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Judicial Discipline and Due Process in Washington State—*In re Deming*, 108 Wash. 2d 82, 736 P.2d 639 (1987)

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JUDICIAL DISCIPLINE AND DUE PROCESS IN WASHINGTON STATE—*In re Deming*, 108 Wash. 2d 82, 736 P.2d 639 (1987).

Belief in the basic integrity of judges lies at the heart of our legal system. Judges perform a critical and highly visible function, and the incompetence or dishonesty of even a few judges can erode the public's confidence in the entire legal system. As concern for judicial integrity has grown, so has an awareness of the need to protect judges from frivolous or retaliatory disciplinary actions.[1] Today, attorneys, the public, and judges themselves are being forced to confront the problem of how to regulate judicial conduct and behavior.

This Note evaluates recent developments in Washington State concerning due process rights in judicial disciplinary proceedings. The focus is on *In re Deming*,[2] a recent disciplinary case decided by the Washington Supreme Court. The analysis by the court in *Deming* highlights the conflict between the desire to discipline wayward judges and the need to protect the autonomy of the judiciary. The historical and procedural background of the *Deming* case is discussed first, and then three important procedural issues raised in the opinion are analyzed. The Note concludes that, although the court's broad due process holdings lack foundation, its specific procedural requirements are justified.

I. BACKGROUND

A. The Judicial Qualifications Commission

In recent years, the creation of a judicial oversight panel has been the standard method of regulating judicial conduct at the state level.[3] In 1980, Washington became the last state to authorize the creation of such a panel.[4] The Washington Judicial Qualifications Commis-

1. This concern is reflected, for example, in a recent United States Supreme Court decision permitting civil actions against judges for certain categories of judicial misconduct. *See* Forrester v. White, 108 S. Ct. 538 (1988).

2. 108 Wash. 2d 82, 736 P.2d 639 (1987).

3. Before 1960, judicial discipline was regulated through the "traditional procedures of impeachment, address, or recall." Shaman & Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 TEMP. L.Q. 755 (1985). These procedures gradually proved unsatisfactory and, in 1960, California established the first permanent state judicial disciplinary commission. In 1965, other states began to follow suit and, by 1981, all fifty states had established organizations with the authority to regulate judicial conduct. *Id.* at 755–56.

4. *See* I. TESITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 2 (2d ed. 1980). The Washington Judicial Qualifications Commission was created in 1980 by constitutional amendment. WASH. CONST. art. IV, § 31; WASH. REV. CODE § 2.64.010–.020 (1987).

sion[5] was formed as a "one-tier" disciplinary board. The Commission is authorized to conduct an initial investigation and factfinding hearing regarding allegations of judicial misconduct, and to recommend disciplinary action to the state supreme court if necessary. The supreme court then conducts an independent review of the Commission's recommendation and renders a final decision on what, if any, discipline to impose.[6] The Commission's recent genesis and infrequent use, however, have left the full scope of its power and authority unclear.[7]

B. In re Deming

1. Factual Background

In late 1985, the Commission flexed its muscle in a disciplinary action against Pierce County District Court Judge Mark S. Deming.[8] In July of 1985, Judge Deming[9] was served with a statement of allegations by the Judicial Qualifications Commission which detailed four areas of reported judicial misconduct.[10] Judge Deming replied to

5. By amendment to its rules effective April 3, 1987, the Washington Judicial Qualifications Commission [hereinafter JQC] was renamed the Commission on Judicial Conduct [hereinafter CJC]. At the same time, the Commission's rules were substantially modified. References in this Note to the original rules will be to the JQCR and the Commission's new rules will be referred to as the CJCR.

6. In a one-tier, or unitary, disciplinary system a single commission handles all phases of the complaint from investigation through recommendation of disciplinary action to the state supreme court. In a two-tier organization the investigative and adjudicative functions are separated. One body receives and investigates complaints. Upon a finding of probable cause for discipline, that body presents the complaint to a second board for adjudication. Forty states and the District of Columbia have adopted a one-tier plan, nine have adopted the two-tier approach, and the remaining states have a modified one-tier system that allows the first tier to impose discipline directly. I. TESITOR & D. SINKS, *supra* note 4, at 3. For a discussion of the relative merits of the two systems, see Cohn, *Comparing One- and Two-Tier Systems,* 63 JUDICATURE 244 (1979).

7. *In re* Deming, 108 Wash. 2d 82, 736 P.2d 639 (1987), was only the third case the Commission had certified to the Washington State Supreme Court for review, and the first that involved a public factfinding hearing. The previous two cases were *In re* Staples, 105 Wash. 2d 905, 719 P.2d 558 (1986), and *In re* Buchanan, 100 Wash. 2d 396, 669 P.2d 1248 (1983). The court recently heard oral argument in a fourth judicial disciplinary case, *In re* Kaiser, J.D. No. 4 (1987). The principal issue in *Kaiser* involved judicial campaign statements. *Kaiser,* with the possible exception of *de novo* review, does not involve the procedural issues discussed in *Deming.*

8. This section is a synthesis of the background statements made by the court, Judge Deming, and the Commission. *Deming,* 108 Wash. 2d at 86–87, 736 P.2d at 641; Opening Brief of Mark S. Deming, Judge, at 1–5, *Deming,* 108 Wash. 2d 82; Judicial Qualifications Commission's Response Brief at 1–4, *Deming,* 108 Wash. 2d 82.

9. Judge Deming was elected to the Pierce County District Court, Tacoma, Washington, in November 1982 and assumed the bench in January 1983.

10. The four areas of investigation included: The judge's personal relationship with a probation department employee; sexual harassment of female employees; threats to the director

these allegations and provided information explaining the background of certain political disputes and placing the allegations in context.[11]

Three months later, Judge Deming was served by the Commission with a formal complaint alleging numerous violations of the Code of Judicial Conduct.[12] He was also provided with notice of the factfinding hearing, and informed that the Commission was considering opening the hearing to the public.[13] The Commission invited Judge Deming to submit any concerns he might have regarding a public hearing.

Judge Deming[14] objected to the holding of a public hearing and asked the Commission to allow oral argument on this issue. The Commission refused to hear oral argument, ordered a public hearing, and made public the complaint and allegations against Judge Deming. After a six-day factfinding hearing, the Commission recommended that Judge Deming be removed from office.[15] The Commission then certified the matter to the Washington State Supreme Court for review. The supreme court heard oral argument in May of 1986, and issued its opinion one year later.

2. *The* Deming *Opinion*

Review of the Commission's recommendation presented the Washington Supreme Court with an opportunity to discuss judicial discipline generally, and to outline some specific procedural standards for application in future disciplinary proceedings. The court's opinion was divided into two broad sections: A substantive review of the Commission's recommendations; and procedural issues and rulings.

The court's substantive review was straightforward and requires little discussion. The court held that the appropriate standard of review

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of the probation department; and aberrant and unstable courtroom behavior. *Deming,* 108 Wash. 2d at 86, 736 P.2d at 641.

11. *Id.*

12. The court held that Judge Deming had violated Canons 1, 2, and 3(A)(3) of the Washington Code of Judicial Conduct. *Id.* at 117, 736 P.2d at 657.

