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(the lawyer's) only safe guide;
the only torch to light his way
amidst darkness and
obstruction.*



The Current Status of Judicial Accountability

By J. Douglas McElvy

By a 2005 order of the Alabama Supreme Court and in conjunction with the Alabama State Bar, the Chief Justice's Commission on Professionalism was established. The mission of the commission, as stated in its charter, is to "support and encourage judges and lawyers to aspire to and to exercise the highest levels of professional integrity in their relationships with litigants, lawyers and their clients, the courts and the public." Consisting of judges, citizens, law school deans, the state bar president, and others, the commission's desire is to promote public confidence in our legal system by ensuring integrity, professionalism and high ethical standards in the legal profession, including the Alabama judiciary. Former Chief Justice Drayton Nabors was appointed as chairman.

In 2007, Chief Justice Sue Bell Cobb asked the Commission on Professionalism to review the Rules of Procedure of the Judicial Inquiry Commission ("JIC"). These rules were originally promulgated by the court in 1975 but were substantially amended in 2001. In conjunction with this review, the Commission on Professionalism was to consider the JIC's suggested modifications to the 2001 amendments, which had been submitted to the supreme court's "Standing Advisory Committee on Rules of Procedure for the Court of the Judiciary and the Judicial Inquiry Commission" after its creation in 2002. After reviewing the original rules, the 2001 amendments and the JIC's proposals, the Commission on Professionalism made a number of findings and recommended the adoption of the JIC's suggestions. In addition, the Commission on Professionalism urged the supreme

court to hold public hearings on proposed changes to the rules. As of this date, the Standing Committee on Rules of Conduct and Canons of Judicial Ethics is reviewing the recommendations of the Commission on Professionalism and the proposed modifications made by the JIC. This article is designed to shed light on the status of the rules addressing judicial accountability, the inadequacy of those rules and the need for substantial modification of those rules.

Judicial Responsibility to the Public

It is most fitting for the Alabama bench and bar to periodically review the mechanisms in place to ensure the public of the integrity and independence of its judiciary. Alabama took the lead in promoting professionalism in the bar when, in 1887, the *Alabama Code of Ethics* became the model for the ABA *Code of Professional Responsibility* and subsequent state bar codes of ethics. The *Alabama Code of Ethics* was written by Thomas Goode Jones, who not only served as a federal judge but also as governor of the State of Alabama and as president of the Alabama State Bar. The *Code of Ethics* quoted George Sharswood:

There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising . . . High moral principle is [the lawyer's] only safe guide; the only torch to light his way amidst darkness and obstruction."¹

These words, written in 1854, remain no less important and applicable today to our legal profession and legal system. Lawyers and judges serve a crucial and critical role in American democratic life. They are entrusted with the stewardship of America's rule of law. They must be worthy stewards.

Lawyers and judges have an obligation to wisely govern themselves. The Alabama State Bar is committed to an effective and rigorous system of regulating its members. Plus, pursuant to constitutional authority, the Supreme Court of Alabama formulated the Canons of Judicial Ethics to govern judicial conduct. Canon 1 states, "An independent and honorable judiciary is indispensable to justice in our society." Canon 1 further requires judges to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. Our supreme court has made it clear as to why a rigorous enforcement of the Canons of Judicial Ethics is necessary.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. Therefore, he must accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

Commentary to Canon 2.

In 1983, the court affirmed the importance of judicial integrity and responsibility by stating in one of its opinions, "*Noblesse oblige*—From one to whom much is given, much is expected."²

Public confidence is essential for the proper functioning of our legal system. A civilized society cannot function without public confidence in the rule of law. As the court noted in *Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee*:

The Preamble to the American Bar Association's *Model Rules of Professional Conduct* provides that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Lawyers must be aware of the duty owed to the public, the judicial system and the bar. Every applicant for admission to the bar takes a solemn oath "to truly and honestly demean myself in the practice of my profession to the best of my skill and abilities, so help me God."

