

# ALABAMA

---

## Report on the Judicial Discipline System

---

March 2009

---

Sponsored by the  
American Bar Association  
Standing Committee on  
Professional Discipline

---



**ALABAMA JUDICIAL DISCIPLINE SYSTEM  
CONSULTATION TEAM**

David S. Baker  
Chair, ABA Standing Committee on Professional Discipline  
Atlanta, Georgia

John S. Gleason  
Denver, Colorado

Hon. Barbara K. Howe  
Towson, Maryland

Arnold R. Rosenfeld  
Boston, Massachusetts

Mary M. Devlin  
Chicago, Illinois

Ellyn S. Rosen, Reporter  
Chicago, Illinois

<b>ALABAMA JUDICIAL DISCIPLINE SYSTEM.....</b>	<b>2</b>
<b>CONSULTATION TEAM.....</b>	<b>2</b>
<b>I. INTRODUCTION.....</b>	<b>5</b>
<b>A. Judicial Independence and the Judicial Discipline Consultation Program.....</b>	<b>5</b>
<b>B. Persons Interviewed and Materials Reviewed for Alabama.....</b>	<b>6</b>
<b>II. OVERVIEW.....</b>	<b>8</b>
<b>A. Strengths of the Alabama Judicial Discipline System.....</b>	<b>8</b>
<b>B. Components of the Alabama Judicial Discipline System.....</b>	<b>9</b>
<b>1. General Background and Budget.....</b>	<b>9</b>
<b>2. The Establishment of the Judicial Inquiry Commission and the Alabama Court of the Judiciary.....</b>	<b>9</b>
<b>3. The Judicial Inquiry Commission.....</b>	<b>10</b>
<b>4. The Alabama Court of the Judiciary.....</b>	<b>15</b>
<b>5. The Supreme Court.....</b>	<b>16</b>
<b>III. PROCEDURAL RULES: JUDICIAL INQUIRY COMMISSION.....</b>	<b>17</b>
<b>Recommendation 1: The Court Should Amend Rules 5, 6, 7, and 9 of the Rules of Procedure of the Judicial Inquiry Commission to Ease Barriers to Investigations.....</b>	<b>17</b>
<b>Recommendation 2: The Court Should Vacate Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission Regarding Certain Communications Between Commission Members and Judges.....</b>	<b>26</b>
<b>Recommendation 3: The Court Should Adopt a Records Retention Rule for the Judicial Inquiry Commission.....</b>	<b>27</b>
<b>IV. PROCEDURAL RULES: ALABAMA COURT OF THE JUDICIARY.....</b>	<b>28</b>
<b>Recommendation 4: The Court Should Amend Rule 10 of the Rules of Procedure of the Alabama Court of the Judiciary to Require Respondent Judges to Testify.....</b>	<b>28</b>
<b>Recommendation 5: The Court Should Amend the Rules of Procedure of the Alabama Court of the Judiciary to Require Judges to Answer the Complaint and Permit a Default When They Do Not.....</b>	<b>29</b>
<b>Recommendation 6: The Court of the Judiciary’s Failure to “Convict” Within 10 Days Should Not Result In a Judge’s “Acquittal”.....</b>	<b>30</b>
<b>Recommendation 7: Discovery In Matters Before the Court of the Judiciary Should Exclude Privileged Materials.....</b>	<b>31</b>
<b>V. STRUCTURE.....</b>	<b>32</b>
<b>Recommendation 8: The Use of Assistant Attorneys General to Investigate and Prosecute Complaints Should be Eliminated.....</b>	<b>32</b>
<b>Recommendation 9: Term Limits for Judicial Inquiry Commission Members Should be Adopted.....</b>	<b>33</b>
<b>VI. SANCTIONS.....</b>	<b>34</b>
<b>Recommendation 10: Automatic Disqualification With Pay May Not Be Necessary In All Cases.....</b>	<b>34</b>
<b>Recommendation 11: The Court Should Adopt a Rule Providing for Private Admonitions and Expand Rule 16 Permitting Deferred Discipline Agreements..</b>	<b>35</b>
<b>Recommendation 12: The Court Should Adopt a Rule Providing for Discipline on Consent.....</b>	<b>37</b>

<b>VII. TRAINING AND FUTURE RESOURCE CONSIDERATIONS .....</b>	<b>39</b>
<b>Recommendation 13: All Members of the Judicial Inquiry Commission Should     Receive Mandatory and Continual Training .....</b>	<b>39</b>
<b>Recommendation 14: The Judicial Inquiry Commission Should Increase Public     Outreach .....</b>	<b>40</b>
<b>Recommendation 15: Future Resource Considerations.....</b>	<b>41</b>
<b>VIII. CONCLUSION.....</b>	<b>43</b>
<b>APPENDIX A.....</b>	<b>44</b>

## I. INTRODUCTION

### **A. Judicial Independence and the Judicial Discipline Consultation Program**

The maintenance of an independent judiciary is vital to the success of our democracy. As noted by the Report of the ABA Commission on the 21<sup>st</sup> Century Judiciary:

[A]n independent judiciary guarantees every citizen access to a branch of government designed to protect the rights and liberties afforded by federal and state constitutions and to resolve disputes peacefully and impartially. Fundamental to this unique role of the courts is the necessity for the judiciary to be distinct from the other two branches of government, functioning independently....<sup>1</sup>

Judicial independence, as traditionally understood, refers to the ability of judges and the courts to render decisions based on the constitution, statutes, court rules, precedent and common law principles without interference by the other branches of government. Under our system of government, judges must be able to render decisions in accordance with the law even though their decisions may sometimes be unpopular.

However, judicial independence is jeopardized unless there is judicial accountability.

Judicial accountability is absolutely essential to preserving public trust and confidence in our courts. Judges are entrusted to uphold the law independently and impartially. When they violate that trust, it is vital that processes be in place to correct the problem.... It all but goes without saying that to be effective, codes of judicial conduct must be enforced.<sup>2</sup>

Judicial conduct commissions, operating under a set of sophisticated procedural rules that include appropriate due process protections for judges, are the mechanisms that preserve the independence of the judiciary by ensuring that judges are accountable for their conduct.<sup>3</sup> Proper levels of transparency in the judicial discipline process ensure that the systems are accountable to and operating for the protection of the public. In all states and the District of Columbia, judicial discipline falls under the judicial branch of government, regardless of how a judicial conduct commission was enacted.

The American Bar Association has long recognized the connection between preserving judicial independence and the need for judges to be accountable for their conduct. In February 1978, the American Bar Association adopted the *Standards Relating to Judicial Discipline and Disability Retirement* as a national model for enforcement of state judicial

---

<sup>1</sup> American Bar Association (2003). Report of the Commission on the 21<sup>st</sup> Century Judiciary, *Justice in Jeopardy*, at iii., <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.

<sup>2</sup> Id. at 57 and 58.

<sup>3</sup> See, e.g., James J. Alfini, Shailey Gupta-Brietzke, and James F. McMartin, IV, *Dealing With Judicial Misconduct in the States: Judicial Independence, Accountability, and Reform*, 48 S. Tex. L. Rev. 889 (Summer 2007); and Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 Hofstra L. Rev. 1245 (Summer 2004).

conduct codes. To assist jurisdictions in the implementation of these standards, in June 1979, the ABA Standing Committee on Professional Discipline and the ABA Judicial Administration Division developed *Model Rules for Judicial Discipline and Disability Retirement*.

In 1990 (and again in 2007), the American Bar Association significantly revised its *Model Code of Judicial Conduct*. In February 1990, the Discipline Committee and the Judicial Administration Division created a Joint Subcommittee on Judicial Discipline. The Joint Subcommittee had the following goals: (1) to assure conformity with the new *ABA Model Code of Judicial Conduct*; (2) to ensure prompt and fair discipline for judges; (3) to ensure the protection of the public and the judiciary; (4) to protect the independence of the judiciary; and (5) to establish a model for states to use as a resource to establish improved judicial discipline systems. The Joint Subcommittee's proposals were submitted to the ABA House of Delegates, and on August 9, 1994, the House adopted the new *ABA Model Rules for Judicial Disciplinary Enforcement* (MRJDE).

To help states strengthen accountability and maintain independence, the Standing Committee on Professional Discipline offers judicial discipline system consultations. These reviews involve study of a jurisdiction's entire judicial discipline system by a team consisting of representatives of the Discipline Committee, experienced disciplinary counsel, and at least one judge.<sup>4</sup> The consultation team conducts extensive interviews with judges, lawyers and non-lawyers responsible for and affected by the judicial discipline system, including members of the judicial conduct commission, commission staff, disciplinary counsel, members of the court with disciplinary jurisdiction, former respondent judges, counsel for respondent judges, complainants, and independent judges. This process provides the team with a broad cross-section of views about the disciplinary process. The team also examines case records and administrative files for purposes of learning about procedures and practices. The team's review of such files and the purpose of the consultation generally are not related to the substance of any pending or resolved cases.

The final consultation report issued by the Committee is designed to assist those responsible for the administration of the judicial disciplinary process by providing constructive suggestions and recommendations based upon the team's study, its collective knowledge and experience, and the ABA MRJDE. While the final report is based upon those Model Rules, the team and Committee do not utilize a checklist approach. They do not recommend changes in local procedures that are functioning well.

#### **B. Persons Interviewed and Materials Reviewed for Alabama**

The Supreme Court of Alabama invited the ABA Standing Committee on Professional Discipline to conduct a review of its judicial discipline system. The consultation team conducted the on-site portion of the consultation in January 2009. Brief biographies of the team members are attached to this Report as Appendix A.

---

<sup>4</sup> The Alabama judicial discipline system consultation team included a retired judge.

Interviewees included the Executive Director and her staff, judge, lawyer and non-lawyer members of the Judicial Inquiry Commission and the Alabama Court of the Judiciary, former Alabama Supreme Court justices, contract Disciplinary Counsel, respondent judges, respondents' counsel, complainants, and lawyers for complainants. The team spoke with the Alabama Bar Association's President and President-Elect. The team also met with the Justices of the Supreme Court of Alabama and the Chief Justice's Commission on Professionalism.

The team reviewed documentation relating to the judicial discipline system in Alabama that included, but was not limited to, the relevant provisions of the Alabama Constitution, the Alabama Canons of Judicial Ethics, formal judicial ethics advisory opinions issued by the Judicial Inquiry Commission, the Rules of Procedure of the Judicial Inquiry Commission, the Rules of Procedure of the Alabama Court of the Judiciary, annual reports, caseload processing information, brochures, complaint forms, transcripts, and files. When produced, the team accepted for review additional materials provided by interviewees.

The ABA Standing Committee on Professional Discipline is grateful to all participants in the consultation for their time, effort and candor. The Committee is impressed with the commitment of the Supreme Court, the members of the Judicial Inquiry Commission and Alabama Court of the Judiciary, the Executive Director's Office, and all interviewees to ensure that the system is fair, effective, and efficient. The Discipline Committee recognizes that positive change is not always easy to accomplish, and it is sensitive to the obstacles faced by the justices and participants in the system as they carefully consider how to effect change. The Discipline Committee hopes that the recommendations contained in this Report will assist the Court in ensuring that the system operates optimally and transparently, for the protection of the public and in furtherance of sustaining the integrity of the Alabama judiciary.