13. The constitutionality and appropriateness of a public factfinding hearing was a significant issue on review. *See infra* note 21 and accompanying text.

14. Judge Deming's original counsel withdrew on February 25, 1986. Judge Deming acted *pro se* until he retained additional counsel on March 8, 1986. *Deming,* 108 Wash. 2d at 87, 736 P.2d at 641. On appeal, Judge Deming claimed that he did not receive effective assistance of counsel due to the withdrawal of his original counsel and the limited time that his new counsel, acting *pro bono,* had to prepare briefs for submission to the supreme court. The court rejected this argument. *Id.* at 107–08, 736 P.2d at 652.

15. The factfinding hearing began on December 12 and continued until December 18, 1985. Depositions and pretrial discovery commenced on November 18, 1985, and continued until the evening of the first day of trial. *Id.* at 86, 736 P.2d at 641.

was whether the Commission's recommendation was supported by "clear, cogent and convincing evidence."[16] The egregious nature of Judge Deming's conduct simplified the court's review on the merits. After evaluating the evidence, the court concluded that Judge Deming had breached the Code of Judicial Conduct, that the Commission's recommendation of removal from the bench was appropriate, and that the recommendation of removal should be upheld despite Judge Deming's previous resignation.[17]

Before reviewing and approving the Commission's recommendation, the court considered a variety of procedural issues. This Note focuses on three of these procedural issues: First, the need for adequate notice of the charges and an opportunity to be heard regarding the holding of a public hearing; second, the combination of functions in the Commission and the appearance of fairness doctrine; and third, the general issue of due process in judicial disciplinary hearings.[18]

II. NOTICE AND OPPORTUNITY TO BE HEARD

One of the first due process arguments discussed by the court was Judge Deming's claim that he was not given adequate notice of the factfinding hearing. The court, finding that the Commission's initial letter to Judge Deming reasonably apprised him of the proceedings, held that the notice requirements had been met.[19] The more difficult question was whether the Commission's refusal to allow oral argument on the public hearing issue was a violation of Judge Deming's due process rights.

16. *Id.* at 109, 736 P.2d at 653. This is the standard set forth in JQCR, *supra* note 5, at 14(d). Clear, cogent, and convincing evidence was defined by the court as evidence which is "weightier and more convincing than a preponderance of the evidence, but which need not reach the level of beyond a reasonable doubt." Davis v. Dep't of Labor and Indus., 94 Wash. 2d 119, 126, 615 P.2d 1279, 1283 (1980). The court rejected Judge Deming's contention that the standard required more than one person's word against another. *Deming*, 108 Wash. 2d at 109, 736 P.2d at 653; *see also In re* McDonough, 296 N.W.2d 648, 692 (Minn. 1979).

17. *Deming*, 108 Wash. 2d at 120–21, 736 P.2d at 659.

18. These are not the only procedural issues the court discussed, nor are they the only controversial procedural rulings in the case. They are, however, the issues to which the court devoted most of its attention.

19. *Deming*, 108 Wash. 2d at 99, 736 P.2d at 648. This is the standard set forth in Duffy v. Dep't of Social and Health Services, 90 Wash. 2d 673, 585 P.2d 470 (1978), which addressed the issue of adequate service of process on patients in mental institutions. The court in *Duffy* held that "[d]ue process requires notice reasonably calculated to apprise a party of proceedings which will affect him." *Id.* at 678–79, 585 P.2d at 474.

A. The Court's Discussion on the Right To Be Heard

Judge Deming argued that he was improperly denied the opportunity to contest orally the appropriateness of a public factfinding hearing.[20] After ruling that public hearings were constitutionally permissible, the court held that the Commission's refusal to allow oral argument was not a due process violation.[21] The court suggested that oral argument might have been allowed, but stated that it did not want to remand on this ground alone. It ruled that the denial of oral argument was not prejudicial in this case.[22]

The court relied on *Parker v. United Airlines* to support its conclusion that oral argument was not necessary.[23] *Parker* was an employee rights case involving the dismissal of a United Airlines flight attendant. The central question was whether Parker was an employee terminable at will. Having determined that she was, the court considered the secondary issue of whether Parker's constitutional right to a hearing had been violated. Parker argued that she did not receive an adequate hearing because the trial judge wrote his decision to grant summary judgment before hearing oral argument.[24] With virtually no discussion, the court held that Parker's due process rights had not been violated.[25]

The court in *Deming* apparently was uncomfortable with its extension of the *Parker* rationale to cover disciplinary proceedings.[26] The court stressed that although a decision to hold a public hearing has

20. In a letter, dated October 21, 1985, the Commission informed Judge Deming that it was considering holding a public disciplinary hearing, i.e., whether to apply JQCR, *supra* note 5, at 4(c), (d), and advising him that "anything pertaining thereto you wish the Commission to consider should be submitted to the Commission office by October 31, 1985." In response, Judge Deming, through counsel, sent a letter to the Commission, dated October 29, 1985, in which he requested the opportunity to present oral argument on the appropriateness of holding a public disciplinary hearing.

21. Judge Deming had argued that the Washington Constitution required all Commission proceedings to be confidential, and that the holding of a public factfinding hearing was therefore unconstitutional. After a lengthy discussion, the court rejected this contention. *Deming,* 108 Wash. 2d at 89–94, 736 P.2d at 643–45. The issue of constitutionality is not discussed in this Note because a constitutional amendment has recently been ratified in Washington requiring all judicial discipline proceedings to be open to the public, after an initial probable cause investigation. *Id.* at 90 n.1, 736 P.2d at 643 n.1; *see also* S.J. Res. 136, 49th Leg., Reg. Sess., 1986. For a comprehensive discussion of the need for confidentiality in judicial disciplinary proceedings, see Shaman & Begue, *supra* note 3.

22. *Deming,* 108 Wash. 2d at 98, 736 P.2d at 647.

23. Parker v. United Airlines, 32 Wash. App. 722, 649 P.2d 181 (1982).

24. *Id.* at 724, 649 P.2d at 184.

25. *Id.* at 728, 649 P.2d at 184.

26. The court began by emphasizing the "intangible yet precious value" of an individual's reputation. The court quoted passages from *Ecclesiastes* 7:1, C. LAMB, LOVE, DEATH AND REPUTATION, stanza 4, W. SHAKESPEARE, RICHARD II, act 2, scene 2, line 177, and PUBLILIUS

immediate and irrevocable consequences for a judge, the flexible nature of due process requirements means that the lack of oral argument is only prejudicial in certain contexts.[27] The court concluded that in the context of a disciplinary hearing the lack of oral argument did not prejudice Judge Deming.[28]

B. Analysis: Opportunity To Be Heard

The court's discussion plainly demonstrates the competing pressures facing a reviewing court in a disciplinary case. The court was obviously concerned with protecting Judge Deming's procedural rights. The court repeatedly stated that great harm could have resulted from the Commission's refusal to allow oral argument, but that no great harm would have occurred had the opportunity for oral argument been granted.[29] Despite its belief that Judge Deming might have been treated unfairly by the Commission, the court chose not to remand the case.[30]

The court had to search to find a case supporting its refusal to remand. In the end it relied on *Parker.* The facts of *Parker,* however, are not even remotely analogous to those in *Deming. Parker* involved oral argument on the merits of the case. *Deming* involved oral argument on a collateral issue. The collateral issue, moreover, was one that had clear constitutional implications, unlike the factual question at issue in *Parker.* Finally, in *Parker* the trial judge had the opportunity to reverse his position after hearing oral argument on the summary judgment question. This opportunity to reconsider was not present in *Deming.*

SYRUS, Maxim 77, to support the general maxim that "[a] good reputation is more valuable than money." *Deming,* 108 Wash. 2d at 96, 736 P.2d at 646.