Tenn. Sup.Ct. R. 6 (2007)

No. M2007-01562-SC-R3-BP,
2008 WL 2687436, at *14 (Tenn.
July 10, 2008).

It has been postulated that a judicial system without accountability will ultimately become a corrupt judicial system. As the Alabama Court of the Judiciary recently observed, "Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions."³

Regulating the Judiciary

Prior to 1972, the only method for discipline and removal of state judges in Alabama was by impeachment.⁴ In January 1972, the voters of Alabama overwhelmingly approved a new method for disciplining state judges by creating the Alabama Judicial Commission. The Judicial Commission had the authority to investigate allegations of judicial wrongdoing, conduct hearings, adjudicate facts and accountability and make final recommendations to the Alabama Supreme Court, i.e., carrying out both the investigative and adjudicative functions in one body. In 1973, Alabama's entire judicial system was revised with the ratification of the Judicial Article.⁵ Amendment 328 of the Alabama Constitution separated the investigative and adjudicative functions, thereby creating a

completely new, two-tiered system of judicial discipline. The legislature and the people of Alabama gave the investigative function solely to the JIC and the adjudicative function to the Court of the Judiciary.

Under this two-tiered system, currently in effect, the JIC is "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" and to:

file a complaint with the Court of the Judiciary in the event that a majority of the members of the Commission decide that a reasonable basis exists (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties.⁶

Furthermore, "[a]ll proceedings of the commission shall be confidential except the filing of a complaint with the Court of the Judiciary."⁷ The Court of the Judiciary, also created by Amendment 328, is charged with the adjudicative responsibility to publicly hear and decide complaints filed by the JIC and is authorized to impose sanctions for violation of a canon, judicial misconduct or failure to perform his or her duties. Sanctions may include removal from office and suspension or retirement of a judge who is physically or mentally unable to perform his or her functions.⁸ Amendment 328 also authorized the supreme court to adopt rules "governing the procedures of the Commission" and also rules "governing the procedures of the Court of the Judiciary."⁹ The court adopted such procedural rules for the Court of the Judiciary on March 11, 1974 and for the JIC on April 25, 1975.

Amendment 328 and the original procedural rules for the JIC envisioned a simple, efficient process to handle complaints, investigations and, if necessary, prosecution of inappropriate conduct by judges—a process that was fair to any judge who was the subject of a complaint. The process also promoted public confidence in the integrity and independence of the judiciary. The original rules for the Court of Judiciary and for the JIC were not weighted in favor of or against those accused of inappropriate conduct, but were considered fundamentally fair so as not to stifle complaints, impede investigations or hinder prosecutions.

In the 26 years of the JIC's existence prior to the 2001 amendments, thousands of inquiries were made to the JIC but only 3,939 inquiries resulted in the filing of formal complaints before the JIC. Obviously, the vast majority of inquirers did not pursue their concerns after gaining information from the JIC's staff about judicial ethics, the JIC's authority and the requirements for a complaint. Of the inquiries that resulted in formal complaints, only 27 complaints progressed to charges being filed with the Court of Judiciary. This represents only 68 percent of the formal complaints filed by the JIC before the Court of the Judiciary. The 1975 rules for the JIC enabled the JIC to expeditiously handle the numerous frivolous or unfounded inquiries or complaints and to fairly handle complaints that necessitated further inquiry or warranted actual charges being filed with the Court of the Judiciary.¹⁰

2001 Amended Rules

The JIC and the Court of the Judiciary operated under their original respective procedural rules for 26 years until October 9 and 10, 2001, when the Alabama Supreme Court substantially amended the rules of the JIC and the Court of the Judiciary. These amendments were without notice or opportunity for comment from the bar, the judiciary, the public or even the supreme court's own Standing Committee on Rules of Conduct and Canons of Judicial Ethics. The JIC and then Attorney General Bill Pryor immediately asked the court to reconsider its amendments and filed specific objections. Those objections asserted that several of the amendments were substantive rather than procedural and thus beyond the court's constitutional authority, that other fundamental changes were in direct contravention of the constitutional provisions, and that the court expanded its jurisdiction beyond that conferred by the constitution. Former Governor Albert P. Brewer, former Chief Justice C.C. "Bo" Torbert and individual judge members of the JIC joined in General Pryor's request for reconsideration.

