raised as to whether a judicial conduct organization that possesses the combined authority to investigate and to adjudicate cases violates the due process clause. Some have argued that a body which investigates matters cannot be an impartial adjudicator of those same matters. Nonetheless, a considerable amount of opinion holds that the mere combination of investigative and adjudicative authority into a single administrative agency does not run afoul of due process standards.[128] Rather, courts consistently take a pragmatic position concerning this matter by requiring proof that the combination of functions has produced actual bias which is sufficient to overcome a presumption of fairness and integrity in adjudicators.[129]

In the nine jurisdictions that employ the two-tier model of judicial discipline, the investigative and the adjudicative functions are separated to ensure the highest degree of impartiality In the remaining jurisdictions, where the functions are combined, the courts have been unwilling to assume that the requisite degree of impartiality is not present. Some of these courts are perhaps sensitive to the fact that such a structural charac-

---

[125] *See, e.g., In re Wireman*, 367 N.E.2d at 1368; *In re Daniels*, 340 So. 2d at 301.

[126] *See, e.g., In re Haggerty*, 241 So. 2d at 469; *In re Peoples*, 250 S.E.2d at 890.

[127] *See, e.g., In re* Murchison, 349 U.S. 133 (1965).

[128] *See, e.g.,* Withrow v. Larkin, 421 U.S. 35 (1975).

[129] *See, e.g., id.*

teristic may enhance the likelihood of actual bias, but they are unwilling to assume actual bias in all cases. Therefore, these courts emphasize that the adjudicative functions of some judicial conduct organizations amount to no more than a recommendation to a state supreme court to discipline a judge. Even in those states where judicial conduct organizations are vested with actual disciplinary power, however, due process challenges to the combined functions of the organizations have failed.

In the seminal case of *Keiser v Bell*,[130] a federal District Court considered a judge's contention that his due process rights were violated by the involvement of the Executive Secretary of the Pennsylvania Judicial Inquiry and Review Board in the prosecutorial, the fact-finding, and the adjudicative stages of the disciplinary proceedings. Specifically, the Executive Secretary had executed one of two affidavits to verify the complaint filed against the judge. In his affidavit, the Executive Secretary swore that the facts set forth in the complaint were true and correct. Thereafter, the Executive Secretary participated in the Board's fact-finding committee and in the formulation of the Judicial Board's recommendation that the judge be removed from judicial office.

The court found no violation of the due process clause. In the court's opinion, the determination made by the Board was not a final adjudication but was only a recommendation subject to approval or rejection by the Pennsylvania Supreme Court. Therefore, a clear separation between the preliminary investigation of the complaint and the state Supreme Court's final adjudication existed. The court also held that the judge's due process challenge must fail because there was neither an allegation nor any evidence to show that the signing of the affidavit in support of the complaint affected the fact-finding committee or prejudiced the Board's adjudication. In other words, there was no showing of actual bias; therefore, no violation of the due process clause existed.

In *Roy v Jones*,[131] several justices of the peace sought to enjoin the Pennsylvania Judicial Inquiry and Review Board

---

[130] 332 F Supp. 608 (E.D. Pa. 1971).

[131] 349 F Supp. 315 (W.D. Pa. 1972).

from conducting hearings and making further recommendations in their cases. They alleged that the Board could not remain impartial because it had previously recommended that the plaintiffs be suspended from their offices pending final adjudication in the disciplinary actions against them. Additionally, these plaintiffs contended that the functioning of the Board as a prosecutor, as a judge, and as a jury violated their due process right. These arguments were summarily rejected on the ground that they were unaccompanied by a showing of actual bias.

Since *Keiser*, courts have uniformly rejected due process challenges to the combination of investigatory and adjudicatory functions in judicial conduct organizations. In *In re Brown*,[132] the Texas high court rejected a judge's due process contention against combined functions, summarily noting that the same argument "had been considered and rejected in the context of federal administrative agencies and their investigatory-adjudicatory roles."[133] In *Brown*, the Commission had designated an assistant attorney general as an examiner to conduct the actual investigation of the alleged misconduct and to present evidence before the Commission.[134] Such an arrangement is clearly less offensive to the separation of functions principle than the arrangements in *Keiser* or in *Roy*

In some states with one-tier commissions, once an investigation is complete, a commission may reject the accusations against the judge, may issue a private reprimand, may issue a public censure of the judge, or may recommend to the state supreme court the removal of the judge. It has been asserted that the latter two options implicate a judge's due process interests, and removal from office clearly would require procedural due process protections.[135] When a judicial commission recommends removal from office, however, the recommendation does not amount to removal of the judge in and of itself. Rather, the ultimate authority to remove the judge rests exclusively with the state supreme court.[136] Therefore, even when a

---

[132] 512 S.W.2d 317 (Tex. 1974).