27. *Deming,* 108 Wash. 2d at 97, 736 P.2d at 647. For example, the court cited Bell v. Burson, 402 U.S. 535 (1971): "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." In citing Goldberg v. Kelly, 397 U.S. 254 (1970), the court said: "The procedural safeguards afforded in each situation should be tailored to the specific function to be served by them."

28. *Deming,* 108 Wash. 2d at 98, 736 P.2d at 647. To support this proposition, the court cited Olympic Forest Products v. Chaussee Corp., 82 Wash. 2d 418, 511 P.2d 1002 (1973). Significant portions of *Chaussee* are merely compilations of different United States Supreme Court cases, all discussing the question of due process, and able to support virtually any viewpoint. Justice Utter, in his concurring opinion, stated that the court "fail[ed] to apply the essential principle" of the discussion in *Chaussee. Deming,* 108 Wash. 2d at 124, 736 P.2d at 661 (Utter, J., concurring).

29. The court held: "(a) oral argument was not required by due process, (b) it would have been preferable to grant oral argument to the accused for his protection and (c) the lack of oral argument did not prejudice him [Judge Deming]." *Deming,* 108 Wash. 2d at 98, 736 P.2d at 647.

30. *Id.* at 98, 736 P.2d at 647.

The court mentioned some very practical concerns in refusing to remand on this issue. The court suggested, for example, that any harm done to Judge Deming could not be undone by remanding the case.[31] The court also stated that a private hearing would not have protected Judge Deming from disclosure of the allegations against him, and that a public hearing provided Judge Deming with the best opportunity to clear his name.[32]

These conclusions, however, are after-the-fact rationalizations. The publicity surrounding a factfinding hearing, complete with television and newspaper coverage, is different from the publicity surrounding a simple press release. Some states which recognize this distinction prohibit any public disclosure until after the conclusion of the disciplinary process.[33] Further, the court's contention that a public hearing provides the best opportunity for judges to clear their names begs the question, as this is the very assumption that Judge Deming wished to contest through oral argument.

Another justification, buried in the middle of the court's conclusion, indicates a more basic concern. This concern was that a private hearing would damage public confidence and lead to reservations about the objectivity of the disciplinary process.[34] While this concern may be valid, it does not respond to Judge Deming's argument. The issue was not whether public hearings were desirable, but whether a judge ought to have the opportunity to contest orally the appropriateness of a public hearing.

These concerns indicate that the court has not reached a settled conclusion regarding the extent of basic procedural protections available to judges in disciplinary hearings. This uncertainty is made even more evident by an inconsistency in the opinion. In the section just discussed, the court held that oral argument regarding the need for a public factfinding hearing was not required. At the conclusion of its due process discussion, however, the court explicitly held that a judge has a right to an opportunity to be heard orally on the necessity of holding a public hearing.[35] These contrasting holdings, although

31. *Id.* at 98, 736 P.2d at 647.

32. *Id.*

33. *Id.* In twenty-three states, confidentiality ceases when the Commission files a recommendation for discipline with the state supreme court; in ten states, confidentiality ceases when discipline is ordered; and in nineteen states, confidentiality ceases when post-investigation charges are brought against the judge. Shaman & Begue, *supra* note 3, at 797–98 (Appendix A).

34. *Deming*, 108 Wash. 2d at 98, 736 P.2d at 647.

35. *Id.* at 103, 736 P.2d at 650; *see infra* note 98 and accompanying text.

moot,[36] do not help in understanding how the court will interpret due process rights in future disciplinary cases.

III. THE COMMISSION'S COMBINATION OF FUNCTIONS

Judge Deming argued that the concentration of investigatory, prosecutory, and adjudicatory powers in one body, the Commission, violated the appearance of fairness doctrine. The court rejected this argument.[37] The discussion of this issue is important in *Deming* because: First, the court clarified and implicitly extended previous holdings involving the appearance of fairness doctrine; and second, the court's conclusion raised questions about the necessary level of due process protection required by the "appearance of fairness" doctrine.

A. The Appearance of Fairness Doctrine

The appearance of fairness doctrine is unique to Washington, and was formulated by the Washington State Supreme Court only two decades ago.[38] Under this doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.[39] This test can be further divided into two parts: the fairness of the hearing procedure, and the impartiality of the decisionmaker.[40] Judge Deming's argument focused on demonstrating that the structure of the Judicial Qualifications Commission itself was unfair.

B. Washington State Medical Disciplinary Board v. Johnston

The court relied heavily on its previous discussion in *Washington Medical Disciplinary Board v. Johnston*[41] in concluding that the Commission's structure did not violate the appearance of fairness doctrine.

36. *Supra* note 21.

37. *Deming*, 108 Wash. 2d at 107, 736 P.2d at 652.

38. A valuable critical evaluation of the appearance of fairness doctrine can be found in Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533 (1986). A good sketch of the development of the appearance of fairness doctrine from its initial application in the land use area through its extension to other types of quasi-judicial proceedings can be found in Vache, *Appearance of Fairness: Doctrine or Delusion?*, 13 WILLAMETTE L. REV. 479 (1977).

39. Swift v. Island County, 87 Wash. 2d 348, 361, 552 P.2d 175, 183 (1976).

40. *See* Fleming v. City of Tacoma, 81 Wash. 2d 292, 299, 502 P.2d 327, 331 (1972). The latter aspect is also known as the bias standard and was not an issue in the *Deming* case.

41. 99 Wash. 2d 466, 663 P.2d 457 (1983). In *Johnston*, a preliminary investigation was conducted after the first complaint, and an order of summary suspension was issued after a second complaint was received. After a formal disciplinary hearing was held, the Board revoked Johnston's medical license. *Id.* at 468–73, 663 P.2d at 459–61.

The *Johnston* court held that the structure of the Washington State Medical Disciplinary Board[42] did not violate Johnston's due process rights, because violation of the appearance of fairness doctrine required something more than the combination of investigatory and prosecutory functions.[43] In *Deming,* the court analyzed whether the addition of the prosecutory function of the Commission was the "something more" which would tip the scales in favor of finding such a due process violation. The court held that it was not.