## II. OVERVIEW

### A. Strengths of the Alabama Judicial Discipline System

This Report is designed to provide constructive suggestions based upon the ABA Standing Committee on Professional Discipline's collective knowledge and experience in judicial regulation and the *ABA Model Rules for Judicial Disciplinary Enforcement*. In order to provide a balanced assessment of Alabama's judicial disciplinary system, its strengths should be recognized. The following is not an exhaustive description of those strengths.

The justices of the Supreme Court of Alabama understand that responsible self-governance is critical to preserving the judiciary's integrity and independence and to enhancing public trust and confidence. The Court's interest in improving the system is evident from its invitation to the Committee to conduct the consultation, the justices' thoughtful suggestions for improvements, and their pointed questions about the existing system and national practices.

The team was advised by interviewees that matters generally proceed through the Alabama judicial discipline system in a timely manner. The time and resources devoted by the Judicial Inquiry Commission members and staff to operating with the significant constraints of the current rules governing the investigation of complaints by the Judicial Inquiry Commission are commendable. That they are able to investigate complaints in the face of those challenges demonstrates their commitment to the system. It is also notable and commendable that the Alabama Constitution provides that formal judicial disciplinary complaints proceeding before the Alabama Court of the Judiciary are public.<sup>5</sup> The team was impressed by the courage and fairness evidenced by the members of the Court of the Judiciary in the performance of their duties, particularly in light of the contentious, high profile, and perceived political nature of some matters.

The team commends the Supreme Court for its adoption of new Rule 16 of the Rules of Procedure for the Judicial Inquiry Commission. This Rule provides that, when there is cause to believe misconduct in a complaint resulted from substance abuse or a mental disorder, the Commission and the judge may agree to have the judge evaluated by the Alabama Lawyers Assistance Program. If treatment is found to be appropriate, the Commission and judge may enter into a diversion agreement, and the complaint will be deferred pending completion of the terms of that agreement. Upon successful completion of the terms of the diversion agreement, the complaint is dismissed. If the judge fails to successfully abide by the agreement or is non-compliant, the complaint may be pursued again.

---

<sup>5</sup> ALA. CONST. art. VI, § 156 (b) and ALA. CONST. art. VI, § 157 (a).

## **B. Components of the Alabama Judicial Discipline System**

### **1. General Background and Budget**

The Alabama court system is unified. Its judges and justices are elected in partisan elections, with the exception of municipal court judges.<sup>6</sup> Those judges are appointed by the governing body of the municipality. When vacancies occur, the Governor of Alabama fills state judicial vacancies and the municipal governing bodies fill municipal court positions.<sup>7</sup>

The judicial branch receives the bulk of its funding from the legislature. Monies from grants and trust funds make up the remainder of the budget. The Alabama Unified Judicial System General Fund for Fiscal Year 2007-2008 was allotted \$174,961,158.<sup>8</sup> The Judicial Inquiry Commission's budget for that Fiscal Year, which came from the State's General Fund, was \$407,777 plus \$150,000 in emergency funds for legal fees, if needed.<sup>9</sup> The Commission's Fiscal Year 2008-2009 budget was \$374,365 plus \$225,000 for legal expenses, if needed.<sup>10</sup>

### **2. The Establishment of the Judicial Inquiry Commission and the Alabama Court of the Judiciary**

Prior to 1972, judges in Alabama were disciplined or removed only via impeachment.<sup>11</sup> In 1972, the Alabama Constitution was amended to establish the Alabama Judicial Commission, which was responsible for the investigation, prosecution, and initial adjudication of judicial misconduct cases.<sup>12</sup> Under this system the Alabama Supreme Court received the Commission's record and recommendation for sanction, and issued a final order.

The Judicial Inquiry Commission and the Alabama Court of the Judiciary were established in 1973 via amendment to the Constitution of Alabama of 1901, as part of a revision of Alabama's entire judicial system.<sup>13</sup> Constitutional amendment 328 convened the Judicial Inquiry Commission permanently as an independent entity under the judicial branch of government, and charged it with receiving, initiating, investigating, and where a majority of its members find a reasonable basis for doing so, filing and prosecuting charges before the Alabama Court of the Judiciary.<sup>14</sup> The Alabama Court of the Judiciary

---

<sup>6</sup> See, e.g., <http://www.judicial.state.al.us/appellate.cfm> (last viewed March 2, 2009).

<sup>7</sup> Id.

<sup>8</sup> Alabama Unified Judicial System, FY 2007 Annual Report and Statistics, <http://www.alacourt.gov/Annual%20Reports/2007AOCAnnualReport.pdf> (last viewed March 2, 2009).

<sup>9</sup> *Supra note 8*. See also, Ala. Act No. 2008-547, 1<sup>st</sup> Special Session 2008 (Ala. 2008).

<sup>10</sup> [www.lfo.state.al.us](http://www.lfo.state.al.us).

<sup>11</sup> Alabama Supreme Court justices were impeached pursuant to the same rules applicable to state executive branch officers, by legislative action, pursuant to ALA. CONST. art. 7, § 173; other state court judges faced impeachment proceedings before the Court as required by ALA. CONST. art. 7, § 174.

<sup>12</sup> ALA. CONST. amend. 317 (1972).

<sup>13</sup> ALA. CONST. amend. 328 (1973). Now, ALA. CONST. art. VI, §§ 156 and 157.

<sup>14</sup> ALA. CONST. art. VI, § 156 (b).

was established to hear complaints filed by the Judicial Inquiry Commission, and after notice and a public hearing, to discipline a judge for violating the Alabama Canons of Judicial Ethics, for misconduct in office or for failing to perform his/her duties.<sup>15</sup> Judges can appeal Court of the Judiciary decisions to the Supreme Court.<sup>16</sup>

The Alabama Constitution authorizes the Supreme Court to adopt rules governing the procedures of the Judicial Inquiry Commission and the Alabama Court of the Judiciary.<sup>17</sup> The Court adopted procedural rules for the Court of the Judiciary in 1974, and for the Commission in 1975. It substantially amended the procedural rules for the Commission in 2001, without notice to the bar, the public, or the judiciary, and without opportunity for comment or public hearing. It ordered its 2001 amendments to apply retroactively. The Judicial Inquiry Commission and then Alabama Attorney General William Pryor objected to the 2001 amendments and requested that the Court reconsider its actions. However, the Court has not ruled on that request to date.

In 2002, the Court established a Standing Advisory Committee on Rules of Procedure for the Court of the Judiciary and the Judicial Inquiry Commission to review the 2001 amendments and recommend further action. The Advisory Committee held meetings and public hearings. In 2007, the Court charged its Standing Committee on Rules of Conduct and Canons of Judicial Ethics to review the procedural rules applicable to the Judicial Inquiry Commission and the Alabama Court of the Judiciary. The Court adopted further amendments to the Rules of Procedure of the Judicial Inquiry Commission on January 8, 2009, effective February 1, 2009.

### **3. The Judicial Inquiry Commission**

Pursuant to Article VI, § 156 (a) of the Constitution of Alabama of 1901, the Judicial Inquiry Commission is comprised of nine members.<sup>18</sup> The Supreme Court appoints one appellate court judge who is not a justice of the Court; the Circuit Judges' Association appoints two circuit court judges; the Governor appoints three non-lawyers and one district judge, all subject to Senate confirmation; and the Alabama State Bar appoints two lawyers.<sup>19</sup> Commission members serve four year terms.<sup>20</sup> There are no term limits set forth in the Constitution or in the Rules of Procedure of the Judicial Inquiry Commission. The Commission members select a chair and, in addition, may elect one or more vice-chairs, an executive secretary and other officers as it may determine.<sup>21</sup> The Commission may also appoint an Executive Committee which consists of the Chair and two other members.<sup>22</sup>

---

<sup>15</sup> ALA. CONST. art. VI, § 157 (a).

<sup>16</sup> ALA. CONST. art. VI, § 157 (b).

<sup>17</sup> ALA. CONST. art. VI, §§ 156 (c) and 157 (c), respectively.

<sup>18</sup> ALA. CONST. art. VI, § 156 (a).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, and Rule 11, Rules of Procedure of the Judicial Inquiry Commission.

<sup>22</sup> Rule 12, Rules of Procedure of the Judicial Inquiry Commission.

Judicial Inquiry Commission meetings may be held at the times and places determined by the Commission or upon three days notice by the call of the Chair, Acting Chair or any two members.<sup>23</sup> A majority of the Commission members present at a meeting constitutes a quorum for the transaction of business; the action of a majority of the members at a meeting at which a quorum is present constitutes the action of the full Commission.<sup>24</sup> However, absent the affirmative vote of a majority of **all** Commission members at a duly called meeting, no investigation may be instituted, subpoena issued or complaint filed against a judge with the Alabama Court of the Judiciary.<sup>25</sup> The institution of an investigation in a manner contrary to the Rule bars prosecution of the matter to be investigated.<sup>26</sup> The issuance of a subpoena in a manner contrary to the Rule bars admissibility of all information and documents sought, received, and discovered as a result of information or material received in response to the improperly issued subpoena.<sup>27</sup>

The Judicial Inquiry Commission has the authority to appoint and direct its staff.<sup>28</sup> The Commission is staffed by the Executive Director, Assistant Executive Director, and Executive Secretary. The Executive Director also acts as the Commission's chief administrator. The Executive Director's office processes inquiries and complaints, conducts legal research on and drafts judicial ethics advisory opinions, coordinates Commission meetings and is responsible for the day-to-day operation of the Commission's office. When requested by the Commission, the Executive Director may conduct legal research, draft correspondence, and prepare publications and other writings for review and approval by the Commission. This position is not responsible for the investigation and prosecution of complaints.

The Assistant Executive Director handles fiscal and internal administrative responsibilities of the Commission. This includes maintaining a journal of accounts, a property inventory, personnel and payroll records, and all necessary statistical data. This position serves as the Commission's *ex officio* meeting secretary. The Assistant Executive Director supervises the Executive Secretary. The Executive Secretary communicates with potential and actual complainants and judges, prepares materials for Commission meetings, copies and mails Commission file materials in accordance with the strict requirements of the Rules of Procedure of the Judicial Inquiry Commission, and performs other administrative functions.