The court made no changes to its 2001 amendments to the JIC's rules and to date, to my knowledge, has not ruled on General Pryor's request. However, on February 1, 2002, the court issued an order establishing the "Standing Advisory Committee on Rules of Procedure for the

Court of the Judiciary and the Judicial Inquiry Commission" to review the amended rules, all motions and comments on file with the court relating to said rules and any additional input the Advisory Committee deemed appropriate. The supreme court also authorized the committee to advise the court on appropriate action with respect to such matters. That Advisory Committee, whose members were appointed February 25, 2002, held at least two public hearings and met a number of times. However, to my knowledge, the Advisory Committee has not publicly disclosed any of its work product or its recommendations, if any, made to the court.

Almost six years later, on November 29, 2007, the court appointed new members to the Standing Committee on Rules of Conduct and Canons of Judicial Ethics (which had been established December 30, 1975). The court charged that standing committee to review the Rules of Procedure of the JIC and the rules of the Court of the Judiciary and to make recommendations to the court. Considering this history it seems clear that, by creating the Standing Advisory Committee on Rules of Procedure for the Court of the Judiciary in 2002 and by charging the Standing Committee on Rules of Conduct and Canons of Judicial Ethics in 2007 to also review the rules, the court has expressed intent to reconsider its 2001 amendments. However, no action has been taken yet by the court. The time has come for the supreme court to revisit the question of whether the 2001 amended rules provide the best vehicle to accomplish the constitutional mandates of Amendment 328.

The Need for Review

As argued by Attorney General Pryor in his request for reconsideration, the 2001 amendments changed the rules substantially. It is now more difficult for a citizen to file a meritorious complaint and for the JIC to consider such a complaint. As structured, the existing rules may give the appearance of favoring the individual judge while seemingly ignoring the integrity of the judiciary as an institution.

A most glaring example is the amendments' disregard for the clear mandate of confidentiality in the investigative process, a linchpin of Constitutional Amendment 328. The constitution wisely mandates confidentiality in the investigative process

before the JIC with a view toward protecting the identity of complainants who may be party litigants, witnesses, attorneys, fellow judges, or court employees. Citizens were to have direct, uninhibited access to judicial disciplinary procedures without fear of reprisal.¹¹ Just as importantly, the confidentiality provision protected the reputation of a judge from unfounded assertions and shielded the judge from public and political exposure. Prior to the 2001 amendments, the JIC was prohibited from any disclosure that would identify the name, position and/or address of any judge, complainant or other person involved in any inquiry before the JIC.¹² In addressing any complaint of apparent substance, the JIC provided (and still provides) a judge under investigation with every opportunity to address the allegations by informing the judge of the substance of those allegations and inviting the judge to meet with the JIC and discuss the allegations. However, under the "old" rules, the complaining party was not identified.

The constitutional mandate of confidentiality in the investigative stage of the process is similar to the work of a grand jury.¹³ However, unlike a grand jury, the JIC must now, pursuant to the 2001 amendments, follow a cumbersome and

expensive procedure for considering even the most seemingly unfounded complaints or accusations made to the JIC. First, under Rule 6.A., the JIC can no longer "initiate complaints," as explicitly provided for in Article VI, Section 156(b). Ignoring the issue of confidentiality mandated by Article VI, Section 156(b), the 2001 amended rules now require the JIC to serve the judge, who is the subject of the complaint, with a copy of the complaint along with "all documents, photographs, tape-recordings, transcripts, notes, and other materials of any nature whatsoever constituting, supporting or accompanying the complaint."¹⁴ This must be accomplished within ten days of receipt of a verified complaint. The verification is a new requirement under amended Rule 6.A.).