[133] *Id.* at 321.

[134] *Id.* at 325 (Reavley, J., dissenting).

[135] *See supra* text accompanying notes 83-95.

[136] *See, e.g., Keiser*, 332 F Supp. at 608; *Brown*, 512 S.W.2d at 317.

judicial commission recommends removal, it is not certain that procedural due process protections are necessary

In *In re Hanson*,[137] the Alaska Supreme Court rejected a judge's due process challenge to Alaska's Judicial Commission Rule 5(a) which authorizes the Commission to determine whether allegations of misconduct are frivolous or unfounded and to determine whether formal proceedings should be instituted and a hearing held. The court ruled that the Commission's dual investigative and adjudicative functions "did not result in a biased or partial tribunal."[138] The court was influenced by the fact that exclusive adjudicatory authority to suspend, to remove, to retire, or even to censure a judge was vested in the state supreme court.

In *Nicholson v Judicial Retirement and Removal Commission*,[139] the Kentucky Supreme Court ruled that the mere combination of functions did not violate the judge's due process rights when the Commission investigated alleged misconduct, instituted formal proceedings, and issued a public censure after conducting an evidentiary hearing. Relying on precedent, the court rejected the judge's contention that the procedures led to a biased trier of fact. Rather, the court found that "this case did not present a situation where common sense dictates that the investigative and adjudicative roles must be played by different persons in order to avoid inevitable bias."[140] In the court's opinion, the judge failed to overcome the assumption of honesty and integrity of the Commission members.

A few cases do exist in which a judge attempted to show actual bias rather than *per se* bias. In *Halleck v Berliner*,[141] the judge alleged that the Judicial Commission Chairman was actually biased against the judge because, nine years earlier, the Chairman was an Assistant United States Attorney, and the judge had been critical of a policy of the United States Attorney's office. Nevertheless, the court held that the evidence did not establish that the judge had a valid claim against the

---

[137] 532 P.2d 303 (Alaska 1975).
[138] *Id.* at 306.
[139] 562 S.W.2d 306 (Ky. 1978).
[140] *Id.* at 309.
[141] 427 F Supp. 1225 (D.D.C. 1977).

Chairman based on bias. In *Roy*, it was suggested that in order to be disqualifying, actual bias "must stem from an extrajudicial source and must result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[142] A personal or a financial interest held by the adjudicator or the existence of a personal affront directed at the adjudicator are examples of disqualifying actual bias mentioned by the court.

E. The Right Against Self-Incrimination

Several courts have held that there is no blanket fifth amendment right against self-incrimination in judicial conduct proceedings. These courts have taken the position that a judge may not refuse to take the stand or to testify because the proceedings are not criminal in nature.[143] In disciplinary proceedings, however, a judge may assert a fifth amendment right not to answer particular questions if the answers would incriminate the judge. This right applies only to questions of an incriminating nature and may be overcome by granting the judge immunity from criminal prosecution. A judge has no right to refuse to answer nonincriminating questions which show that he or she has violated the code of ethics.[144]

In *In re Glancey*,[145] the court held that the fifth amendment right against self-incrimination did not apply to incriminating questions if a judge's answers were used only in a disciplinary action and not in a criminal action. This case arose when two judges refused to report about gifts they might have received. They invoked their fifth amendment right against self-incrimination. The Supreme Court of Pennsylvania ruled that the fifth amendment did not give the judges the right to refuse to report gifts as long as their answers were not used in criminal proceedings. In fact, the court ruled, as recommended by the

---

[142] *Roy*, 349 F Supp. at 321 (quoting United States v. Grinnell Corp., 384 U.S. 563 (1966)).

[143] *See, e.g.*, McComb v. Superior Court, 137 Cal. Rptr. 233 (Cal. 1977); *In re* "Judge Anonymous," 590 P.2d 1181 (Okla. 1978).

[144] *See, e.g.*, Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972), *cert. denied*, 409 U.S. 1037 (1972).

[145] 527 A.2d 997 (Pa. 1987).

Pennsylvania Judicial Inquiry and Review Board, that failure to report constituted misconduct calling for removal from office. Because there had been no prior warning to judges that they could be removed from office for failing to report gifts, the Pennsylvania Supreme Court gave the judges thirty days to report, and if they refused, they would be removed from office.