There is no full-time disciplinary counsel responsible for the investigation and prosecution of complaints and formal charges. Commission members may investigate or, as noted above, direct the Executive Director to do so. The Commission has also employed the services of a contract investigator or used investigators from the Alabama Attorney General's Office as needed. An Assistant Attorney General previously served

---

<sup>23</sup> Rule 9, Rules of Procedure of the Judicial Inquiry Commission.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> ALA. CONST. art. VI, § 156 (d).

as part-time disciplinary counsel to investigate and prosecute complaints. That practice has ceased; the Commission now hires contract lawyers to serve as disciplinary counsel.<sup>29</sup>

Pursuant to the Alabama Constitution, the Judicial Inquiry Commission has the authority to “conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state.”<sup>30</sup> Any person may make a complaint against an Alabama judge. The Rules of Procedure of the Judicial Inquiry Commission provide that the Commission may investigate a judge only upon receipt of a verified complaint filed by a member of the public, a Commission member or a member of the Commission’s staff, and only upon an affirmative vote of a majority of the entire Commission membership at a duly called meeting.<sup>31</sup> The failure to comply with these requirements results in the Commission being barred from pursuing the complaint.<sup>32</sup>

The verification on the Commission’s complaint form states:

The allegations and statements of fact set forth above and in any additional attached pages are true and correct to the best of my knowledge, information, and belief, and I understand that a copy of this complaint and all supporting materials will be provided by the Commission to the judge against whom the complaint is made.

Complaints cannot be sent to the Commission via fax or e-mail. The complaint form is not available for downloading on the Commission’s web site.

Within twenty-one days of the receipt of a complaint against a judge, the Commission must provide the judge with a copy of the complaint and all materials of “any nature whatsoever” supporting or accompanying it.<sup>33</sup> The Commission must comply with this requirement even before it votes on whether to initiate an investigation. Effective February 1, 2009, the Rules require that the Commission must meet within sixty days after a complaint is filed to vote whether to initiate an investigation.<sup>34</sup> If it does not, the complaint becomes void, and the Commission must notify the judge of this fact.<sup>35</sup>

Within twenty-one days of voting to institute an investigation, the Commission must provide the judge with a complete description of the conduct to be investigated and all information and materials received, gathered or in the Commission’s possession that support or refute the allegations and/or the appropriateness of the investigation.<sup>36</sup> The

---

<sup>29</sup> Rule 15, Rules of Procedure of the Judicial Inquiry Commission.

<sup>30</sup> ALA. CONST. art. VI, § 156 (b).

<sup>31</sup> Rule 6 (A), Rules of Procedure of the Judicial Inquiry Commission.

<sup>32</sup> *Supra* note 23.

<sup>33</sup> Rule 6 (C), Rules of Procedure of the Judicial Inquiry Commission.

<sup>34</sup> Rule 6 (B), Rules of Procedure of the Judicial Inquiry Commission. Between October 9, 2001 and February 1, 2009, the Rules required that the Commission meet and initiate an investigation within forty-two days.

<sup>35</sup> *Id.*

<sup>36</sup> Rule 6 (D), Rules of Procedure of the Judicial Inquiry Commission. Between October 9, 2001 and February 1, 2009, the Rule required the Commission to do so within ten days.

Commission's failure to comply with this requirement bars continuation of the investigation and any prosecution of the conduct at issue.<sup>37</sup>

The Commission is required to provide a judge with updated disclosures of all information every six weeks.<sup>38</sup> If exigent circumstances exist, the Chair of the Commission may extend the time for compliance by twenty-one days.<sup>39</sup> The Commission's failure to provide updated disclosures bars continuation of the investigation by the Commission and any prosecution of the conduct at issue, if the judge requests the overdue information and the Commission fails to comply within seven days.<sup>40</sup>

Alabama judges cannot be compelled to give evidence against themselves in disciplinary proceedings.<sup>41</sup> Nor do the Rules require that a judge cooperate with the Commission or respond to a complaint.

The team was advised that the Commission usually meets monthly in order to consider new complaints and pending investigations. A large number of complaints filed are not investigated by the Commission because it determines that they are frivolous or do not fall under its jurisdiction. Complaints that lack sufficient information for the Commission to vote on whether an investigation should be authorized are dismissed, and the Commission does not request that the complainant provide additional information. The team was advised that making such a request would constitute an investigation that was not properly voted upon in accordance with the Rules of Procedure of the Judicial Inquiry Commission. Only if an investigation is approved will the Commission seek additional information from the complainant or other sources. Similarly, the team was advised that if allegations of judicial misconduct come to its attention via the news media, the Commission will not seek additional information to authenticate such a report unless and until a verified complaint is filed and an investigation is duly authorized. The Commission's members and staff believe that to do otherwise would constitute an improper investigation under the Rules.

The Commission has the power to subpoena witnesses and documents.<sup>42</sup> However, as Rule 6 (H) of the Rules of Procedure of the Judicial Inquiry Commission exempts the judge from being compelled to give evidence against himself or herself, it is unlikely that the word "witness" in Rule 7 includes the respondent judge. Subpoenas must be relevant to the allegations in the complaint. The Commission must serve the judge with a copy of a subpoena prior to or simultaneous with its service upon the witness.<sup>43</sup> A failure to do so

---

<sup>37</sup> Rule 6 (F), Rules of Procedure of the Judicial Inquiry Commission.

<sup>38</sup> Rule 6 (E), Rules of Procedure of the Judicial Inquiry Commission.

<sup>39</sup> *Id.*

<sup>40</sup> Rule 6 (G), Rules of Procedure of the Judicial Inquiry Commission.

<sup>41</sup> Rule 6 (H), Rules of Procedure of the Judicial Inquiry Commission.

<sup>42</sup> ALA. CONST. art. VI. § 156 (d); Rule 7, Rules of Procedure of the Judicial Inquiry Commission.

<sup>43</sup> Rule 7 (B) and (C), Rules of Procedure of the Judicial Inquiry Commission, respectively.

results in any testimony or information sought, obtained or discovered being inadmissible.<sup>44</sup>

During Fiscal Year 2008 (from October 1, 2007 through September 30, 2008), the Commission received 888 unverified complaints and inquiries upon which it took no action. The Commission received 159 verified complaints that year. It investigated 40 new matters. Of the 159 verified complaints resolved that year (this number includes matters pending from prior years), 87 presented allegations that were outside the scope of the Commission's jurisdiction; 103 asserted matters that presented no reasonable basis to file a complaint with the Alabama Court of the Judiciary. In 39 instances no ethics violation was found. The Commission dismissed the remainder for other appropriate reasons. The Commission issued 4 advisory opinions in Fiscal Year 2008 and 13 advisory opinions in Fiscal Year 2007.

Data for 1996 through 2008 indicate that the number of complaints filed with the Commission dropped significantly after 2001 when complaints had to be verified and judges were given the names of complainants.

<u>Year</u>	<u># of Complaints Received</u>
1996	250
1997	264
1998	291
1999	215
2000	279
2001	176
2002	141
2003	112
2004	167
2005	171
2006	161
2007	167
2008	159

Consistent with other states, the majority of complaints filed against judges in Alabama are made by litigants/defendants or their friends and relatives. The most common allegations are that the judge has made an erroneous ruling (21% of the 159 verified complaints filed in 2008) or that the judge is biased (18% of the 159 verified complaints filed in 2008). Most complaints are made against circuit court judges, followed by complaints against district judges.

The Commission may file a complaint against a judge with the Alabama Court of the Judiciary when a majority of its full membership determines that a reasonable basis exists to: (1) charge a judge with a violation of the Alabama Canons of Judicial Ethics; (2)

---

<sup>44</sup> Id.

charge a judge with misconduct in office; (3) charge a judge with a failure to perform his or her duties; or (4) charge a judge with being physically or mentally unable to perform his or her job.<sup>45</sup> All proceedings of the Commission are confidential, except the filing of the complaint with the Court of the Judiciary, with certain exceptions set forth in the Rules of Procedure of the Judicial Inquiry Commission.<sup>46</sup>

#### **4. The Alabama Court of the Judiciary**

Pursuant to Article VI, § 157 (a) of the Constitution of Alabama of 1901, the Alabama Court of the Judiciary is comprised of nine members.<sup>47</sup> The Supreme Court appoints one appellate court judge who is not a justice of the Court. That judge serves as the Chief Judge of the Court of the Judiciary.<sup>48</sup> The Circuit Judges' Association appoints two circuit court judges, and the District Judges' Association appoints one district judge.<sup>49</sup> The remaining members consist of two lawyer members chosen by the State Bar of Alabama, and three non-lawyers appointed by the Governor subject to Senate confirmation.<sup>50</sup>

Upon the filing of a complaint with the Alabama Court of the Judiciary, the judge against whom it is filed is disqualified from service, but continues to receive pay.<sup>51</sup> The Alabama Court of the Judiciary serves as the trier of fact for complaints filed against judges by the Commission.

After the filing and service of a complaint with the Court of the Judiciary, the respondent judge has the right to file a responsive pleading within thirty days.<sup>52</sup> Hearings on complaints are public and must be held before all members of the Court of the Judiciary, unless the charged judge agrees to allow the hearing to proceed with fewer members, but no fewer than a quorum.<sup>53</sup> Except where inappropriate or otherwise specified in the Rules of Procedure, the rules of evidence in civil cases and the Alabama Rules of Civil Procedure apply to hearings held before the Alabama Court of the Judiciary.<sup>54</sup> The Commission must prove the allegations in the complaint by clear and convincing evidence, and a judge cannot be compelled to give evidence against himself or herself in disciplinary proceedings.<sup>55</sup>

At the conclusion of a hearing the Alabama Court of the Judiciary is required to enter an order that dismisses the matter, finds misconduct and disciplines the judge or finds a

---

<sup>45</sup> ALA. CONST. art. VI, § 156 (b); and Rule 5, Rules of Procedure of the Judicial Inquiry Commission.

<sup>46</sup> Id.

<sup>47</sup> ALA. CONST. art. VI, § 157 (a).

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> ALA. CONST. art. VI, § 159.

<sup>52</sup> Rules 3 and 5, Rules of Procedure of the Alabama Court of the Judiciary.

<sup>53</sup> Rule 9, Rules of Procedure of the Alabama Court of the Judiciary.

<sup>54</sup> Rule 10, Rules of Procedure of the Alabama Court of the Judiciary.

<sup>55</sup> Id.

disability and suspends the judge or orders retirement.<sup>56</sup> For cases that do not involve removal, the Court of the Judiciary's vote finding misconduct or disability must be that of no fewer than six of nine members.<sup>57</sup> A unanimous vote is required for removal.<sup>58</sup> As stated in Rule 16 of the Rules of Procedure of the Alabama Court of the Judiciary, the Court's failure to "convict" the judge within ten days after the conclusion of the hearing results in the "acquittal" of the charged judge.<sup>59</sup> Decisions by the Alabama Court of the Judiciary are final, subject to the judge's right to appeal to the Supreme Court.<sup>60</sup>

## **5. The Supreme Court**

Within thirty days after the Alabama Court of the Judiciary issues its ruling, the respondent judge may file a notice of appeal with the Alabama Supreme Court.<sup>61</sup> The rules governing appeals to the Supreme Court apply to these proceedings except where otherwise provided or inapplicable.<sup>62</sup>

---

<sup>56</sup> ALA. CONST. art. VI, § 157 (a); and Rule 16, Rules of Procedure of the Alabama Court of the Judiciary.