The court made four arguments to support its conclusion that the Commission's structure was at least as fair as the Medical Disciplinary Board's structure in *Johnston.* First, the court noted that the members of the Commission were attorneys,[44] not doctors, and suggested that their knowledge of the relevant procedural protections, as well as their integrity, was therefore assumed to be greater.[45] Second, the court emphasized that the Commission did not have as much power as the Board.[46] The Board had the power to impose sanctions, whereas the Commission only had the power to make recommendations to the supreme court. Third, the court noted that the Commission rules provided safeguards against "bias and prejudgment."[47] Finally, the court emphasized that the investigation and prosecution of this case was conducted by staff personnel who did not participate in the adjudicatory process.[48]

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42. The Washington State Medical Disciplinary Board was created by the Medical Disciplinary Board Act, 1955 Wash. Laws 840 (codified at WASH. REV. CODE § 18.72) (1987).

43. The court cited the following language from *Johnston*: "We are convinced that the mere combination of adjudicative and investigative powers in one agency, without more, would not be viewed by a reasonably prudent and disinterested observer as denying any party a fair, impartial, and neutral hearing." *Johnston,* 99 Wash. 2d at 479–80, 663 P.2d at 465.

44. *In re* Deming, 108 Wash. 2d 82, 106, 736 P.2d 639, 651 (1987). The members of the Judicial Qualifications Commission include three judges (one each from the superior court, court of appeals, and district court), two attorneys, and two members of the public who are not attorneys. WASH. CONST. art. IV, § 31, amend. 71.

45. The court cited Nicholson v. Judicial Retirement & Removal Comm'n, 562 S.W.2d 306 (Ky. 1978), *appeal after remand,* 573 S.W.2d 306 (Ky. 1978), for this assertion. This case stated that there was a "presumption of honesty and integrity of the members of the commission, most of whom are members of the bench or bar and cognizant of the proper standards applicable at each stage of the proceeding." *Id.* at 309.

46. *Deming,* 108 Wash. 2d at 106, 736 P.2d at 652.

47. The only specific example of these safeguards cited by the court is JQRC, *supra* note 5, at 9(b), (c), which provide the judge the opportunity to challenge and preempt a specified number of Commission members. *Deming,* 108 Wash. 2d at 106, 736 P.2d at 652.

48. *Deming,* 108 Wash. 2d at 106, 736 P.2d at 652. This is not technically correct. The Commission itself conducts the initial investigation through its executive officer. After reaching a decision to proceed to a factfinding hearing, staff attorneys conduct pretrial discovery and serve as prosecutors at the factfinding hearing. JQCR, *supra* note 5, at 5–8.

C. *Analysis: The Appearance of Fairness Doctrine and the Combination of Functions*

Several states have one-tiered commissions with structures identical to that of the Washington State Judicial Qualifications Commission.[49] Not all states, however, have the same method of delegating the functions of the commission. Over half of the commissions in other states provide for the hiring of an independent prosecutor. In another third of the states, lawyers on the attorney general's staff, who are independent of the commission, act as prosecutors. In most of the remaining states, including Washington, both the investigation and the prosecution are conducted by staff attorneys, or by independent attorneys retained by the commission.[50]

The *Deming* court's ruling that the combination of functions in the Commission is acceptable is in conformity with those states that have similarly structured commissions with similar divisions of labor. A difficulty arises, however, when the appearance of fairness doctrine is considered. What might be acceptable in any other state might not be acceptable given the existence of this unique Washington doctrine.

1. *The Court's Broad Interpretation of* Johnston

In spite of the court's reliance on *Johnston,* it is not the definitive statement on the application of the appearance of fairness doctrine to a combination of functions problem. In fact, *Johnston* can be read to allow or disallow the combination of functions found in the Commission. In addition, *Deming* and *Johnston* can be distinguished on several bases. Most importantly, *Johnston* only involves the combination of the adjudicatory and investigatory functions, whereas the Commission also performs a prosecutory function.[51] The combination of all three of these functions raises legitimate questions about whether a reasonably prudent and disinterested observer could conclude that a fair and impartial hearing was possible.

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49. *See supra* note 6.

50. I. TESITOR, JUDICIAL CONDUCT ORGANIZATIONS (1978). This is a summary of the information presented in Table 8. *Id.* at 32.

51. *Deming,* 108 Wash. 2d at 107, 736 P.2d at 652. The fact that the medical board did not possess prosecutory powers was the subject of some debate throughout the *Johnston* opinion. The court in *Deming* stated that the majority in *Johnston* mentioned the triple combination of functions several times. The only cited passage, however, does not refer to the facts in *Johnston,* but to the facts in a previous United States Supreme Court case, Withrow v. Larkin, 421 U.S. 35 (1975). Washington Medical Disciplinary Bd. v. Johnston, 99 Wash. 2d, 466, 477, 663 P.2d 457, 463 (1983). In fact, Justice Rosellini in his dissent in *Johnston* suggested that the majority ignored the presence of the prosecutory function. *Id.* at 488, 663 P.2d at 469 (Rosellini, J., dissenting).

Perhaps recognizing the shortcomings of *Johnston,* the court suggested the additional grounds for concluding that the Commission in *Deming* was fairer than the Board in *Johnston.* The court's first assumption, that the bench and bar have a greater inherent honesty than physicians, is at best uncertain. A layman probably would not agree. Although members of the bar may have a greater knowledge of the relevant standards of review, this knowledge does not necessarily reflect their adherence to those standards, nor does it mean that the appearance of fairness is enhanced. Indeed, given the fact that the purpose of the Commission is to evaluate the misbehavior of judges, this conclusion seems particularly inappropriate.

The court's second suggestion, that the Commission's limited power increased the fairness of the proceedings, is also problematic. It is true that the Medical Disciplinary Board, unlike the Commission, has the authority to impose sanctions directly. Other state courts have held that the power to impose sanctions requires that the defendant be provided with a greater degree of due process protection.[52] It does not follow, however, that the power only to recommend a sanction makes the proceedings more fair. Practically speaking, there is little difference between the power to impose and the power to recommend a sanction. As the court stressed in its discussion on the right to oral argument, a disciplinary action can have a harmful effect on an individual's reputation regardless of whether sanctions are directly imposed.[53]

The court's third statement, that the Commission's rules provide safeguards against bias and prejudgment, simply begs the question of how those safeguards can be preserved. Similar safeguards exist in the courtroom, but no one is simultaneously allowed to be both a judge and a prosecutor. Moreover, although in *Deming* the investigation and prosecution were conducted by staff personnel, this situation is not reassuring. From an appearance of fairness standpoint, whenever the individuals who are responsible for adjudicating the defendant's guilt are also responsible for hiring the prosecuting attorney and staff, basic questions about the impartiality of the prosecution must be raised.[54] Concerns such as these indicate that the court would have had little difficulty in finding a violation of the appearance of fairness

52. The *Deming* court cited Richardson v. Perales, 402 U.S. 389 (1971), and *In re* Nowell, 237 S.E.2d 246 (N.C. 1977).

53. This problem is made worse by the court's interpretation of its *de novo* review power. *See infra* note 118 and accompanying discussion.

54. For a discussion of the shortcomings of the appearance of fairness doctrine when applied to staff personnel in quasi-judicial proceedings, see Comment, *supra* note 38, at 560–62.

doctrine. Indeed, such a conclusion might have been more consistent with the analysis in *Johnston.*

2. *Demise of the Appearance of Fairness Doctrine*

For some time the appearance of fairness doctrine has come under attack from several members of the Washington Supreme Court.[55] A minority of the justices have argued that the appearance of fairness standard may in fact be more effectively interpreted as an actual fairness standard.[56] *In re Deming* appears to be a step in this direction.