Contrary to the constitutional provision that the JIC is "convened permanently with authority to conduct investigations,"¹⁵ the JIC then must meet within 42 days from the date the complaint is filed and determine whether or not to investigate the complaint.¹⁶ A majority of all members of the JIC, rather than a quorum, must vote to investigate even though Article VI, Section 156(b) requires a vote by a majority of the JIC's members only

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for charges to be filed with the Court of the Judiciary.¹⁷ Within ten days of instituting an investigation, the JIC must notify the judge who is the subject of the complaint of the initiation of the investigation, accompanied by a full description of the conduct to be investigated along with all information and materials in the possession of the JIC.¹⁸

The JIC is under further obligation, every four weeks after serving notice of the commencement of an investigation, to provide to the judge all additional information and materials of whatsoever nature in the possession of the JIC and a statement of whether it then intends to continue the investigation.¹⁹ Failure to disclose the complaint and all information and materials accompanying that complaint (within ten days of receipt), or failure to disclose instigation of an investigation and all information and materials in the JIC's possession at the times required bars the continuation of the investigation and requires the dismissal of the complaint with prejudice.²⁰ For example, if the JIC's staff inadvertently fails to notice a slight malfunction of the copier machine while copying a bulky complaint, resulting in the failure to serve one page of the bulky complaint on the judge, the complaint is rendered null and void, requiring dismissal with prejudice, without any showing whatsoever of prejudice to the judge. Likewise, failure to strictly meet any of the rigorous time requirements bars the continuation of the investigation and requires the dismissal of the complaint with prejudice.²¹

Such a result occurred when the staff mistakenly served another judge who had the same name as the judge who was the subject of the complaint, except the served judge had a different middle initial and a one-letter difference in his surname. By the time the staff was notified of the error, the ten-day period had expired. The complaint, on its face, presented a *prima facie* ethical violation. However, due to an inadvertent error, that complaint can never be reviewed by the JIC.

If the JIC fails to provide investigative materials every four weeks during an investigation, the judge can request the information required and the JIC has seven days to comply or any prosecution for the conduct being investigated will be barred.²² These requirements fail to recognize or give credence to the confidentiality of the JIC proceedings by requiring the

JIC to serve the judge with a copy of the complaint filed against him or her, thereby revealing both the identities of the complainants and all witnesses in support of the allegations and the results of the JIC's investigation before any formal complaint has been made to the Court of the Judiciary. The potential publicity of this type of information before violations are reasonably substantiated by the JIC can be damaging to the reputation of the judge involved, invites political manipulation and certainly has an impact on the credibility and integrity of the profession.

Similar observations are applicable to the 2001 amendments regarding the JIC's authority under Article VI, Section 156(d), to issue subpoenas. Subpoenas can now be issued only upon the affirmative vote of the majority of all of the members of the JIC, rather than a quorum, taken at a duly called meeting of the JIC.²³ The amended rules provide that, prior to or simultaneously with the serving of a subpoena, the JIC must also serve the subpoena on the judge under investigation.²⁴ Failure to abide by these provisions results in a complete bar to the admissibility of all information and materials sought by the subpoena, obtained in response to the subpoena and discovered as a result of information or material obtained in response to the subpoena.²⁵

In a nutshell, the 2001 amendments took away the JIC's constitutional authority to initiate a complaint. Upon receipt of a complaint, the JIC has a ten-day window to provide the judge who is the subject of the complaint, not only with the complaint, but also with all names and materials associated with the complaint. Now the JIC must meet within 42 days and determine, by majority of the entire commission rather than a quorum, whether to investigate. After a ten-day notice, the JIC must provide the judge with any documents and/or information uncovered in its investigation. If these timelines are not strictly met, the complaint must be dismissed with prejudice. After deciding to investigate and notifying the judge of this decision, the JIC then, every four weeks, must provide the judge with a statement as to whether the JIC will continue the investigation and, again, all new materials received by the JIC as part of the investigation must be provided to the judge. If the JIC fails to provide investigative materials every four weeks during an investigation, the judge can

request the information required and the JIC has seven days to comply or any prosecution for the conduct being investigated is barred. The JIC must also serve every subpoena on the judge before or simultaneously with its serving of the subpoena in order to avoid having any resulting evidence excluded.