<sup>57</sup> Rule 16, Rules of Procedure of the Alabama Court of the Judiciary.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> ALA. CONST. art. VI, § 157 (b); and Rule 16, Rules of Procedure of the Alabama Court of the Judiciary

<sup>61</sup> Rule A. Rules Governing Appeals from Alabama Court of Judiciary.

<sup>62</sup> Rule D. Rules Governing Appeals from Alabama Court of Judiciary.

### III. PROCEDURAL RULES: JUDICIAL INQUIRY COMMISSION

#### **Recommendation 1: The Court Should Amend Rules 5, 6, 7, and 9 of the Rules of Procedure of the Judicial Inquiry Commission to Ease Barriers to Investigations**

##### Commentary

During the on-site portion of the consultation, the team met with over forty interviewees. As noted at page 7 above, these individuals possess different backgrounds and perspectives on the Alabama judicial discipline system. They have had varying levels of involvement with it. The team is grateful for their time, candor, and willingness to consider what is in the best interest of the system.

The team noted a consensus among most interviewees that the 2009 and 2001 iterations of Rules 6, 7 and 9 of the Rules of Procedure of the Judicial Inquiry Commission contain overly burdensome requirements for authorizing and conducting investigations, and for issuing subpoenas. Some who support the 2001 amendments to the procedural rules agreed that, in retrospect, those changes have had certain unintended adverse consequences. A small minority maintains steadfast support for the disclosure and subpoena requirements set forth in Rules 6 and 9.

The team concurs with the significant majority of those interviewed. As discussed below, the requirements set forth in these Rules conflict with national practice and are not protective of the public. They unduly burden the system, deter the filing of valid complaints, and compromise the ability of the Commission to effectively conduct a proper investigation. Sanctions for the Commission's failure to comply with these requirements are unnecessarily punitive and often bear no relationship to the harm that may be created by a technical violation of the procedural rule. Under the current Rules, technical and/or minor violations are subject to the harshest sanction favoring the judge against whom a complaint has been filed, e.g., dismissal with prejudice.

#### **A. The Requirement that Complaints Be Verified Should Be Eliminated**

Pursuant to the Alabama Constitution, the Judicial Inquiry Commission has the authority to "...conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state."<sup>63</sup> Prior to 2001, Rule 6 of the Rules of Procedure of the Judicial Inquiry Commission provided that "any person" could make a complaint against an Alabama judge. Complaints against judges did not have to be verified.

In 2001, the Court amended Rule 6(a) of the Rules of Procedure of the Judicial Inquiry Commission to provide that:

---

<sup>63</sup> ALA. CONST. art. VI, § 156 (b).

Investigations may be instituted by the Commission only upon a verified complaint filed by either a member of the public or by a member of the commission and only upon the affirmative vote of a majority of all members of the commission at a duly called meeting agreeing to investigate the complaint.<sup>64</sup>

It is unclear to the team what distinction was intended between the terms “any person” and a “member of the public.” The team assumes that the Court intended to include lawyers and judges to constitute “members of the public” for purposes of filing complaints, especially because they may have duties to do so under the applicable rules of professional conduct.

The 2001 amendments eliminated the ability of the Commission to initiate an investigation upon its own motion and required the affirmative vote of a majority of all Commission members before an investigation could commence.<sup>65</sup> In January 2009, the Court amended Rule 6 (A) to provide that the Commission’s staff may also file a verified complaint against a judge. Failure to comply with the majority vote or verified complaint requirements results in the Commission either not being able to initiate an investigation or being barred from pursuing the complaint.<sup>66</sup>

Complainants should not be required to sign their complaints under penalty of perjury. The ABA Model Rules for Judicial Disciplinary Enforcement define a complaint as “information in any form from any source received by the commission that alleges or from which a reasonable inference can be drawn that a judge committed misconduct or is incapacitated. If there is no written complaint from another person, disciplinary counsel’s written statement of the allegations constitutes the complaint.”<sup>67</sup> The verification requirement chills the willingness of complainants to come forward with information about judicial misconduct. A majority of states do not require complaints to be verified.<sup>68</sup> The constitutional provision establishing the Commission sets forth no limitations or restrictions, including the form in which complaints are to be received.<sup>69</sup> Requiring Commission members and staff to submit verified complaints impinges upon the ability of the Commission to carry out its mandate under the Alabama Constitution. It is vital to the integrity of the disciplinary process that complainants be permitted to freely file their grievances and that the Commission be able to conduct its investigations without undue restrictions or interference.

The public must have confidence that the Commission, a judicial branch entity, will consider all information about unethical judges and protect those who provide that information. Complainants should not be subject to the threat of prosecution implicit in requiring verification under oath for the filing of a complaint with the disciplinary agency. The judicial disciplinary process in Alabama provides for confidentiality until

---

<sup>64</sup> Rule 6 (A), Rules of Procedure of the Judicial Inquiry Commission (2001).

<sup>65</sup> Id.

<sup>66</sup> Rules 6 and 9, Rules of Procedure of the Judicial Inquiry Commission.

<sup>67</sup> Terminology, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>68</sup> Judith Rosenbaum, *Practices and Procedures of State Judicial Conduct Organizations*, American Judicatory Society (1990).

<sup>69</sup> The Commission does not accept the filing of complaints via e-mail or on-line at this time.

the filing of a complaint with the Alabama Court of the Judiciary. This provides a significant and sufficient layer of protection for judges against false and malicious complaints becoming public.

**B. The Court Should Eliminate the Requirement That the Commission Provide a Judge With the Complaint and Accompanying Material Within Twenty-One Days After Filing**

Pursuant to Rule 6 (C) of the Rules of Procedure of the Judicial Inquiry Commission, within twenty-one days of the filing of a complaint against a judge, the Commission must provide the judge with a copy of the complaint and all materials of “any nature whatsoever” supporting or accompanying it.<sup>70</sup> The complaint form advises the complainant that a copy of the complaint will be provided to the judge. By doing so, the Commission reveals the identity of the complainant, in addition to providing the judge with the complaint itself and additional material, even before it votes on whether to initiate an investigation.

This practice, particularly the revelation of the complainant’s identity, has a chilling effect on those who may want to file a complaint against a judge. Specific instances were described to the team by a range of interviewees, including but not limited to potential complainants, actual complainants, lawyers and judges. Statistics compiled by the Commission from 1996–2008 demonstrate a significant drop in the number of complaints filed after the adoption of the 2001 amendments.<sup>71</sup>

The Commission should evaluate all information coming to its attention by complaint or other sources.<sup>72</sup> This includes information that is received by telephone, from the news media and complaints that are submitted anonymously.<sup>73</sup> To do so is, in the team’s opinion, consistent with the provisions creating the Commission set forth in the Alabama Constitution.

Consideration of anonymous complaints in the same manner as other complaints ensures that lawyers, court personnel, litigants, and other judges can bring misconduct to the attention of the Commission without fear of retaliation.<sup>74</sup> The need for anonymous complaints is heightened by information provided to the team regarding the close relationship between judges in small counties and municipalities and the citizenry and legal profession. The mere possibility of retaliation against a complainant by a judge, however unlikely it is in reality, can intimidate a complainant who would otherwise come forward with true, accurate and independently verifiable information about serious judicial misconduct.

---

<sup>70</sup> Rule 6 (C), Rules of Procedure of the Judicial Inquiry Commission.

<sup>71</sup> See page 14 above.

<sup>72</sup> Rule 17 (a), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>73</sup> Id.

<sup>74</sup> Id.

Most jurisdictions permit complaints to be submitted anonymously.<sup>75</sup> Judicial conduct organizations nationwide are mindful of the risks to judges posed by anonymous complaints. However, the risks to the public and the integrity of the judiciary of ignoring them are far higher. Balance is achieved by ensuring that allegations can be independently verified through objective sources by the judicial disciplinary agency.<sup>76</sup>

Notifying a judge of the complainant's identity and providing a copy of the complaint and all attachments even before the Commission initiates an investigation also jeopardizes the availability of evidence. Sadly, there is a small minority of judges in every jurisdiction who will attempt to stymie an investigation by hiding or destroying evidence. However, after a preliminary investigation the judge may request the name of the complainant, and the Commission should provide that information unless there is good cause to withhold it.<sup>77</sup>

In Alabama, as in most states, approximately 90% of complaints against judges are dismissed outright or after minimal investigation. An impact of the 2001 amendments is that Alabama judges receive notice of every complaint filed against them, including those that are facially frivolous. In the Discipline Committee's experience, most judges do not want to receive notice of these complaints, and they do not need to be notified of matters that do not allege violations of the Alabama Canons of Judicial Ethics. In addition to the unnecessary anxiety suffered by a judge every time he or she receives a letter from a judicial conduct organization, these are not official complaints. Providing information on non-meritorious complaints to the judge means that judges who seek other positions may have to report these matters to potential future employers. Rule 17 (A) of the ABA Model Rules for Judicial Disciplinary Enforcement provides that "[i]f the information would not constitute misconduct or incapacity if it was true, disciplinary counsel shall dismiss the complaint..." The Commentary explains that "it is not necessary to notify a judge of a complaint that is dismissed after screening on the ground that it does not state facts constituting misconduct." Thus, judges who have been the subject of non-meritorious "complaints" do not have to report that they have been recipients of complaints. A judge should be able to truthfully state that no official complaints have been filed against him or her on disclosure forms when non-meritorious matters have been screened out.

The team is aware that New Hampshire and Vermont require that judges receive copies of all complaints filed against them. However, in those jurisdictions all complaints, or summaries of complaints, become public in every case after the judicial disciplinary commission's final action. As a result, it is necessary for judges be provided those documents and given an opportunity to respond to them. Such is not the case in Alabama.

---

<sup>75</sup> Nancy E. Rix, *Judicial Conduct Reporter*, Vol. 21, No 2 (Summer 1999). This article notes that in a survey of 39 judicial conduct organizations, of the 33 responding jurisdictions only two (Montana and Wyoming) did not accept or act on anonymous complaints. Updated research indicates that Missouri does not consider anonymous complaints.

<sup>76</sup> *Id.*

<sup>77</sup> Rule 17 (C) (1)(d), ABA Model Rules for Judicial Disciplinary Enforcement.

**C. The Court Should Eliminate the Requirement that the Commission Meet Within 60 Days to Vote By a Majority of All Members to Authorize an Investigation**

Effective February 1, 2009, the Commission must meet to vote whether to initiate an investigation within sixty days after a complaint is filed.<sup>78</sup> If it does not do so, or if a majority of all Commission members do not vote affirmatively to authorize an investigation, the complaint becomes void.<sup>79</sup> The team was advised that the Commission usually meets monthly for this purpose. This requires Commission members to travel to the Commission's office in Montgomery.

Complaints that lack sufficient information for the Commission to vote on whether an investigation should be authorized are dismissed, and the Commission does not give the complainant an opportunity to provide additional information. Only if an investigation is approved will the Commission seek additional information from the complainant or other sources. It is believed that to do otherwise would constitute an unauthorized investigation under the Rules resulting in the voiding of the complaint.

