

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE BAR,)	
)	
Plaintiff,)	<u>FROM THE DISCIPLINARY</u>
)	<u>HEARING COMMISSION OF THE</u>
v.)	<u>NORTH CAROLINA STATE BAR</u>
)	
JERRY R. TILLET,)	
)	
Defendant.)	

**MOTION OF NORTH CAROLINA JUDICIAL STANDARDS
COMMISSION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The North Carolina Judicial Standards Commission (“Commission”) hereby requests leave pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure to file an *amicus curiae* brief in the above-captioned matter. The Commission submits its proposed brief contemporaneously with this motion.

On 27 May 2016, this Court, *ex mero motu*, issued a writ of certiorari in this case to consider the following issue:

Do the North Carolina State Bar Council and the Disciplinary Hearing Commission have the jurisdictional authority to discipline a judge of the General Court of Justice for conduct as a judge for which the

judge has already been disciplined by the Judicial Standards Commission?

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Commission was established by N.C. Gen. Stat. § 7A-374.1, wherein the General Assembly enacted Chapter 7A, Article 30 as an alternative process to discipline a judge or justice of the General Court of Justice. Such process is in addition to the impeachment of judges as provided for in Article IV.

The statutory mandate of the Commission is to investigate and resolve inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice. N.C. Gen. Stat. § 7A-374.1, -376, -377. Any discipline recommended by the Commission is submitted to this Court for final disposition. N.C. Gen. Stat. § 7A-377.

The Commission moves for leave to file its *amicus curiae* brief to assist this Court by providing it with an overview of the relevant history and rationale for the judicial disciplinary process as well as a discussion about the impact concurrent jurisdiction over the disciplinary process would have on the judiciary.

ISSUE TO BE ADDRESSED

The Commission has an interest in preserving the General Assembly's mandate to investigate and submit recommendations for disciplinary action to this Court. In addition, a judge, even if he never becomes the subject of a complaint and investigation by the Commission, is entitled to *expect* uniform application of

the Code of Judicial Conduct (“the Code”) and appropriate and consistent discipline with regard to the Code. Similarly, the people of North Carolina have an expectation that the judges of this State will perform the duties of their office without undue distraction or chilled decision-making as a result of an unsettled practice as to who disciplines judges.

The Commission believes that the issue of first impression presented by the case—whether the State Bar and the Disciplinary Hearing Commission have jurisdiction to conduct a disciplinary hearing involving a sitting judge—should be resolved in favor of preserving the statutory and constitutional role of the Commission and this Court in resolving allegations of misconduct by the judges of the General Court of Justice.

WHEREFORE, the Commission respectfully requests that the Court grant this Motion for Leave to File its proposed *Amicus Curiae* Brief.

Respectfully submitted this the 14th day of July, 2016.

NORTH CAROLINA
DEPARTMENT OF JUSTICE

Electronically Submitted
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **MOTION OF NORTH CAROLINA JUDICIAL STANDARDS COMMISSION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF** which was filed electronically with the appellate courts' official website, was served on this the 14th day of July, 2016, upon all parties, electronically via email, to counsel's correct and current email address as follows:

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DEPARTMENT OF JUSTICE

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AMICUS CURIAE BRIEF OF
THE NORTH CAROLINA JUDICIAL STANDARDS COMMISSION

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AMICUS CURIAE BRIEF OF
THE NORTH CAROLINA JUDICIAL STANDARDS COMMISSION

In an order dated 27 May 2016 this Court, *ex mero motu*, issued a writ of certiorari in this case to consider the following issue:

Do the North Carolina State Bar Council and the Disciplinary Hearing Commission have the jurisdictional authority to discipline a judge of the General Court of Justice for conduct as a judge for which the judge has already been disciplined by the Judicial Standards Commission?

The question presented is a matter of first impression. Previous cases involving State Bar disciplinary actions based on misconduct by judges occurred only **after** the judge had been removed from office and had returned to the practice

of law. In those cases, therefore, the State Bar's jurisdiction was asserted against the respondent in his capacity as an attorney licensed in the State of North Carolina, albeit for conduct that occurred during his tenure as a judge.¹ Here, the North Carolina State Bar ("the State Bar") and the Disciplinary Hearing Commission ("the DHC") have initiated an unprecedented disciplinary proceeding against a sitting superior court judge in his capacity as a judge of the General Court of Justice.²

These circumstances pose a significant threat to the constitutional and statutory scheme that was carefully designed to balance the need for an independent judiciary to administer justice "without favor, denial, or delay" against the need to maintain public confidence in the courts. *See* N.C. Const. art. I, sec. 18. For this reason, the North Carolina Judicial Standards Commission ("the