The Original Rules Revisited

Prior to the 2001 amendments, the JIC had a reasonable and traditional procedure for carrying out its constitutional responsibilities to investigate that allowed unfounded complaints to be disposed of quickly, efficiently and with complete confidentiality. Under that procedure, the JIC dismissed most complaints as obviously frivolous or unfounded. Now any complaint must be served on the judge. Prior to the amendments, the JIC efficiently disposed of such meritless complaints without notification to the judge and without investigation. Between the JIC meetings, the chairman with the concurrence of the executive committee could authorize the institution of investigations and the issuance of subpoenas. This mechanism allowed the JIC to dispose of its constitutional duties in a timely and efficient manner.

For example, in regard to a complaint that a judge rendered a default judgment for failure to appear when allegedly the judge had not issued an order for the hearing, the Executive Committee under the pre-2001 rules could have authorized the JIC's executive director to ask the circuit clerk for the routine docketing information. If the judge had in fact issued a scheduling order, the JIC could have dismissed the complaint without further investigation. However, under the 2001 amendments, after receipt of a complaint, the complaint must be served on the judge within ten days. Then, a majority of the JIC must meet within 42 days and vote to investigate and direct that the simple question be asked of the circuit clerk or that a case action summary be obtained. Within ten days of the vote to investigate, the judge must be served with notice of "an investigation," even though the "investigation" may consist merely of one question to the circuit clerk or the procurement of a case action summary. Then, the answer to the sole question is presented to the entire JIC at the next meeting, which must be held within another 42 days and will be

the JIC's first opportunity to consider the merits of the simple allegation. Any attempt to obtain the single necessary fact before the vote for investigation results in an unauthorized investigation that renders the complaint null and void under Rule 6.B.

Noncompliance with the 2001 amended rules could result in the dismissal on procedural grounds of serious and substantial questions involving a judge's ethical conduct. Complaints alleging a judge's importation of marijuana, coercing a divorce litigant to have a vasectomy, promising favorable treatment in litigation in exchange for sexual relations with a litigant, sexual abuse of a child at a judicial conference, or inappropriate physical contact during *ex parte* meetings with juveniles appearing before a judge could be dismissed with prejudice simply because a time requirement was not met. Each of the above allegations constituted an actual charge the JIC has filed with the Court of the Judiciary. Each charge resulted in either resignation or suspension without pay until the expiration of the term of office.²⁶ It is sobering to consider what allegations might be permanently barred from investigation but for the vigilance of the JIC and its staff of three.²⁷ If the notification, discovery and stringent time requirements, along with the severe result of dismissal with prejudice for failure to meticulously follow each requirement, result in the dismissal with prejudice of a serious case of wrongdoing, such as those noted above, the public could not be expected to understand or accept the judiciary's failure to police itself.

Due to the onerous notice and open discovery provisions of the amended rules for the JIC, both the design and purposes of the confidentiality provisions of Article VI, Section 156 of the constitution are emasculated. The purposes of the constitutional provision are to promote judicial accountability and public safety, ensure an excellent judicial system and give the public confidence in our courts, judges and legal system. These important objectives are also recognized in the comments to the Canons of Judicial Ethics.²⁸ Yet, these principled objectives are diluted by the tedious and overbearing provisions of the 2001 amended rules. This state's citizens and its legislature, via Amendment 328, deliberately divided the disciplinary

process between two entities, separating the investigative and adjudicative functions to protect both the integrity of the investigative process and the due process rights of the judge during the adjudicative process. Under Amendment 328, confidentiality was required during the investigation by the JIC and public access was required during the adjudicative process in the Court of the Judiciary.²⁹