In addition to eliminating the verification and disclosure requirements discussed above, the Committee recommends that the Court amend Rule 6 to give the Commission, preferably through Disciplinary Counsel (currently retained on a contract basis) or its Executive Committee, the authority to immediately screen out complaints against judges that fall outside of the jurisdiction of the agency or do not contain allegations which, even if true, would be the basis for discipline.<sup>80</sup> The Commission should not be required to meet to vote to dismiss such matters. This process wastes volunteer time and Commission resources.

Rules 6 and 9 of the Rules of Procedure of the Judicial Inquiry Commission should also be amended to eliminate the requirement of an affirmative vote of a majority of all Commission members to initiate an investigation. This requirement is not protective of the public and may conflict with Article VI, Section 156 of the Alabama Constitution which provides that the Commission "shall be convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state."

Further, Disciplinary Counsel, an investigator for the Commission or the Executive Committee should be authorized to conduct timely preliminary inquiries without Commission approval.<sup>81</sup> These preliminary investigations would include conducting interviews and examining evidence to determine if grounds exist to support the allegations in the initial complaint when it cannot be immediately screened out. Upon the completion of a preliminary investigation, the matter should be dismissed or the

---

<sup>78</sup> Rule 6 (B), Rules of Procedure of the Judicial Inquiry Commission. The Rule previously required the Commission to do so within 42 days.

<sup>79</sup> Id.

<sup>80</sup> Rule 17 (A), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>81</sup> Rule 17 (B), ABA Model Rules for Judicial Disciplinary Enforcement.

Commission asked to authorize a full investigation.<sup>82</sup> This eliminates the need for the Commission to meet within sixty days of the filing of a complaint to vote on whether to investigate it as required by Rule 6(B). It will permit more timely screening, dismissal, and preliminary investigation of matters and preserve the agency's limited resources.

The Court should also eliminate the language in Rules 6(B) and 9 providing that the complaint becomes void and the Commission is barred from prosecuting the conduct at issue if it fails to meet the requirements of Rule 6. This is an unduly harsh penalty that is not protective of the public or consistent with national practice. The team neither saw nor heard anything that warrants these requirements. The Committee recommends that the Court instead adopt time guidelines for the conducting of investigations. These guidelines should be procedural and not jurisdictional.

#### **D. The Court Should Eliminate Other Disclosure Requirements in Rules 6 and 9**

Within twenty-one days of instituting an investigation, the Commission must provide the judge with a complete description of the conduct to be investigated, and all information and materials received or in the Commission's possession that support or refute the allegations and/or the appropriateness of the investigation.<sup>83</sup> The Commission's failure to do so bars continuation of the investigation and any prosecution of the conduct at issue.<sup>84</sup> The Commission is required to provide a judge with updated disclosures of all information every six weeks.<sup>85</sup> If exigent circumstances exist, the Chair of the Commission may extend the time for compliance by twenty-one days.<sup>86</sup> The Commission's failure to do so bars continuation of the investigation and any prosecution of the conduct at issue.<sup>87</sup>

Article VI, Section 156 of the Alabama Constitution provides that the Commission "...shall be convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state." The Committee recommends that the Court eliminate the above-mentioned provisions of Rules 6(C), (D), and (E) and the penalties set forth under Rules 6 (F) and (G). The Rules are overly burdensome, not protective of the public, and compromise the ability of the Commission to conduct a proper investigation. They result in an unnecessary expenditure of time and resources to comply with these requirements-- time and resources better spent investigating complaints. That minor, accidental or technical violations of the disclosure requirements could result and have resulted in the barring of an investigation and ultimate prosecution of serious misconduct is troubling and may conflict with the provisions of the Constitution.

---

<sup>82</sup> Id.

<sup>83</sup> Rule 6 (D), Rules of Procedure of the Judicial Inquiry Commission. The Rule previously required that the Commission do so within 10 days.

<sup>84</sup> Rule 6 (F), Rules of Procedure of the Judicial Inquiry Commission.

<sup>85</sup> Rule 6 (E), Rules of Procedure of the Judicial Inquiry Commission. The Rule used to require these updates every 4 weeks.

<sup>86</sup> Id.

<sup>87</sup> Rule 6 (G), Rules of Procedure of the Judicial Inquiry Commission.

After a complaint has been screened, preliminarily investigated and found to be meritorious, the Commission should notify the judge about the complaint. The notice should include a statement that the Commission has authorized a full investigation. It should provide the judge with a specific statement of the allegations being investigated and the canons allegedly violated, with the provision that the investigation can be expanded, if appropriate.<sup>88</sup> If the investigation is expanded the Commission must provide notice to the judge of the specific nature of the new allegations. Such notice is consistent with due process requirements. Before the Commission determines the disposition of an investigation a judge should be able to request an appearance before the Commission to provide information.

#### **E. Judges Should Be Required to Cooperate With the Commission**

Alabama judges cannot be compelled to give evidence against themselves in disciplinary proceedings.<sup>89</sup> Nor is a judge required to cooperate with the Commission or respond to a complaint. The Commission has the power to subpoena witnesses and documents during the course of an investigation.<sup>90</sup> An affirmative vote of all Commission members is required before a subpoena can be issued.<sup>91</sup>

Subpoenas must be relevant to the allegations in the complaint and the Commission must serve the judge with a copy of a subpoena prior to or simultaneous with its service upon the witness.<sup>92</sup> Failure to comply with the requirements of Rule 7 and Rule 9 results in barring any testimony or information sought, obtained or discovered as a result of responsive information.<sup>93</sup>

The Committee recommends that the Court amend Rule 6 to provide that the Commission may request that a judge respond in person or writing to a complaint, and that the judge has a duty to do so.<sup>94</sup> A judge's failure to respond to a lawful request from the Commission should constitute grounds for discipline.<sup>95</sup> This is consistent with the Alabama Canons of Judicial Ethics and national practice. Nevertheless, a judge may properly invoke his or her Fifth Amendment right against self-incrimination when appropriate. Judicial disciplinary proceedings, however, are neither civil nor criminal but *sui generis*.

The Committee suggests that the Court amend Rule 7 (C) to eliminate language stating that failure to serve the judge with notice of a subpoena results in the barring of any information sought by the subpoena, information obtained in response to it, and additional information/documents obtained as a result of reviewing the original responsive material. This sanction and the "fruit of the poisonous tree" analysis for lack

---

<sup>88</sup> Rule 17 (B), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>89</sup> Rule 6 (H), Rules of Procedure of the Judicial Inquiry Commission.

<sup>90</sup> Rule 7, Rules of Procedure of the Judicial Inquiry Commission.

<sup>91</sup> Rule 9, Rules of Procedure of the Judicial Inquiry Commission.

<sup>92</sup> Rule 7 (C), Rules of Procedure of the Judicial Inquiry Commission.

<sup>93</sup> *Id.*

<sup>94</sup> Rule 17(C), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>95</sup> Rule 6 (A) (2), ABA Model Rules for Judicial Disciplinary Enforcement.

of notice are unduly harsh and overly protective of judges. If the complaint is dismissed after reviewing this information, the judge is not harmed. If the subpoenaed information results in the filing of formal charges, the judge will receive the information during discovery when the case is pending before the Alabama Court of the Judiciary.

The Rules can be amended to provide that the Chair of the Commission or the Executive Committee can approve the issuance of a subpoena. Consistent with Rule 17 (B) of the ABA Model Rules for Judicial Disciplinary Enforcement, the Commission should be able to issue a subpoena for testimony or documents when there are grounds to believe that evidence supporting the allegations could be obtained in that manner. Requiring all Commission members to vote to approve the issuance of a subpoena is not efficient. The Committee also recommends that the Court eliminate the language in Rule 9 setting forth the sanction for failing to obtain required votes to authorize a subpoena. Barring the use of subpoenaed information for this reason is not protective of the public, is unduly harsh, and is inconsistent with national practice. Article VI, Section 156 of the Alabama Constitution provides that the Commission "...shall be convened permanently with authority to conduct investigations...concerning any judge of a court of the judicial system of this state."

The Court should consider granting the Commission the discretion to orally provide the complainant with a summary of the judge's response to the complaint. Allowing the complainant the opportunity to reply to the judge's response is a valuable investigative tool. The complainant also should be provided with an explanation of the basis for dismissal of a complaint.<sup>96</sup> This explanation should include a brief summary of the facts and reasoning upon which the decision to dismiss was made.<sup>97</sup> If a matter is resolved via a deferred discipline agreement under new Rule 16 of the Rules of Procedure of the Judicial Inquiry Commission, the complainant should be notified that action was taken, but the nature of the disposition should not be specified.<sup>98</sup>

The Committee understands the confidentiality requirements imposed on the Commission by the Alabama Constitution and the Rules of Procedure of the Judicial Inquiry Commission. However, the Committee believes that a sufficient explanation can be crafted that advises the complainant of the dismissal of his or her complaint within those requirements. A number of states do so.<sup>99</sup> Rule 5(A)(2) of the Rules of Procedure of the Judicial Inquiry Commission seems to provide a means for doing so, albeit with the judge's approval of the statement issued. The Committee does not believe that the judge should have the right to approve or disapprove the contents of the Commission's notice to the complainant that a matter has been dismissed.

---

<sup>96</sup> Rule 16, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> *Supra* note 68 at Chapter 4, pages 11-13.

**F. The Court Should Amend Rule 5 of the Rules of Procedure of the Judicial Inquiry Commission to Allow Cooperation With Law Enforcement and Other Agencies When Necessary**

Rule 5 of the Rules of the Judicial Inquiry Commission sets forth the parameters of confidentiality under which the Commission must operate. Prior to the 2009 amendments to the Rules, the Commission could, when the seriousness of a matter warranted, inform the Chief Justice that a particular judge was under investigation.<sup>100</sup> The 2009 amendments state, “When the commission refers a judge to the Alabama Lawyers Assistance Program (ALAP) for evaluation under Rule 16, the commission may disclose relevant information to ALAP.”

In the team’s experience there are instances when information comes into the possession of a judicial discipline commission that must be provided to law enforcement or other agencies to protect an individual, the public or the administration of justice. The Commission should be able to provide that information to law enforcement or other government agency officials.<sup>101</sup>

---

<sup>100</sup> Former Rule 5 (A)(4), Rules of Procedure of the Judicial Inquiry Commission.

<sup>101</sup> Rule 11 (B)(1)(a), ABA Model Rules for Judicial Disciplinary Enforcement.

**Recommendation 2: The Court Should Vacate Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission Regarding Certain Communications Between Commission Members and Judges**

Commentary

Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission prohibits the Commission from having informal communications with a judge pertaining to a complaint following its dismissal unless such communications and their content are approved by a majority of the Commission at a duly called meeting. The Rule further provides that no lawyer member of the Commission shall be authorized to undertake any informal communications authorized by the Rule.

The Committee recommends that the Alabama Supreme Court vacate this Rule and adopt a rule on *ex parte* communications between Commission members and judges.<sup>102</sup> The intent of the Rule 17 is unclear to the team and its language vague.

---

<sup>102</sup> Rule 10, ABA Model Rules for Judicial Disciplinary Enforcement.