¹ *See In re Belk*, 364 N.C. 114, 691 S.E.2d 685 (2010) (District Court Judge removed from office for willful misconduct by Order of this Court entered 15 April 2010); *N.C. State Bar v. William I. Belk*, No. 13 DHC 6 (2010) (Disciplinary Hearing Commission decision to suspend lawyer from the practice of law resulting from Complaint filed in 2013); *In re Badgett*, 362 N.C. 482, 666 S.E.2d 743 (2008) (District Court Judge removed from office for willful misconduct by Order of this Court entered 10 October 2008); *N.C. State Bar v. Mark H. Badgett*, No. 09 DHC 6 (2008), *aff'd*, No. COA10-1200, 2011 N.C. App. LEXIS 1302 (N.C. App. Ct. June 7, 2011) (unpublished) (Disciplinary Hearing Commission decision to disbar lawyer from the practice of law resulting from Complaint filed in 2009).

² Judges of the General Court of Justice are statutorily and ethically prohibited from practicing law. *See* N.C. Gen. Stat. § 84-2, North Carolina Code of Judicial Conduct, Canon 5F (Nov. 5, 2015).

Judicial Standards Commission” or “the Commission”) offers this *amicus curiae* brief to assist the Court in answering the question presented by providing the Court with information regarding the creation of the Commission as the only constitutionally and statutorily authorized body (other than the General Assembly through the impeachment process) to take or recommend action leading to the professional discipline or removal of a sitting judge. In addition, the Commission also asserts its interest as an *amicus curiae* to inform the Court of the enormous practical difficulties that would arise if the State Bar were to initiate and prosecute disciplinary actions against sitting judges while the Commission also has advisory and disciplinary jurisdiction over those same judges for the same conduct.

ARGUMENT

I. THE COMMISSION WAS SPECIFICALLY CREATED AS AN “ARM OF THE COURT” TO INVESTIGATE CHARGES OF MISCONDUCT BY SITTING JUDGES AND TO RECOMMEND APPROPRIATE DISCIPLINE.

Prior to 1971, the only way to remove or discipline a sitting superior court judge or an appellate judge or justice was through the “slow and cumbersome” impeachment procedure set forth in Article IV, Section 4 of the North Carolina Constitution. John V. Orth & Paul Martin Newby, The North Carolina State Constitution, 139-40 (2d ed. 2013). Moreover, district court judges could not be impeached for misconduct at all, and only could be removed from office for mental or physical incapacity. See REPORT OF THE NORTH CAROLINA COURTS

COMMISSION TO THE GENERAL ASSEMBLY at 19 (1971) (hereinafter “NORTH CAROLINA COURTS COMMISSION REPORT”). Because of these difficulties and other challenges facing the court system, the General Assembly created the Judicial Standards Commission to provide an alternative to the impeachment process that was carefully crafted to balance the competing needs of judicial accountability and judicial independence.

A. Historical Background On The Creation Of The Judicial Standards Commission.

The General Assembly constituted the North Carolina Courts Commission in 1969 to study improvements to the judicial branch, including judicial discipline and removal. *See* NORTH CAROLINA COURTS COMMISSION REPORT at 2.³ In reporting its findings to the General Assembly in 1971, and after studying the judicial impeachment process in North Carolina and other states, the North Carolina Courts Commission concluded that impeachment alone as a method to discipline and remove judges was woefully inadequate because it was expensive, misconduct not rising to the level of an impeachable offense would often go

³ The original Courts Commission, as it was then named, was created in 1963 to fully implement Article IV of the North Carolina Constitution, and its reports and recommendations resulted in a number of fundamental changes to the North Carolina court system, including creation of the district courts, the Court of Appeals and other major achievements. *See* James Drennan, *Presentation on the History of North Carolina Courts Commission* (UNC School of Government (Sept. 23, 2014) available at: <http://www.ncleg.net/documents/sites/committees/BCCI-98/Meetings/2014-09-23/Drennan%20Powerpoint%20Presentation%20on%20History%20of%20North%20Carolina%20Courts%20Commission.pdf>.

without redress, and the process itself in the legislature was often marred by political rancor. *See* NORTH CAROLINA COURTS COMMISSION REPORT at 19-20. Given these difficulties, it is not surprising that the North Carolina Courts Commission noted that no North Carolina judge had been removed by impeachment since 1868. *Id.* at 19.