Just and Efficient Procedures

The amended rules are unique among the judicial disciplining processes in all other states in numerous respects, but especially in regard to their notice and disclosure provisions and the consequences of a violation of those rules, i.e. (1) providing not only notice of the filing of a complaint, but a copy of the actual complaint and all



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accompanying materials, thereby obviously informing the subject judge of the identity of the complainant(s) and supporting witnesses; (2) providing notice of the investigation and its substance; (3) requiring that the JIC maintain complete, open discovery during the entire investigation; and (4) mandating dismissal with prejudice of any violation of those provisions as to service of the complaint and of the notice of instigation of investigation, regardless of any egregious nature of the complaint's allegations or the absence of any prejudice to the judge.³⁰

It is unparalleled for a purely investigative body—whether a grand jury or a judicial conduct investigative commission—to give a person suspected of wrongdoing advance notice of an accusation and investigation, including the names of witnesses and informants as well as all evidence produced during the investigation while that investigation is pending.³¹ The implications of such a rule are clear. First, it provides the opportunity for the subject of the complaint to intimidate witnesses, destroy evidence and obfuscate the effectiveness of an investigation. Additionally, statistics suggest that, since the court's adoption of the amended rules, the notice provisions are stifling the filing of complaints by litigants, users of the court systems, attorneys, fellow judges, and court personnel. Statistics support the facts since the court's adoption of the amended rules, inquiries to the JIC have decreased 16 percent and the filing of complaints has decreased approximately 37 percent.³²

While it is understandable that the subject judge or anyone else might like to know if a complaint is pending, the real question should be whether that desire to know should trump the constitutional and practical purposes of the confidentiality provision? When measured by the constitutional requirement of confidentiality, the notification and open discovery provisions are inordinate and simply improper. From the practical standpoint, citizens are reluctant to complain when they know the judge will be informed of their identity.³³ In addition, the investigation becomes unnecessarily more burdensome, complicated and expensive, providing the person accused of wrong conduct the opportunity to destroy or affect the integrity of potential evidence, e.g. intimidate witnesses, backdate orders and emulate seemingly rehabilitative behavior.

In reality, it seems the unforgiving notice requirements and technicalities required by the 2001 rules are more likely to protect those few judges who are engaging in particularly egregious conduct. As indicated earlier, the JIC has complied with its constitutional charge by investigating allegations, many of which have ultimately been made public by the filing of charges in the Court of the Judiciary, dealing with sexual misconduct, a wide range of criminal activity and other serious conduct. In contrast, the unfounded and frivolous accusations against judges—the vast majority of the complaints—are now more difficult to summarily dispose of. Contrary to the constitutional directive that the JIC be convened permanently and despite the constitutional authority to initiate complaints, the JIC's chair cannot even direct the JIC's director to make a simple telephone inquiry without the JIC first receiving a verified complaint and then meeting to vote to initiate "an investigation."

Because of the 42-day requirement for the JIC's decision whether to investigate a complaint and the requirement that only a majority of its members may approve the issuance of a subpoena, the JIC has increased its meeting frequency from bimonthly to approximately monthly without a corresponding increase in the budgetary resources of the JIC to pay the actual travel expenses of its members and a stipend for its non-judicial members, as required by Section 12-6-1, *Code of Alabama* (1975).³⁴ In 2000, the JIC had the ability to limit, and did in fact limit, the number of meetings per year due to budgeting constraints. This is no longer possible. However, even more fundamental is the effect the restriction has had on the flexibility necessary to effectively and efficiently carry out and manage the JIC's business. Finally, and possibly most perplexing, is the requirement that a subpoena be issued only upon the vote of a majority of the entire the JIC. As is obvious, the need for specific subpoenas ordinarily arises in the course of the investigation, yet under Rule 9, the JIC's prosecutor must wait for a duly called meeting to submit specific subpoena requests.