Prior to the *Deming* case, the court was divided on the question of whether the appearance of fairness doctrine was simply a subcategory of due process analysis.[57] Although treated as a separate issue in *Deming,* the court held that the doctrine was intrinsically related to due process protections and rights.[58] This shift away from the traditional appearance of fairness interpretation of the doctrine may signal a trend toward a "simple fairness" test.

A review of the court's discussion reveals that the court was in fact conducting a fairness analysis. An unbiased observer viewing the Commission for the first time would question the fairness of its structure. The whole thrust of the court's argument, however, was that the Commission's structure was fair, despite appearances to the contrary. This fairness in fact analysis is not that envisioned by the appearance of fairness doctrine.

Practically speaking, the court would have found it difficult to require a complete restructuring of the Commission, and this may explain the shift towards a fairness in fact analysis. The Commission is a constitutionally created entity.[59] The Washington Supreme Court has stated that the appearance of fairness doctrine is not constitutionally based.[60] If the court held that the Commission's structure vio-

55. *Id.* at 551–52.

56. *See, e.g.,* Harris v. Hornbaker, 98 Wash. 2d 650, 667–68, 658 P.2d 1219, 1229–30 (1983) (Utter, J., concurring).

57. *See* Washington Medical Disciplinary Bd. v. Johnston, 99 Wash. 2d 466, 483–85, 663 P.2d 457, 466–67 (Utter, J., concurring).

58. That the appearance of fairness doctrine could be analyzed in terms of due process was a point of contention in the *Johnston* case, with Justice Utter advocating the minority view. In *Deming,* however, the court seemed to adopt Justice Utter's analysis: "As stated in the concurring opinion by Justice Utter . . . the appearance of fairness doctrine should consist of no more than importing procedural due process safeguards into quasi-judicial proceedings of legislative bodies." *In re* Deming, 108 Wash. 2d 82, 105, 736 P.2d 639, 651 (1987) (citing *Johnston,* 99 Wash. 2d at 483, 663 P.2d at 467).

59. *See supra* note 4.

60. City of Bellevue v. King County Boundary Review Bd., 90 Wash. 2d 856, 863, 586 P.2d 470, 475 (1978) (dictum); *see* Comment, *supra* note 38, at 550.

lated the appearance of fairness doctrine, the appropriate remedy would have been to require a restructuring of the Commission.[61] Such a restructuring would not only have been exceedingly difficult to accomplish, it also would have been contrary to the will of the legislature and the people.

IV. DUE PROCESS

The court ruled for the Commission and against Judge Deming on each of the specific due process issues it considered on review, with reservations on some points.[62] After addressing the procedural issues, the court might have moved directly to a review on the merits on Judge Deming's misconduct. Instead, the court again emphasized the importance of due process protections in disciplinary cases.[63] The court made two due process holdings, delineated eleven specific procedural rights to which judges are entitled, and stated that its *de novo* review power provided judges with additional due process protection.

A. The Court's Broad Due Process Holdings

1. The Court's Analysis

The court made two expansive due process holdings: First, that "a judge accused of misconduct is entitled to no less procedural due process than one accused of crime," and second, that a judge "is entitled to the same procedural due process protection when facing disqualification as a lawyer facing disbarment."[64]

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61. In order to have a basis for restructuring the Commission, it would have been necessary for the court to have ruled that the Washington constitutional amendment creating the Commission was at odds with some aspect of the United States Constitution. Federal due process analysis simply does not justify such a result. *See infra* notes 75 & 82 and accompanying text.

62. Under the general heading of "Due Process Considerations" the court considered the following issues: Notice and opportunity to be heard concerning the holding of a public hearing; notice of the charges; the right to present evidence and confront accusers; the right to prompt resolution of the allegations; the atmosphere of the factfinding hearing; and the authority of the Commission to sanction Judge Deming. *Deming*, 108 Wash. 2d at 94–102, 736 P.2d at 645–50. The court expressed particular concern about the lack of an opportunity for the judge to be heard regarding the holding of a public hearing. *Id.* at 95–98, 736 P.2d at 645–47; *see supra* note 22 and accompanying text.

63. *Deming*, 108 Wash. 2d at 102–04, 736 P.2d at 649–51. At the very beginning of the opinion, the court stated: "Since this appeal was argued to this court Judge Deming has resigned. We answer the issues raised because of their substantial public importance." *Id.* at 85, 736 P.2d at 641.

64. *Id.* at 103, 736 P.2d at 650.

The court supported the first conclusion by referring to the United States and Washington constitutions;[65] the second by citing *In re Ruffalo*[66] and *Joint Anti-Fascist Refugee Committee v. McGrath,*[67] two United States Supreme Court cases. The problem, however, is that the conclusions contradict one another by setting forth two different procedural standards.

The first conclusion is also supported by a simple syllogism: One, judges facing disbarment have a property interest identical to those of criminal defendants; two, criminal defendants have procedural protections guaranteed by the United States Constitution; therefore, three, judges are entitled to the same due process protection as criminal defendants. This interpretation is internally consistent. The weak link, however, is the premise that attorneys and judges have the same property interest as criminal defendants.

Justice Utter, joined by Justices Pearson and Brachtenbach, objected to the majority's reasoning on the due process issue, although he concurred in the court's final ruling upholding the Commission's recommendation of removal.[68] Justice Utter's principal objection was that the extension of full due process protection to judges was dicta and not binding on the court in future cases.[69] He concluded that the court's final discussion of a judge's due process rights constituted an unwarranted advisory opinion and did not contribute to the resolution of the case.[70] In addition, Justice Utter claimed the decision would open the court to criticism that it acted in a self-serving fashion to protect judges by granting them procedural protections not available to anyone other than criminals.[71] Justice Utter also pointed out the deficiencies of *Ruffalo*[72] as support for the majority's conclusion that attorneys have complete due process rights. Finally, Justice Utter suggested that the court had ignored cases on which it had relied in other sections of the opinion. In its earlier analysis, the majority had concluded that due process is a "fluid concept which is measured by the nature of the interest that may be adversely affected."[73] This principal is neglected by the majority in its due process summary. The court's

65. U.S. CONST. amend. V, VI, XIV; WASH. CONST. art. I, § 22 (amend. 10), art. IV, § 31 (amend. 71), *cited in Deming,* 108 Wash. 2d at 103, 736 P.2d at 650.

66. 390 U.S. 544 (1968).

67. 341 U.S. 123 (1951).

68. *Deming,* 108 Wash. 2d at 121–25, 736 P.2d at 660–61 (Utter, J., concurring).

69. *Id.* at 121–22, 736 P.2d at 660.

70. *Id.* at 122, 736 P.2d at 660.

71. *Id.*

72. *In re* Ruffalo, 390 U.S. 544 (1968).