### **Recommendation 3: The Court Should Adopt a Records Retention Rule for the Judicial Inquiry Commission**

#### Commentary

The Rules of Procedure of the Judicial Inquiry Commission lack provisions regarding records retention. The team was advised that a proposed rule is pending before the Alabama Supreme Court. This proposed rule would provide that all dismissals by the Commission are dismissals “with prejudice” and that all files and documents relating to those matters must be destroyed.

The Committee recommends that the Alabama Supreme Court adopt a rule relating to the use of allegations in dismissed cases. That rule should provide that, if the Commission dismisses a complaint against a judge, the allegations made therein cannot be used for any purpose in any judicial or lawyer disciplinary proceeding against that judge.<sup>103</sup> However, the dismissal should not be “with prejudice.” If additional information comes to the attention of the Commission regarding a matter that has been dismissed prior to the filing of a complaint with the Alabama Court of the Judiciary, the Commission should have the discretion to reinvestigate the matter.<sup>104</sup> A judge should not be forever subject to possible disciplinary action based on a complaint that has been investigated and dismissed. However, if additional evidence is discovered that supports the allegations, reopening the matter to investigate further is appropriate.<sup>105</sup> The conduct of a judge, no matter when it has occurred, is always relevant to that individual’s fitness to remain on the bench.<sup>106</sup>

The ABA Model Rules for Judicial Disciplinary Enforcement contemplates that files from dismissed cases should not be immediately destroyed if they are to be effectively reinvestigated. The Committee recommends that the Court consider the records retention policy set forth in Rule 4 (B) (12) of the ABA Model Rules for Lawyer Disciplinary Enforcement. That Rule provides for the expunction of records or other evidence of the existence of complaints three years after the dismissal except for good cause shown.

---

<sup>103</sup> Rule 18 and Commentary, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Id.

#### IV. PROCEDURAL RULES: ALABAMA COURT OF THE JUDICIARY

##### **Recommendation 4: The Court Should Amend Rule 10 of the Rules of Procedure of the Alabama Court of the Judiciary to Require Respondent Judges to Testify**

###### Commentary

Rule 10 of the Rules of Procedure of the Alabama Court of the Judiciary provide that no judge may be compelled to give evidence against himself or herself unless the judge chooses to testify. If the judge chooses to testify, he or she is subject to cross examination.

The Committee recommends that the Alabama Supreme Court amend Rule 10 to provide that Disciplinary Counsel responsible for prosecuting the complaint before the Court of the Judiciary may call the respondent judge as a witness.<sup>107</sup> Disciplinary proceedings are not criminal proceedings. The respondent judge should not be able to refuse to testify. However, the judge can assert his or her Fifth Amendment protections when appropriate.<sup>108</sup>

---

<sup>107</sup> Rule 24 (C) and Commentary, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>108</sup> *Id.*

**Recommendation 5: The Court Should Amend the Rules of Procedure of the Alabama Court of the Judiciary to Require Judges to Answer the Complaint and Permit a Default When They Do Not**

Commentary

Rules 3 and 5 of the Rules of Procedure of the Alabama Court of the Judiciary provide that the respondent judge may file an answer to the complaint, pursuant to the Alabama Rules of Civil Procedure, within 30 days after its service. Rule 11 states that, regardless of “...the failure of any judge to file responsive pleadings or to appear, the court may proceed with the hearing...”

Judges should be required to answer the allegations filed against them before the Alabama Court of the Judiciary or to file any other appropriate responsive pleading.<sup>109</sup> The Alabama Supreme Court should require judges to do so as part of their duties as public officials. The judge should admit or deny each allegation set forth in the complaint. If he or she lacks knowledge or information to do so, he or she should so specify. The judge’s answer should also contain any affirmative or other defenses to the allegations of misconduct, including that the facts alleged do not constitute misconduct.<sup>110</sup>

A judge’s failure to answer should be construed as an admission of the factual allegations of the complaint.<sup>111</sup> The same should happen if the judge fails to appear for the hearing when ordered to do so. This is consistent with national practice.

---

<sup>109</sup> Rule 20, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>110</sup> *Id.*

<sup>111</sup> Rule 21, ABA Model Rules for Judicial Disciplinary Enforcement.

**Recommendation 6: The Court of the Judiciary’s Failure to “Convict” Within 10 Days Should Not Result In a Judge’s “Acquittal”<sup>112</sup>**

Commentary

Rule 16 of the Rules of the Alabama Court of the Judiciary requires “acquittal” of a judge if, after a trial the Court does not “convict” him or her within 10 days.<sup>113</sup> The Committee strongly recommends that the Alabama Supreme Court delete this provision. To permit a judge who committed misconduct to avoid the consequences of his or her actions because the Court of the Judiciary has not issued its order within 10 days is not protective of the public, jeopardizes judicial independence, and wastes valuable resources. The team is aware of no such provision in other states.

As the Court is aware, those few matters that have recently proceeded to trial before the Court of the Judiciary were highly contested, complex, and difficult. They involved allegations of serious misconduct and resulted in significant media coverage. The Court of the Judiciary should be given a reasonable amount of time to conduct its deliberations and issue thoughtful opinions. The Supreme Court can adopt time guidelines for the issuance of rulings and opinions by the Court of the Judiciary. These guidelines should be procedural and not jurisdictional.

The Committee was also concerned that this Rule requires a unanimous vote of all Court of the Judiciary members to remove a judge from office. This is unique to Alabama. While the Committee understands the seriousness of removing a judge from office, it is concerned that this requirement can undermine confidence in the system by limiting the Court of the Judiciary’s authority to impose a constitutionally authorized disciplinary sanction when merited. Under this Rule one member of the Court of the Judiciary can allow a judge who has committed serious misconduct to avoid any accountability for his or her actions when the eight other members of that tribunal conclude otherwise. The public will be skeptical of a system that allows a judge to remain on the bench when more than a majority of the Court of the Judiciary votes to remove him or her from office.

A judge can be charged with more than one count in a complaint, but it is not clear whether a unanimous vote of the Court of the Judiciary is required on every count before removal can be effected, or whether a unanimous vote on only one count of a complaint is sufficient. This ambiguity also risks allowing judges who have committed serious breaches of their ethical and public duties to escape accountability.

---

<sup>112</sup> These terms from the Rule relate to criminal proceedings, but judicial disciplinary proceedings are neither criminal nor civil.

<sup>113</sup> Id.

**Recommendation 7: Discovery In Matters Before the Court of the Judiciary Should Exclude Privileged Materials**

Commentary

Discovery in Court of the Judiciary proceedings is conducted pursuant to the Alabama Rules of Civil Procedure.<sup>114</sup> The consultation team recommends that the Alabama Supreme Court amend Rule 10 to specify that the Commission, Disciplinary Counsel, and the judge do not have to disclose material covered by applicable privileges, including the deliberative process, work product and attorney-client privilege. The parties should be required to exchange all other non-privileged evidence relevant to the complaint.<sup>115</sup> This information exchange should include the names and addresses of all persons with knowledge of the relevant facts.<sup>116</sup>

The liberal and prompt exchange of non-privileged material expedites the proceedings, and enables the respondent judge to prepare his or her defense. The respondent judge should be provided with all exculpatory evidence relevant to the charges against him or her.<sup>117</sup>

---

<sup>114</sup> Rule 10, Rules of Procedure of the Alabama Court of the Judiciary

<sup>115</sup> Rule 22 (B), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>116</sup> Rule 22 (A), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>117</sup> Rule 22 (C), ABA Model Rules for Judicial Disciplinary Enforcement.

## V. STRUCTURE

### **Recommendation 8: The Use of Assistant Attorneys General to Investigate and Prosecute Complaints Should be Eliminated**

#### Commentary

The Judicial Inquiry Commission was established as a permanent, independent entity under the judicial branch of government.<sup>118</sup> The Commission has the authority to appoint and direct its staff.<sup>119</sup> The Commission is staffed by the Executive Director, Assistant Executive Director, and Executive Secretary. There is no full time Disciplinary Counsel responsible for the investigation and prosecution of complaints.

The Commission has, in the past, had an Assistant Attorney General serve as part-time Disciplinary Counsel to investigate and prosecute complaints. The Commission has also used investigators from the Attorney General's Office. The team was advised that this practice recently ceased. The Commission now hires independent contract lawyers to serve as Disciplinary Counsel.<sup>120</sup>

The Committee recommends that the Court vacate Rule 15 of the Rules of Procedure of the Judicial Inquiry Commission to preclude staff of the Office of the Alabama Attorney General from investigating and/or prosecuting matters on behalf of the Commission. The Committee understands that, in addition to the requirements of Rule 15, past participation by the Office of the Attorney General was partially budget driven, and that the budget for the Alabama judiciary is in a tenuous state. Judicial branch budget crises are not unique to Alabama, and the team is highly sensitive to the current economic difficulties facing state judiciaries nationwide.<sup>121</sup> However, the executive branch of government should not be involved in the investigation and prosecution of judicial discipline cases. Additionally, a system that relies on other government agencies to investigate and/or prosecute complaints may endanger confidentiality and enhance inefficiencies and conflicts in the processing of cases.<sup>122</sup> The Commission has the constitutional authority to appoint and direct its staff. This should include having a staff lawyer to investigate and prosecute complaints as suggested in Recommendation 15 below.

---

<sup>118</sup> ALA. CONST. art. VI, § 156 (b).

<sup>119</sup> ALA. CONST. art. VI, § 156 (d).

<sup>120</sup> Rule 15, Rules of Procedure of the Judicial Inquiry Commission.

<sup>121</sup> See Recommendation 15 below.

<sup>122</sup> Commentary, Rule 4, ABA Model Rules for Judicial Disciplinary Enforcement.

**Recommendation 9: Term Limits for Judicial Inquiry Commission Members Should be Adopted**

Commentary

Article VI, § 156 (a) of the Alabama Constitution provides that Judicial Inquiry Commission members serve four-year terms.<sup>123</sup> The Standing Committee on Professional Discipline recommends term limits for members of the Judicial Inquiry Commission. Instead of being able to serve indefinitely, Commission members should be eligible for reappointment for one full second four-year term.<sup>124</sup> After the expiration of a second term, the appointing authority should seek to appoint new individuals. A member appointed for a term of less than four years, or appointed to fill the unexpired term of another Commission member should be able to be reappointed for two full terms.<sup>125</sup>

The team was advised that a number of Commission members have served in excess of four years, some in excess of eight. While this commitment to public service is admirable, terms of membership on the Commission should be long enough to promote consistency, but short enough to ensure the system benefits from new perspectives. New members need to be and can be educated about the process and what is expected of them.<sup>126</sup> The Discipline Committee is aware that a constitutional amendment to accomplish the establishment of term limits may be required.

Appointments to the Commission should not be made on the basis of politics or ideology.<sup>127</sup> To do so would jeopardize the Commission's independence and its necessary ability to function fairly, free of outside influence and in the public's interest.<sup>128</sup> Appointments should be made in a manner that ensures diversity of Commission membership. The team noted that currently no women serve on the Commission and there is only one African-American member.