In October 2001, the same month the supreme court amended the JIC's rules of procedure, the court also made significant changes to the procedural rules for the Court of the Judiciary. The Court of

the Judiciary, the adjudicative body, acts only after the JIC has investigated a complaint and filed a formal charge with the Court of the Judiciary. At that point, the proceedings of the Court of the Judiciary become public. It is not the purpose of this article to review the rules related to the Court of the Judiciary or the October 2001 amendments thereto. However, it is noteworthy that the rules were changed to require "conviction" of a judge only with the concurrence of no fewer than six of its nine members, and to allow removal from office only with the concurrence of *all* of the members of the Court of the Judiciary.³⁵ The current rule further provides that a failure to "convict" within ten days after the conclusion of the hearing constitutes an "acquittal."³⁶ While the investigations of the JIC and the proceedings of the Court of the Judiciary are not designed to be and are separate and apart from criminal proceedings, the supreme court uses terms such as "acquittal" and "conviction." Such terms are generally reserved for criminal or quasi-criminal proceedings. If the supreme court does view the proceedings as criminal or quasi-criminal in nature, then the requirements to notify a judge immediately upon a suggestion of wrongdoing and prior to the commencement of an investigation seem even more out of place.

Conclusion

The Commission on Professionalism noted several deficiencies in the JIC's procedural rules and urged the Supreme Court of Alabama to expeditiously revisit the current rules of procedure. Provisions in the current rules, in which investigations become null and void and are dismissed with prejudice for failure to comply with technical limitations, certainly give the perception that the rules exist to protect judges. This article is not designed to provide a technical examination of the current rules or suggested changes, but to identify the problems encountered by the JIC, the public, litigants and attorneys and the difficulties they face in filing complaints with the JIC.

The Chief Justice's Commission on Professionalism urges the Supreme Court of Alabama to bear in mind, as the court considers revisions, the constitutional mandates that control the operations of the JIC. The Professionalism Commission

further recommends that the court modify or eliminate the current timelines and deadlines, as they create unnecessary expense for the JIC and provide draconian penalties for failure to comply, weakening the constitutional authority of the JIC. The current rules compromise the constitutionally mandated rule of confidentiality and affect the ability of the JIC to conduct fact-finding investigations. In addition, the JIC is not able to currently offer an effective program to deal with impaired judges suffering from physical, mental or drug/alcohol-related disabilities. It is hoped that these, as well as other issues, raised in this article will be taken into consideration as the supreme court reviews the rules.

The people of Alabama have entrusted the supreme court with the responsibility to adopt procedural rules that assure accountability for our judges and courts. Almost all of the judges in the State of Alabama are outstanding public servants who possess high standards of character and moral virtue. The public has a right to expect, and public confidence in the judicial system demands, that all judges conduct themselves with honesty, integrity, public respect, fairness, and moral integrity. In those few cases where there are violations of the standards of conduct required of judges, the public, as well as the judicial system, is entitled to have confidence in a process that is designed to promote fairness and confidentiality to complainants as well as judges.

The Chief Justice's Commission on Professionalism was asked to study the rules and to study proposed changes to the rules. After much study, the commission has recommended modification of the existing rules as they relate to the JIC. The commission further urged the court to conduct public hearings and invite comment on what can be done to improve the rules of procedure of the JIC for the sake of the public and the profession. ▲▼▲

Endnotes

- George Sharswood, quoted in *Alabama Code of Ethics*, Alabama State Bar Annotations, 1887.
- Hayes v. Alabama Court of the Judiciary*, 437 So.2d 1276, 1278 (Ala. 1983).
- In re DuBose*, No. COJ # 36, slip op. at 25 (C.O.J. June 5, 2008) (quoting *In re Conduct of Ginsberg*, 690 N.W. 2d 539, 549 (Minn. 2004)).
- Charles D. Cole, *Judicial Reform in Alabama: A Survey*, 4 Cumb. L. Rev.41, 43 and n.3 (1973).
- Ala. Const. amend. 328 (now Ala. Const. art. VI).