73. *Deming,* 108 Wash. 2d at 124, 736 P.2d at 661; *see supra* notes 27 & 28.

sweeping due process ruling is not warranted, Justice Utter concluded, because the loss of judicial office could not be equated with the "loss of freedom and rights that threaten a criminal defendant."[74]

2. *Analysis of Due Process Rights in Disciplinary Hearings*

There are three premises underlying the court's due process holdings: That *Ruffalo* grants full due process rights to attorneys; that *Joint Anti-Fascist* provides a link between attorney and judicial discipline; and that there is constitutional support for believing that judges are guaranteed full due process of law in disciplinary proceedings. The validity of each of these premises is debatable.

a. In re Ruffalo

In *Ruffalo,* the United States Supreme Court held that attorney disciplinary proceedings are quasi-criminal in nature and require a minimal level of due process protection.[75] *Ruffalo* does not grant an attorney the full panoply of rights afforded criminal defendants; nor does it specifically extend these limited protections to judges.[76] The only protections the Supreme Court specifically recognized as available to attorneys facing discipline were the right to fair notice of the charge and an opportunity to be heard.[77]

In *Ruffalo,* the charges brought against an attorney were revised during the disciplinary proceeding on the basis of the testimony of the accused attorney himself. The Supreme Court held that this action resulted in the disciplinary proceedings becoming a trap for the accused attorney, who was not properly informed of the charges against him. The facts in *Deming* were quite different. Judge Deming received proper and complete notice of the charges against him, and the court had already stated that he was not denied due process protection on this account. The question was the extent of Judge Deming's remaining due process rights.

Most courts, including the Washington Supreme Court, have refused to extend criminal due process protection to attorneys facing disciplinary proceedings.[78] *In re Allper*[79] is the most striking example

74. *Deming,* 108 Wash. 2d at 125, 736 P.2d at 661.

75. *Ruffalo,* 390 U.S. at 550–551.

76. Justice Utter also pointed out that *Ruffalo* does not extend as far as the court seems to believe. *Deming,* 108 Wash. 2d at 124, 736 P.2d at 661.

77. *Ruffalo,* 390 U.S. at 550.

78. *See, e.g.,* Napolitano v. Ward, 457 F.2d 279 (7th Cir.) (no fifth amendment right against self-incrimination), *cert. denied,* 409 U.S. 1037 (1972), *reh'g denied,* 410 U.S. 947 (1973); Keiser v Bell, 332 F. Supp. 608 (E.D. Pa. 1971) (no right to confront accusers under sixth and

of the Washington Supreme Court's refusal to do so, and its ultimate holding is in direct conflict with the holding in *Deming.* In *Allper,* a 1980 discipline case involving an attorney's misuse of client funds, the court held that attorney discipline proceedings are neither criminal nor civil in nature, but fall into a unique category of their own.[80] This unique category allowed for flexibility in determining due process requirements. Due process protections in such proceedings may be relaxed, and are generally lower than in criminal proceedings.[81]

b. Joint Anti-Fascist Refugee Committee v. McGrath

Even if *Ruffalo* had granted criminal due process protections to attorneys in disciplinary proceedings, *Ruffalo* did not extend those protections to judges. In an effort to justify this extension, the *Deming* court quoted extensively from the concurring opinion of Justice Douglas in *Joint Anti-Fascist Refugee Committee v. McGrath.*[82] *Joint Anti-Fascist* discussed the due process rights of defendants in the "loyalty" hearings of the 1950's. Justice Douglas argued that the sixth amendment right to confront witnesses ought to be granted to such defendants even though they were not technically entitled to a right available only to criminal defendants.[83] The principal reason Justice Douglas offered was the critical nature of such hearings in the lives of the defendants.[84] The Washington Supreme Court argued, implicitly, that the same reasoning holds true for judges in disciplinary proceedings, that due process protections ought to be extended to judges even if they are not technically entitled to them.[85]

There are a number of problems with this reasoning. First, the argument in *Joint Anti-Fascist* was limited to sixth amendment protections involving notice of the charge and an opportunity to confront accusers.[86] Moreover, the facts of *Joint Anti-Fascist* do not support the conclusion of a necessary connection between attorney and judicial discipline. There are real differences between a "loyalty" hearing

fourteenth amendments); Sharpe v. State *ex rel.* Okla. Bar Assoc., 448 P.2d 301 (Okla.) (no right to jury trial), *cert. denied,* 393 U.S. 904 (1968).

79. *In re* Allper, 94 Wash. 2d 456, 617 P.2d 982 (1980).

80. "[D]isciplinary proceedings are not criminal actions; they are *sui generis* and peculiar to themselves . . . . Allper's argument fails because due process requirements in these special proceedings may differ from those in the criminal context." *Id.* at 467, 617 P.2d at 987.

81. *Id.* at 466–68, 617 P.2d at 987–88.

82. *In re* Deming, 108 Wash. 2d 82, 103, 617 P.2d 639, 650–51 (1987) (quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 177–80 (1951) (Douglas, J., concurring)).

83. *Joint Anti-Fascist,* 341 U.S. at 180.

84. *Deming,* 108 Wash. 2d at 104, 736 P.2d at 651 (citing *Joint Anti-Fascist,* 341 U.S. at 180).

85. *Deming,* 108 Wash. 2d at 104, 736 P.2d at 651.

86. *Joint Anti-Fascist,* 341 U.S. at 178–80.

which directly attacks the beliefs of a private citizen, and a disciplinary action against a judge who has been elected or appointed to his position. The court stressed throughout the *Deming* opinion that the primary purpose of judicial discipline is to protect the public.[87] This concern alone would justify a lower due process standard in cases of judicial misconduct.[88]

c. *United States and Washington Constitutions*

The court also appears to be interpreting the United States and Washington Constitution as granting due process protection directly to judges in a disciplinary proceeding. The court cited, without explanation, the fifth, sixth, and fourteenth amendments of the United States Constitution, and article 1, section 22 (amendment 10), and article 4, section 31 of the Washington Constitution. These sections certainly affirm the proposition that criminal defendants have constitutionally defined due process rights. With the exception of the fourteenth amendment to the United States Constitution, however, the cited clauses only apply to criminal defendants.[89] The cited sections do not expressly grant the same protections to those individuals not facing criminal prosecution.

Both the United States and Washington Supreme Courts have distinguished between disciplinary hearings and criminal actions, and have refused to grant the same procedural protection in disciplinary hearings as in criminal cases.[90] In Washington, criminal actions are defined as actions for which the authorized punishment is imprisonment.[91] Because the result of a judicial disciplinary proceeding is at worst removal from office, and not imprisonment, it follows that the proceedings are not criminal in nature. If judges are not accused of a

87. *Deming*, 108 Wash. 2d at 120, 736 P.2d at 659.

88. The court's analysis of *Joint Anti-Fascist* would presumably apply to attorney disciplinary proceedings as well. But, as *Allper* made clear, the court would not accept this conclusion. *In re* Allper, 94 Wash. 2d 456, 617 P.2d 982 (1980); *see supra* note 80 and accompanying text.

89. *See infra* note 102 and accompanying text.