---

<sup>123</sup> ALA. CONST. art. VI, § 156 (a).

<sup>124</sup> Rule 2 (D), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>125</sup> Id.

<sup>126</sup> See Recommendation 13 below.

<sup>127</sup> The same should be true of appointments to the Alabama Court of the Judiciary.

<sup>128</sup> Commentary, Rule 2, ABA Model Rules for Judicial Disciplinary Enforcement.

## VI. SANCTIONS

### **Recommendation 10: Automatic Disqualification With Pay May Not Be Necessary In All Cases**

#### Commentary

Article VI., Section 159 of the Alabama Constitution provides for the automatic disqualification of a judge, with pay, from his or her duties upon the filing of a complaint with the Alabama Court of the Judiciary. This disqualification acts as an interim suspension of the judge. The consultation team understands that this provision is intended to protect the public and the integrity of the judiciary. These are laudable goals.

However, because some or all of the allegations in the complaint filed before the Court of the Judiciary may be dismissed or subject a judge to only a lesser sanction, in appropriate circumstances a judge should not be removed. The current constitutional provision does not permit the Court of the Judiciary any discretion in these matters. It may be useful for the Alabama Supreme Court, the Court of the Judiciary, and the Judicial Inquiry Commission to consider whether this constitutional provision warrants amendment. Such amendment could set forth specific circumstances when automatic disqualification would be warranted. An example of an appropriate circumstance for automatic disqualification is found in the first part of Section 159, where a judge is charged with a crime punishable as a felony under state or federal law. When there is evidence that a judge charged with misconduct poses a substantial threat of serious harm to the public or to the administration of justice is another appropriate circumstance for automatic disqualification.<sup>129</sup>

---

<sup>129</sup> Rule 15 (C), ABA Model Rules for Judicial Disciplinary Enforcement.

**Recommendation 11: The Court Should Adopt a Rule Providing for Private Admonitions and Expand Rule 16 Permitting Deferred Discipline Agreements**

Commentary

When the Judicial Inquiry Commission finds a reasonable basis to believe that a judge has violated the Alabama Canons of Judicial Ethics, it may file a complaint with the Alabama Court of the Judiciary. That tribunal has the authority to impose public discipline after notice and a public hearing.<sup>130</sup> In some cases, however, a judge may have committed only minor misconduct where there is little or no injury to the public, the legal system or the profession. In these cases, where there is also little or no danger that the misconduct will recur, the Commission may not want to file a complaint before the Court of the Judiciary. For cases such as these, the Committee recommends that the Judicial Inquiry Commission be allowed to impose private admonitions.<sup>131</sup> A private admonition must be entered into with the judge's consent and execution of a waiver of a right to a hearing.<sup>132</sup> Private admonitions should be in writing.<sup>133</sup> If the judge does not agree to the issuance of a private admonition, the Commission should file charges with the Alabama Court of the Judiciary or dismiss the matter.<sup>134</sup> Private admonitions, like deferred discipline agreements addressed below, can only be entered into prior to the filing of a complaint with the Court of the Judiciary.<sup>135</sup> In many states, judicial conduct commissions can impose this type of private discipline. An amendment to the Alabama Constitution may be necessary to permit the Commission to take such action.

The Committee also recommends that the Alabama Supreme Court consider expanding Rule 16 to permit deferred discipline agreements in appropriate situations in addition to impairments or mental or emotional disorders. For example, some judges may not possess the managerial skills to properly manage their court call and/or staff. In these instances a judge might enter into a deferred discipline agreement with the Commission requiring that he or she participate in an educational program designed to remedy the problem.<sup>136</sup> A deferred discipline agreement does not constitute a finding that misconduct has been committed, and the Commission and the judge enter into the agreement prior to any finding by the Commission that a reasonable basis exists for filing a complaint before the Court of the Judiciary. Upon the judge's successful completion of the program the complaint is dismissed.<sup>137</sup>

---

<sup>130</sup> ALA. CONST. art. VI, § 157 (a).

<sup>131</sup> Rules 7, 17 (D) and Commentary, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>132</sup> Rule 17(D) and Commentary, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> Rule 7 and Commentary, ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>136</sup> Id.

<sup>137</sup> Rule 16, Rules of Procedure of the Judicial Inquiry Commission; Rule 17 (d) and Commentary, ABA Model Rules for Judicial Disciplinary Enforcement.

In the context of this recommendation, the Committee recommends that the Alabama Supreme Court vacate Rule 10 of the Rules of Procedure of the Judicial Inquiry Commission. New Rule 16 provides an appropriate, fair and thoughtful mechanism for resolving minor matters after the Commission's completion of its investigation and prior to a determination to file a complaint with the Court of the Judiciary. This is especially true if the Court expands Rule 16 as recommended above.

Rule 10 should also be vacated because it allows a judge under investigation the power to disrupt a pending investigation by requiring, at any time, that the entire Commission conduct a hearing to discuss the charge and attempt to resolve the investigation on terms to be presented to the Court of the Judiciary. The Rule does not limit the number of times a judge may require the Commission to conduct such a hearing during the pendency of an investigation. Allowing a respondent judge unfettered control over the Commission's proceedings is not appropriate, risks circumvention of or interference with the investigation, and appears to conflict with the provisions of the Alabama Constitution setting forth the powers of the Commission.<sup>138</sup> Such a practice is also not protective of the public nor is it a sound use of Commission resources. Recommendation 12 below sets forth a mechanism for the parties to negotiate discipline on consent once a complaint is pending before the Court of the Judiciary.

---

<sup>138</sup> ALA. CONST. art. VI, § 156 (b).

## **Recommendation 12: The Court Should Adopt a Rule Providing for Discipline on Consent**

### Commentary

Rule 10 of the Rules of Procedure of the Commission on Judicial Conduct provides that, at any time during the pendency of a charge, the judge may require the entire Commission to hold a hearing to discuss the charge and to attempt to resolve it on terms to be presented to the Alabama Court of the Judiciary via joint motion. The team understands the term “charge” to refer to the allegations in a complaint filed against a judge with the Court of the Judiciary.<sup>139</sup>

Rule 10 requires the Commission to hold a hearing on a matter when it is already pending before the Court of the Judiciary. This would seem to conflict with the jurisdictional provisions set forth in the Alabama Constitution for the Commission and the Court of the Judiciary.

As noted in Recommendation 11 above, the Committee recommends that the Alabama Supreme Court vacate Rule 10. The Committee recommends that the Court instead amend the Rules of Procedure of the Alabama Court of the Judiciary to provide for discipline on consent.<sup>140</sup> Allowing the parties to negotiate and submit a proposal to resolve a disciplinary matter consensually benefits all participants and the public. It allows for the prompt resolution of matters, conserves system resources and allows the judge to avoid a costly, public trial.

The Committee suggests that the rule provide that, at any time following the filing of a complaint with the Court of the Judiciary, counsel prosecuting the charges and the respondent judge should be able to negotiate an agreed disposition of the matter and present the proposed agreement to that tribunal for its approval.<sup>141</sup> The agreement should set forth sufficient facts, analysis, and citations to authority to enable the Court of the Judiciary to make an informed decision. The agreement should be accompanied by an affidavit executed by the judge stating that he or she is entering into the agreement freely and voluntarily, that he or she consents to the recommended sanction, and that the facts set forth in the affidavit are true.<sup>142</sup>

After a brief prove-up hearing on the petition for discipline on consent, because a public hearing is required under the Alabama Constitution, the Court of the Judiciary should approve or reject the petition for discipline on consent.<sup>143</sup> If it rejects the request for

---

<sup>139</sup> See, e.g., Rule 3 of the Rules of Procedure of the Court of the Judiciary referring to the allegations set forth in the complaint as “charges.” Similarly, Rule 5 (A) (1) and Rule 9 of the Rules of Procedure of the Judicial Inquiry Commission refer to a judge who has been publicly charged or “charges against a judge” to be filed with the Court of the Judiciary.

<sup>140</sup> Rule 23 (A), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>141</sup> Id.

<sup>142</sup> Rule 23 (C), ABA Model Rules for Judicial Disciplinary Enforcement.

<sup>143</sup> These short prove-up hearings could be held telephonically.

consensual resolution, the judge's admission should be deemed withdrawn and cannot be used against him or her in the proceedings.<sup>144</sup>

---

<sup>144</sup> Rule 23 (B), ABA Model Rules for Judicial Disciplinary Enforcement.

## VII. TRAINING AND FUTURE RESOURCE CONSIDERATIONS

### **Recommendation 13: All Members of the Judicial Inquiry Commission Should Receive Mandatory and Continual Training**

#### Commentary

The team was advised that, in large part, Judicial Inquiry Commission members receive on-the-job training. Training is vital to the effective and efficient operation of the system, and is especially important for the non-lawyer members of the Commission. The Committee recommends that the Executive Director develop a training manual for all Commission members as well as training programs specific to judicial discipline matters. Additionally, respondents' counsel can provide valuable insights to Commission appointees. The training manual and other materials should be made available to Commission members electronically and easily updated with recent cases.

Training helps to ensure consistency in and the expeditious resolution of disciplinary matters. Training should be mandatory for all new appointees and should occur at least every other year for all others. Training should stress the need for the Commission members to fulfill their duties in a timely manner so as to enhance the public's perception that the system is operating efficiently. Commission members should receive training and guidance with respect to substance abuse, gambling and mental health issues. These issues are raised with increasing frequency in judicial disciplinary cases.

The Committee also recommends that Commission members, the Executive Director, and contract Disciplinary Counsel attend the National College on Judicial Conduct and Ethics sponsored by the American Judicature Society's Center for Judicial Ethics. The National College provides a forum for judicial conduct commission members and staff, judges, and judicial educators to learn about current issues in judicial ethics and discipline.<sup>145</sup> Attendees have the opportunity to collect information and discuss current issues and problems in this area with leading experts, scholars and practitioners from across the country.

---

<sup>145</sup> <http://www.ajs.org/ethics/college.asp>

**Recommendation 14: The Judicial Inquiry Commission Should Increase Public Outreach**

Commentary

The judicial discipline system exists to protect the public and the integrity of the judiciary. As a result, the members of the Judicial Inquiry Commission owe a duty to the public, and to Alabama judges and lawyers, to advise them about the existence and operation of the Alabama judicial discipline process. Although there are outreach efforts to members of the judiciary, outreach efforts to the public are needed.

The public should be provided with the means to easily identify the agency as the appropriate office with which to file a complaint about judicial misconduct. One of the simplest ways to inspire confidence is to ensure that the agency is as accessible as possible to the public, lawyers, and judges. This includes enhancing the Commission's web site to enable complainants to download complaint forms. Information about the system should also be made available in locations such as public libraries and consumer organizations.