CONCLUSION

When the creation of judicial conduct organizations was first proposed, it aroused considerable opposition, particularly, but not exclusively, from judges. The opposition had two main arguments. The first argument was that it was unnecessary to establish judicial disciplinary agencies because instances of judicial misconduct were rare and could be handled adequately through the existing mechanisms of impeachment, address, or recall. This assertion ignored the deficiencies of those mechanisms and seriously underestimated the frequency of judicial misconduct. Unfortunately, the judiciary, like the other branches of government, has not been free from misfeasance, malfeasance, and outright corruption. The judiciary has had its share of villians who have populated the bench at all levels.

While the great majority of judges adhere scrupulously to ethical norms, the frequency of judicial misbehavior is substantial enough to require systematic regulation of judicial misconduct. This point has been confirmed by experience since the establishment of judicial conduct organizations. In each of the last five years over one hundred judges have been found to have engaged in misconduct[146]—a small percentage, perhaps, of the total number of judges, but certainly enough to be cause for concern, especially when one considers that other instances of judicial misconduct go unreported.

The second argument against the creation of judicial conduct organizations was that the organizations pose a threat to judicial independence. In this nation, there has been a long-

[146] An annual survey of judicial misconduct case dispositions is published by the American Judicature Society in the *Judicial Conduct Reporter E.g.*, Begue, *Center Surveys JCO Complaint Disposition, Budget and Staff for 1985*, JUD. CONDUCT REP., Winter 1987, at 1.

standing belief in judicial independence so that judges can be free to decide cases without fear of retribution or the need to curry favor. Furthermore, judicial independence fosters public confidence in the courts, which is essential to a legal system that depends in good part upon voluntary compliance with judicial decisions. Thus, judicial independence is a cornerstone of our legal system: the common law rule gives judges absolute immunity from civil liability for their judicial acts, and the United States Constitution mandates that federal judges may not be removed from office except for misbehavior and that their salaries may not be reduced while they are in office.[147]

Because judicial independence is an integral part of our legal system, the argument that it is threatened by a system of judicial discipline cannot be dismissed lightly Nevertheless, the nature of the judicial disciplinary system that has been established poses little threat to judicial independence for several reasons. First, the system operates essentially through judicial self-regulation. In every state, judges are included in the composition of judicial conduct commissions; in some states, judges constitute a majority of the commission membership. Moreover, commission decisions ordinarily are appealable to a court, which has the final say as to what constitutes judicial misconduct. With this self-regulation, any threat posed to judicial independence is greatly diminished.

Second, the system of judicial discipline is designed to safeguard judicial independence. The Code of Judicial Conduct expressly states that the integrity and the independence of the judiciary should be preserved and that the Code should be construed to further that objective.[148] Modern judicial discipline is directed at the regulation of activities that should not be and traditionally have not been considered within the ambit of judicial independence. For instance, judges have been disciplined for harassing litigants or attorneys, for willfully and persistently failing to perform the duties of their office, for using the influence of their office to obtain favors for relatives or for friends, for hearing cases in which they have an interest,

---

[147] U.S. CONST. art. III, § 1.

[148] CODE OF JUDICIAL CONDUCT Canon 1 (1972).

and for committing acts such as deciding cases by the flip of a coin.

The modern judicial disciplinary system distinctly recognizes that judges may not be censured or penalized for making erroneous or unpopular decisions. The system follows the standard originated by the Constitution, which protects the independence of judges "during good behavior "[149] This standard has been incorporated in the modern judicial discipline system, which does not permit judicial discipline to be used as a substitute for appeal or as a means to regulate judges for rendering mistaken or disfavored decisions.

Given this approach, the judicial disciplinary process can strengthen judicial independence by bolstering the principle that judges should not be liable to reprisal merely because their decisions are wrong or out of favor Admittedly, there is a risk that this principle will not be faithfully observed and that discipline will be used improperly to encroach upon judicial independence. Thus far, however, in the approximately twenty-five year history of modern judicial discipline, that risk has come to fruition on only a few occasions. In fact, judicial retention elections (in those states where they exist) have proven to be a greater threat to judicial independence than the disciplinary system. In the last few years, for example, vigorous campaigns have been mounted in states such as California, North Carolina, and Oregon to unseat judges whose decisions are viewed in some corners as being too "liberal." These campaigns, whether directed at liberal or at conservative judges, pose a real threat to judicial independence.

It has been twenty-seven years since the creation of the first permanent judicial conduct commission in California. In that time, we have seen the rise of a system in the states which has been able to upgrade the professional conduct of judges. This upgrading has been accomplished in a fair manner, usually consistent with due process, and without impinging upon judicial independence. The establishment of judicial conduct commissions has been a successful movement that improves the quality of the judiciary Commissions began as experiments

---

[149] U.S. CONST. art. III, § 1.

that, for the most part, have worked well. They have become an important cog in our system of government.