- Ala. Const. art. VI, § 156(b), recompiled from § 6.17(b) of Amendment 328.
- Id.*
- Ala. Const. art. VI, § 157(a), recompiled from § 6.18(a) of Amendment 328.
- Ala. Const. amend. 328, § 6.17(c) and § 6.18(c), respectively (now Ala. Const. art. VI, §§ 156(c) and 157(c), respectively).
- State of Alabama Judicial Inquiry Commission Annual Reports*, FY 1998-2005; 2006-2007, statistics supplied by Jenny Garrett, director of the JIC.
- Charles D. Cole, *Discipline, Removal, or Exoneration of Alabama Jurists*, 5 Cumb. L. Rev.214, 231 (1974).
- Rule 5.A.(1) and (2) provided the only exceptions to this prohibition. Subsection (1) provided that the Commission, at the request of a judge who has been publicly charged or is the subject of an investigation or in any proceeding where the subject matter is known to the public, could make a very limited statement confirming or denying an investigation, clarifying its procedure or defending the judge's right to a fair trial or to preserve public confidence in the administration of justice. Subsection (2) provided that, where the Commission has determined that allegations against a judge have no basis for the filing of charges or for further proceedings, the Commission may, at the judge's request, issue an explanatory statement. The 2001 amendments changed these provisions only by adding the requirement that the Commission's statement be approved by the judge.
- Cole, *supra* note 13 at 226. See also *Boggan v. Judicial Inquiry Commission*, 759 So. 2 550, 552 (Ala. 1999)
- Rule 6.C. Rules of Procedure of the Judicial Inquiry Commission.
- Ala. Const. art. VI, § 156(b).
- Rule 6.B.
- Rules 6.A., 6.B. and 9.
- Rule 6.D.
- Rule 6.E.
- Rules 6.F.
- Id.*
- Rule 6.G.
- Rule 9.
- Rule 7.C.
- Rules 7.C. and 9.
- See COJ # 12, 14, 17, 20, and 31, respectively.
- The Judicial Inquiry Commission is budgeted for and employs an executive director, an assistant executive director and an executive secretary. It was never



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envisioned that the investigations would be encumbered and complicated by the additional requirements mandated by the amended rules. The budgetary and administrative structures of the commission were not designed nor have they been increased to facilitate such investigations.

- See, e.g., Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."); Canon 2.A. ("A judge should ... conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); Canon 2.B. ("A judge should at all times maintain the decorum and temperance befitting his office and should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.");
- Rule 10, *Rules of Procedure of the Alabama Court of the Judiciary*.
- Cynthia Gray, director of the Center of Judicial Conduct Organizations for the American Judicature Society, appearance before the Alabama Supreme Court's Standing Committee on Rules of Conduct and Canons of Judicial Ethics, July 18, 2008.
- In fact, the current attorney general has determined that his office, who has always provided investigative and legal services to the commission, has a conflict in continuing those services because of the commission's notification and discovery requirements, particularly in regard to the serious nature of some of the complaints filed with the Judicial Inquiry Commission, i.e. sexual abuse, sexual misconduct, bribery and other charges that could relate to criminal conduct. The commission must now incur additional expense for these services on a budget never designed to include these activities.
- State of Alabama Judicial Inquiry Commission Annual Reports*, FY 1998-2005; 2006-2007, statistics supplied by Jenny Garrett, director of the JIC.
- Jenny Garrett, director of the JIC, reports that many would-be complainants refuse to follow through once they are told that the judge will be provided their identity within ten days of filing a complaint.
- According to Peggy Groves, assistant executive director of the commission, this past year, the commission met 16 times, with only three of those by telephone.
- Rule 16, *Rules of Procedure of the Alabama Court of the Judiciary*.
- Id.*

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