The Commission's web site currently includes a searchable data base of ethics advisory opinions. This is laudable. Complaints filed with the Alabama Court of the Judiciary and that tribunal's orders and opinions should be included. Additionally, when the Alabama Supreme Court seeks public comment on proposed amendments to the Rules of Procedure of the Judicial Inquiry Commission and the Alabama Court of the Judiciary, notice should appear on the Commission's web site along with downloadable copies of the proposed amendments. The Commission should post up-to-date Annual Reports on its web site. Unfortunately, the last Annual Report is for 2005. The team was advised that the Commission ceased producing an Annual Report after that date because its resources have been diverted to complying with the disclosure requirements of the Rules. Annual reports are vital to ensuring public trust and confidence in the system, and the Commission should reinstitute this practice.

The Committee was pleased to learn that the Commission members and the Executive Director make presentations at judicial education programs for judges throughout Alabama, and at judicial association meetings. The team hopes these efforts continue.

## **Recommendation 15: Future Resource Considerations**

### Commentary

The Executive Director and staff process inquiries and complaints, conduct legal research on and draft judicial ethics advisory opinions, coordinate Judicial Inquiry Commission meetings and are responsible for the day-to-day operation of the Commission's office. When requested by the Commission, the Executive Director may conduct other legal research, draft correspondence, and prepare publications and other materials for review and approval by the Commission. The Executive Director is not responsible for the investigation unless directed by the Commission. The Executive Director does not prosecute complaints before the Alabama Court of the Judiciary.

The Assistant Executive Director communicates with complainants and the public, copies and disseminates advisory opinions, prepares materials for Commission meetings, copies and mails Commission file materials in accordance with the strict requirements of the Rules of Procedure of the Judicial Inquiry Commission, and performs other administrative functions. This position is assisted by the Executive Secretary

There is no full-time professional Disciplinary Counsel responsible for the investigation and prosecution of complaints and formal charges. An Assistant Attorney General used to serve as part-time disciplinary counsel to investigate and prosecute complaints.<sup>146</sup> As noted above, that practice has ceased; contract lawyers serve as Disciplinary Counsel. In the past, the Commission has employed the services of a contract investigator or used investigators from the Attorney General's Office as needed.

The Executive Director's office spends significant time and resources complying with the burdensome disclosure obligations set forth in the Rules of Procedure of the Judicial Inquiry Commission. Any investigatory duties performed by the Executive Director are minimal and done at the Commission's direction. Based upon interviews and its review of files, the team concluded that too often the Commission relies on only the complaint and judge's response in determining how to proceed. The Commission needs the services of a professional investigator. A professional investigator can review complaints not screened out by the Commission and advise the Commission as to what should be investigated. The investigator will perform those services and report the results. The team understands that there are serious budget constraints facing the Alabama judiciary. Implementing Recommendation One should free up some funds currently expended on compliance with the disclosure rules that could be used to retain an investigator's services.

The Committee strongly believes the use of contract Disciplinary Counsel is not desirable. The system should retain at least one professional staff person responsible for the investigation of complaints and presentation of cases to the Court of the Judiciary.<sup>147</sup>

---

<sup>146</sup> Rule 15, Rules of Procedure of the Judicial Inquiry Commission.

<sup>147</sup> Rule 4, ABA Model Rules for Judicial Disciplinary Enforcement.

If the Committee's recommendations to eliminate the burdensome and unnecessary disclosure obligations described above are implemented, and the system returns to the practice of accepting anonymous complaints, it is highly likely that the Commission's case load will increase. A dedicated Disciplinary Counsel will assist in improving the effectiveness and efficiency of the system and lessen the burden on the Commission members.

The Committee suggests that, upon improvement of the economy and the budget for the Alabama judiciary, funds be made available for the Commission to hire a Disciplinary Counsel. Whether this position needs to be full or part-time can be determined by the Commission. If a part-time Disciplinary Counsel is hired, steps should be taken to ensure that that lawyer does not have a conflict.<sup>148</sup> Disciplinary Counsel should screen and investigate complaints, as well as file and prosecute formal charges. Disciplinary Counsel should not be removed from office absent the concurrence of the Commission and the Court.<sup>149</sup> The Court should adopt a rule setting forth Disciplinary Counsel's duties and powers.<sup>150</sup>

The roles of Disciplinary Counsel and the Executive Director for the Commission should continue to remain distinct. The Executive Director maintains a close advisory role with the Commission. The role of Disciplinary Counsel requires independence.

---

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Id.

## **VIII. CONCLUSION**

As noted throughout this Report, the consultation team was impressed by the dedication of the Court, the volunteers and the professional staff of the disciplinary agency. The Standing Committee on Professional Discipline hopes that the recommendations contained in this Report will assist the Court, the discipline system, and the people of the State of Alabama.

As part of the discipline system consultation program, the Committee is available for further consultation with the Court. The Committee recommends that the Court make this Report available for public review.

## **APPENDIX A**

**ABA STANDING COMMITTEE  
ON PROFESSIONAL DISCIPLINE  
ALABAMA JUDICIAL DISCIPLINE SYSTEM CONSULTATION  
TEAM MEMBERS' BIOGRAPHIES**

**DAVID S. BAKER** is Chair of the ABA Standing Committee on Professional Discipline. He was a partner with Powell Goldstein, L.L.P. in Atlanta, Georgia, where his practice was concentrated corporate and business law, and in the representation of health care providers until 2008 when he joined the firm of Taylor English Duma LLP. He has served as Chair of the ABA General Practice Section (1986-1987) and the Standing Committee on Environmental Law (1993-1996). A former member of the ABA House of Delegates (1987-1990), Mr. Baker also formerly served on the ABA Board of Elections and the Committee on State Justice Initiatives. Mr. Baker was a member of the Board of Visitors of the Terry Sanford Institute of Public Policy at Duke University. Recently, he was elected to the board of his Amelia Island condominium as Vice President and Secretary. He is a graduate of the Harvard Law School and is licensed to practice law in Georgia and formerly in New York.

**JOHN S. GLEASON** is Regulation Counsel, Colorado Supreme Court, where he directs the office responsible for the regulation of Colorado attorneys and magistrates and the prosecution of unauthorized practice of law matters. He also serves as counsel to the Colorado Supreme Court Attorneys' Fund for Client Protection, State Board of Law Examiners, and as special counsel for the Commission on Judicial Discipline. Prior to his appointment as Regulation Counsel to the Supreme Court, he served as a senior trial lawyer and Deputy Regulation Counsel. He previously served with the Allen County Prosecutor's Office and was in private practice with a law firm in Denver for several years. He is currently President of the National Client Protection Organization. He attended Bowling Green State University and earned his law degree from Ohio Northern University Pettit College of Law.

**HON. BARBARA KERR HOWE** is immediate Past-Chair of the ABA Standing Committee on Professional Discipline. She was an Associate Judge of the Circuit Court for Baltimore County, Maryland, and now serves in "senior status" throughout the courts in Maryland. After her appointment in 1988, she was elected to the bench in 1990 for a fifteen-year term. She served as a director of the Attorney Grievance Commission of Maryland from 1983-1985 after having served on its Inquiry Panels for a number of years. She was a member of the Judicial Disabilities Commission of Maryland from 1991 through 1995 and its Chair during 1995. She is a graduate of the University of Maryland Law School and was a partner in a law firm engaged in general practice.

She was President of the Maryland State Bar Association, 1996-1997, a member of the ABA Standing Committee on Professionalism from 1995-1998, chair of the Professionalism and Professional Responsibility Committee of the ABA General Practice Solo and Small Firm Section, a member and director of the American Judicature Society, and the National Association of Women Judges. She is a life fellow of the Maryland Bar Foundation and of the American Bar Foundation.

**ARNOLD R. ROSENFELD** is Of Counsel in the Boston Office of the international law firm of K & L Gates LLP. Mr. Rosenfeld presently focuses his law practice on complex civil and criminal litigation in state and federal courts. He frequently represents lawyers in bar discipline matters and advises lawyers and law firms on legal ethical issues.

Prior to joining K & L Gates, Mr. Rosenfeld served as the Chief Bar (Disciplinary) Counsel of the Board of Bar Overseers of the Supreme Judicial Court in Massachusetts for eight years and as the first Chief Counsel of the Massachusetts Committee on Public Counsel Services, the state public defender organization. He has been lead counsel in over fifty jury trials and written briefs and argued over thirty appellate cases in the state and federal courts.

Mr. Rosenfeld is a Visiting Professor of Law at Boston University Law School. He is the author of numerous law reviews. He presently serves as a member of the Strategic Planning Committee of the ABA Center for Professional Responsibility, and was a member of the ABA Standing Committee on Professional Discipline for three years. Mr. Rosenfeld also served as a member of the Massachusetts Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct and was appointed by the Supreme Judicial Court to the Massachusetts Committee for Public Counsel Services.

Mr. Rosenfeld is an elected member of the American Law Institute. He has been selected by his peers for inclusion in the Best Lawyers in America since 2006. In 1997, Mr. Rosenfeld was named the Wasserstein Public Service Fellow in Residence at Harvard Law School and, in 2001, he was the recipient of the St. Thomas More Award from Boston College Law School. In 2005, he was selected as an Inaugural Fellow of the National Institute for Teaching Ethics and Professionalism and, in 2008, he was honored with the Thurgood Marshall Award for Outstanding Service by the Committee for Public Counsel Services. He is a cum laude graduate of Bowdoin College and received his J.D. from Boston College Law School.

**MARY M. DEVLIN** is Regulation Counsel, American Bar Association Center for Professional Responsibility, where she directs the Association's efforts in improving lawyer and judicial disciplinary enforcement for the ABA Standing Committee on Professional Discipline. She served as counsel to the ABA Standing Committee on Amicus Curiae Briefs for eleven years. She has been involved in professional ethics and discipline for over twenty-five years, previously serving as counsel to the American Medical Association's Council on Ethical and Judicial Affairs. She is the author of over 50 articles, including "The Development of Lawyer Disciplinary Procedures in the U.S.," published in the Georgetown Journal of Legal Ethics. Her J.D. from I.I.T. Chicago-Kent College of Law was with honors. She received an LL.M. from DePaul University College of Law in 1996. She has a master's degree in library science from Dominican University and a master's degree in history from the University of Illinois at Chicago. She is a Life Fellow of the American Bar Foundation.

**ELLYN S. ROSEN** is the Associate Regulation Counsel at the American Bar Association Center for Professional Responsibility, where she serves as counsel to the ABA Standing Committee on Professional Discipline and the ABA Task Force on International Trade in Legal Services. She also serves as staff liaison to the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers. Previously, she was a senior litigation counsel with the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, where she investigated and prosecuted allegations of lawyer misconduct for six and one-half years. Ms. Rosen co-chaired the Chicago Bar Association's Young Lawyers Section Professional Responsibility Committee, for the 1997-98 through 1999-00 bar years. Since 2000, she has served as an investigator and interviewer for the Alliance of Bar Associations for Judicial Evaluations. The Alliance of Bar Associations consists of the Illinois State Bar Association and ten special interest bar associations that evaluate candidates for election and appointment to the bench in Illinois. She received her J.D. with honors from the Indiana University School of Law in Bloomington, Indiana.