90. State v. Carpenter, 130 Wash. 23, 225 P. 654 (1924). The best example of the court's reluctance to apply due process protections in non-criminal proceedings is Chmela v. Department of Motor Vehicles, 88 Wash. 2d 385, 561 P.2d 1085 (1977) (administrative proceedings); *see also* Dawson v. Hearing Comm., 92 Wash. 2d 391, 597 P.2d 1353 (1979) (prisoner disciplinary proceeding); State v. Shannon, 60 Wash. 2d 883, 376 P.2d 646 (1962) (probation revocation or modification proceeding).

91. WASH. REV. CODE § 9A.04.040 (1987) defines a crime as "an offense . . . for which a sentence of imprisonment is authorized . . . ." *See also* State v. Eilts, 94 Wash. 2d 489, 494 n.3, 617 P.2d 993, 996 n.3 (1980).

crime, then the rights of criminal defendants need not be extended to them.[92]

3. *Limited Interest Justifies Limited Due Process Rights*

The central theme running through the arguments presented above, as well as in Justice Utter's concurring opinion and the motion for reconsideration submitted by the Commission, is that a disciplinary proceeding does not raise the same concerns as a criminal trial. The court itself stated that judicial disciplinary hearings are not criminal in nature.[93] In such quasi-criminal proceedings there has traditionally been a reduced expectation of due process protections.

The Commission cited three factors which distinguish disciplinary from criminal actions:[94] First, the purpose of a disciplinary action is to maintain a standard of fitness, not to punish criminal activity;[95] second, the results of a disciplinary proceeding are not binding on the Supreme Court—the Commission is only authorized to make a recomendation;[96] and third, the Commission has only limited power to investigate judicial misconduct.[97] The Commission stressed that the importance of any disciplinary proceeding lies in the need to protect the public from incompetent, biased, or unprofessional judges.

These factors suggest that the court's final due process holdings are too broad. No state has interpreted the Constitution as providing non-criminal defendants with complete due process protection. In particular, Washington has not granted such protection to attorneys, and there is no reasonable basis to distinguish between attorney and judicial disciplinary proceedings. This does not mean that judges are not entitled to any due process protection. As was discussed above, a disciplinary action has irrevocable consequences. The due process rights granted to judges, however, simply do not have to be equivalent to those granted criminal defendants.

92. *See* Motion of the Commission on Judicial Conduct for Reconsideration and Clarification of the Court's Decision Dated May 7, 1987, at 14, *In re* Deming, 108 Wash. 2d 82, 736 P.2d 639 (1987) [hereinafter "Motion for Reconsideration"].

93. *Deming*, 108 Wash. 2d at 102, 736 P.2d at 650.

94. Motion for Reconsideration, *supra* note 92, at 15–18.

95. *In re* Zderic, 92 Wash. 2d 777, 600 P.2d 1297 (1979). These factors are very similar to the distinctions made by the court when discussing the appearance of fairness doctrine. *See supra* note 43 and accompanying text.

96. *In re* Buchanan, 100 Wash. 2d 396, 669 P.2d 1248 (1983). The Commission cited Keiser v. Bell, 332 F. Supp. 608 (E.D. Pa. 1971) (no right to confront accusers under sixth and fourteenth amendments), as a leading case.

97. The principal case cited by the Commission is *In re* Whitaker, 463 So.2d 1291 (La. 1985).

B. Specific Procedural Protections

1. The Court's Eleven Procedural Requirements

The court outlined eleven procedural protections to which every judge charged by the Commission is entitled. These protections include the right to: One, notice of the charge and the nature and cause of the accusation in writing; two, notice, by name, of the person or persons who brought the complaint; three, appear and defend in person or by counsel; four, testify in his or her own behalf; five, confront witnesses face to face; six, subpoena witnesses in his or her own behalf; seven, be apprised of the intention to make the matter public; eight, appear and argue the merits of the holding of a public hearing; nine, prepare and present a defense; ten, a hearing within a reasonable time; and eleven, the right to appeal.[98]

No authority was cited to support these specific due process holdings. The protections listed are basic, although their application is sometimes uncertain.[99] The question is whether there is a legitimate basis for accepting each of the specific due process requirements set forth by the court.

2. Justification for the Court's Procedural Requirements

Instead of analyzing each of these requirements individually, several broad grounds supporting the adoption of the court's specific procedural protections will be discussed. These include the fourteenth amendment to the United States Constitution, the Commission's rules governing the factfinding hearing, and the appearance of fairness doctrine.

a. Fourteenth Amendment Rights

Under the fourteenth amendment to the United States Constitution, judges have a "claim of entitlement" to their office that constitutes a protected property interest.[100] The extent of this protection, however, probably is limited to adequate notice of the proceedings, and a trial-type hearing before discipline is imposed.[101] These two protections are

98. *In re* Deming, 108 Wash. 2d 82, 102–03, 736 P.2d 639, 650 (1987).

99. For example, protection number eight presented by the court gives a judge the right to "appear orally and argue the merits of the holding of a public hearing." *Id.* at 103, 736 P.2d at 650. This, however, contradicts the court's previous holding that due process did not require that a judge have an opportunity to be heard orally on the holding of a public hearing.

100. Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sinderman, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

101. *See* Cohn, *The Limited Due Process Rights of Judges in Disciplinary Proceedings*, 63 JUDICATURE 232 (1979). Cohn notes that this claim of entitlement may not apply if the judge

generally present in all judicial disciplinary proceedings and are specifically present in the Judicial Qualifications Commission's rules.[102]

Washington's analog to the fourteenth amendment of the United States Constitution[103] has been construed at least as broadly as its federal counterpart.[104] In addition, the amendment creating the Judicial Qualifications Commission contains language specifically mandating confidentiality of the proceedings and requiring the Commission to establish rules protecting the due process rights of judges.[105]

b. The Commission's Rules

Rule 10 of the Judicial Qualifications Commission sets forth the procedural rights of a judge at the factfinding hearing. The Commission has the power to create the rules that govern its proceedings. The court implicitly confirmed this power by relying on the Commission's rules to support several of its arguments.[106]

The rights set forth in the Commission's rules include: The right to notice of the initial proceedings; the right and reasonable opportunity to defend against the allegations of the complaint by the introduction of evidence; the privilege against self-incrimination; the right to be represented by counsel; the right to cross-examine witnesses; the right to testify or not to testify; the right to issue subpoenas for the attendance of witnesses; and the right to a prompt resolution of the allegations in the complaint. Together, these rights effectively comprise the right to a trial-type hearing required by the fourteenth amendment.

Unless the court finds the Commission's rules unconstitutional, the rules the Commission sets forth are binding. In its motion for reconsideration, the Commission argued that it alone had the power to create rules governing its operation, and that any procedural rules suggested by the court were not binding upon the Commission.[107] Whatever the merits of this argument, it does not affect the conclusion that the Commission's rules are binding at the factfinding hearing and provide judges with a degree of due process protection.

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serves at the pleasure of the appointing authority and may be removed without cause, but such situations are extremely rare. *Id.* at 234.

102. JQCR, *supra* note 5, at 10(a).

103. WASH. CONST. art. 1, § 3.

104. *See* Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

105. *See supra* note 4.

106. *In re* Deming, 108 Wash. 2d 82, 99–101, 736 P.2d 639, 648–49 (1987) (notice of the charges, JQCR, *supra* note 5, at 6(b), right to prompt resolution of actions, JQCR 5, 6).

107. Motion for Reconsideration, *supra* note 92, at 7.

c. *Appearance of Fairness*

The appearance of fairness doctrine also dictates certain minimum due process protections, often duplicating those listed above.[108] Appearance of fairness has been held to require that interested parties have adequate notice of a hearing,[109] right to be heard,[110] right to cross-examine witnesses,[111] right to have knowledge of all communications with the decisionmaker,[112] and a right to a verbatim record of the proceedings.[113] In addition, the bias standard inherent in the appearance of fairness doctrine also discourages prejudgement of the issue by the adjudicator or participation in the decisionmaking process by an adjudicator with a financial or personal interest in the decision.

d. *Uncertain Procedural Requirements*

The only requirements that remain to be discussed are the right to notice of the name of the individual who brought the complaint, the right to confront witnesses face to face, and two requirements concerning confidentiality of the proceedings. The two requirements concerning confidentiality have been superseded by constitutional amendment.[114] The justification and application of the first two requirements is uncertain.

The right to confront witnesses may be specific to the *Deming* case. It probably relates to Judge Deming's assertion that he was not allowed to make eye contact with witnesses during depositions.[115] The requirement of notice by name of the person who made the complaint is left to the discretion of the Commission under the Commission's rules.[116] Such discretion might conflict with the right to confront witnesses if the complainant chooses to testify. Both requirements benefit

108. *See* Comment, *supra* note 38; *see also* text accompanying notes 38–40.

109. Glaspey & Sons, Inc. v. Conrad, 83 Wash. 2d 707, 521 P.2d 1173 (1974).

110. Smith v. Skagit County, 75 Wash. 2d 715, 739–42, 453 P.2d 832, 845–46 (1969) (right to be heard and have knowledge of all communications with decisionmaker).

111. Chrobuck v. Snohomish County, 78 Wash. 2d 858, 870–71, 480 P.2d 489, 496 (1971) (cross-examination).

112. Smith v. Skagit County, 75 Wash. 2d 715, 734–41, 453 P.2d 832, 843–47 (1969) (disallowing private meetings of decisionmaker with single party).

113. Parkridge v. City of Seattle, 89 Wash. 2d 454, 464, 573 P.2d 359, 365 (1978).

114. All Commission proceedings are now required to be open to the public after the initial probable cause investigation. The court recognized this fact in its opinion and concluded that the specific procedural requirements contrary to the amendment were no longer valid. *In re* Deming, 108 Wash. 2d 82, 103, 736 P.2d 639, 650 (1987); *see supra* note 4.

115. Judge Deming alleged that he was not allowed eye contact with various witnesses during depositions. This assertion was not documented in the record. *Deming*, 108 Wash. 2d at 99–100, 736 P.2d at 648.

116. CJCR, *supra* note 5, at 4(e)(iv).

judges because they might prevent a complaint from being filed or a witness from voluntarily coming forward. There is, however, ample precedent for allowing such procedural rights.[117]

C. *De Novo Review as a Procedural Safeguard*

The court concluded that the procedural errors made by the Commission could be remedied through the court's power of *de novo* review. This is an aspect of the court's more general theme that its *de novo* review of the Commission's proceedings provide judges with additional procedural safeguards. Unfortunately, the court's interpretation of its *de novo* review power is overbroad.

The Washington State Constitution requires the court to review the Commission's recommendation, but does not state what the nature of the review ought to be. The *Deming* court held that it was required to conduct a *de novo* review.[118] This holding is consistent with rulings in other states with "single-tier" judicial review systems.[119] The court's interpretation of *de novo* review power, however, leads to difficulties for two reasons. First, the court stated that a *de novo* review made any errors, irregularities, or invasions of constitutional rights at the trial level immaterial.[120] Given this standard, it is easy to see why the court did not feel any compelling need to remand the case, even when it perceived procedural problems at the level of the initial hearing. In fact, under this standard it might never be necessary to remand a case to correct procedural errors.

Second, the standard itself undermines the alleged benefits of *de novo* review. The court stated that *de novo* review provided judges with additional due process protection.[121] Because the judiciary was the only branch of government subject to administrative oversight, *de novo* review was necessary to curb possible abuses of the Commission's power.[122] While *de novo* review might rectify substantive errors, the court's standard does little to protect a judge from procedural abuse during the initial proceedings. In fact, such a standard may undermine the procedural protection available at the factfinding hearing. If

117. *See generally* Shaman & Begue, *supra* note 3.

118. *Deming*, 108 Wash. 2d at 87–89, 736 P.2d at 641–43. The court also held that its *de novo* review was not limited to the record, but that the court was free to evaluate independently the evidence and to review supplemental evidence if necessary.

119. *See supra* note 6.

120. *Deming*, 108 Wash. 2d at 89, 736 P.2d at 642 (quoting 2 AM. JUR. 2D *Administrative Law* § 698 (1962)).

121. *Id.*

122. *Id.*

any procedural errors made by the Commission can be remedied on review, there is little initial incentive to correct them.

The court appears to have come full circle. Initially, it wanted to insure that judges received adequate due process protection. As a result, the court held that judges were entitled to extensive due process protections. If the court faithfully applied its broad due process standards, however, it would have remanded the case. The court was therefore forced to rely heavily on its broad power of *de novo* review to avoid remanding the case. But, by relying on *de novo* review in this fashion, the court has undermined the due process protections it was trying so hard to install.

To escape this dilemma, the court should limit its due process and *de novo* review holdings in *Deming*. The specific due process protections outlined by the court are both acceptable and necessary. They form a solid foundation onto which the court can add additional due process protections as required on a case-by-case basis. For these protections to be effective, however, the court must be willing to remand a case for rehearing when a specific requirement has not been met. Failure to do so can only undermine both the public's and the judiciary's faith in the Judicial Qualifications Commission.

V. CONCLUSION

Effective judicial discipline requires a frustrating balancing of objectives. On the one hand, public confidence in the integrity of the judiciary needs to be reinforced; on the other, the rights of judges facing a disciplinary action must be protected. These objectives of confidence and independence are mutually exclusive, and a balance is difficult to achieve. The confusion that is present in the *Deming* opinion demonstrates the difficulties involved in balancing such divergent goals.

In the *Deming* case these inconsistencies may go unnoticed because of the egregious nature of Judge Deming's misconduct. The court agreed that Judge Deming deserved to be removed from the bench and strongly censured. The confusion in the court's opinion, however, does not help the Commission or the public understand how future disciplinary proceedings ought to be conducted. In the long run, such confusion will undermine the public's faith in the judicial system and can only work to the disadvantage of judges.

Naturally, comprehensive procedural standards cannot be formulated in a single case. Over time, the court should strive to develop a consistent framework of procedural protections for judges. The court's specific procedural protections provide a strong foundation on

which to build. In future cases the court ought to abandon the notion that judges are entitled to sweeping due process protection, and focus instead on strictly enforcing the more limited due process rights to which judges are entitled.

Stephen Hobbs