Beyond concerns with the impracticability of the impeachment process, the North Carolina Courts Commission noted that the problem of judicial discipline “is a very sensitive one, especially to some judges, who are understandably wary that efforts to impose accountability for judicial conduct may interfere with the tradition of independence.” NORTH CAROLINA COURTS COMMISSION REPORT at 20. At the same time, the deficiencies in the impeachment system posed a threat to public confidence in the courts and failed to adequately hold judges accountable for misconduct – a situation that the North Carolina Courts Commission described as “the most pressing problem facing the 20th century judiciary.” NORTH CAROLINA COURTS COMMISSION REPORT at 21.

To confront the problem in improving judicial accountability, the North Carolina Courts Commission recommended the adoption of a “flexible machinery that can handle minor cases as well as major ones.” *Id.* at 21. Towards this end, the North Carolina Courts Commission looked specifically to the mechanism in place in the North Carolina State Bar for censure and disbarment of attorneys. *See*

id. at 21. Rather than recommend expanding the State Bar’s jurisdiction to consider complaints of misconduct against sitting judges, however, the North Carolina Courts Commission **recommended** the establishment of an independent commission to consider complaints and recommend disciplinary action. *See id.* at 26-27. In reaching this recommendation, the North Carolina Courts Commission looked to other states that had developed such independent commissions – an innovation that had begun in the 1960s and that had been adopted by over half the states at the time it was proposed in North Carolina. *Id.* at 25; *see generally* Charles Geyh, James Alfini, Steven Lubet, Jeffrey Shaman, Judicial Conduct & Ethics, 1-10 (5th ed. 2013) (describing the history and development of judicial conduct commissions in the United States).

In describing the “virtues” of an independent judicial conduct commission, as opposed to extending the authority of other state bodies such as the State Bar, the North Carolina Courts Commission noted four key considerations. First, a new and independent commission could be tailored to the unique needs of the judiciary and also offer a flexible, fair, efficient and inexpensive means of dealing with misconduct as well as mental and physical infirmities. NORTH CAROLINA COURTS COMMISSION REPORT at 25. In this regard, the North Carolina Courts Commission specifically noted that “[t]he provisions for confidentiality and three [judges] on the commission assure each judge of fairness and freedom from harassment.” *Id.*

at 26. Second, the ability to recommend discipline short of removal would act as a deterrent to judges not culpable of misconduct warranting impeachment. *See id.* Third, the proposed commission could act as a “safety valve” to stop the loss of confidence in the courts by providing a procedure for complaints by disgruntled litigants. *See id.* Last but not least, the North Carolina Courts Commission found that an independent commission within the judicial branch assures the public of “an honest, able, efficient bench, while at the same time the independence of the judiciary is fully protected.” *Id.* As the North Carolina Courts Commission stated, “since the system permits the judiciary to police its own ranks, with any decision to censure, remove or retire coming from the supreme court, temptation of the executive or legislative branches to involve themselves in these matters is minimized.” *Id.* at 26.

Importantly, the plan recommended by the North Carolina Courts Commission did not grant the judiciary complete autonomy and self-policing with respect to judicial misconduct. Instead, the mixed composition of the proposed commission with members from the bench, bar and public was a central feature of the plan to provide a balanced and fair approach to the evaluation of judicial misconduct. According to the recommendations of the North Carolina Courts Commission, the Chief Justice would appoint members of each level of the General Court of Justice – district court, superior court and appellate court - to

ensure that the views of experienced judges would be considered in evaluating complaints and recommending discipline against sitting judges. *Id.* at 27. The interests of the North Carolina State Bar in the administration of justice would be represented on this commission through attorneys elected by the State Bar Council, and only those with at least ten years of legal experience would be permitted to serve. *Id.* at 27-28. Finally, “[t]o give the Commission balance and objectivity,” members of the public would also be appointed. *See id.* at 28.

In response to the North Carolina Courts Commission Report, the General Assembly immediately enacted two bills to implement the recommendations – one calling for a constitutional amendment to mandate that the General Assembly create an alternative to impeachment and the other (the Judicial Standards Commission Act) creating the structure and authority of the new commission.⁴ *See In re Peoples*, 296 N.C. 109, 163, 250 S.E.2d 890, 921 (1978) (“Both G.S. 7A-376 [the Act] and the constitutional amendment authorizing this legislation were conceived and ratified together. Both bills were enacted by the General Assembly

⁴ In addition to the creation of the Judicial Standards Commission, and to fully implement an integrated system for ensuring the highest ethical conduct of the state’s judges, the Supreme Court also adopted the state’s first Code of Judicial Conduct on September 26, 1973. *See In re Nowell*, 293 N.C. 235, 243, 237 S.E.2d 246, 252 (1977) (“Specific guidelines for judicial officers of North Carolina are to be found in the North Carolina Code of Judicial Conduct, adopted by this Court on 26 September 1973 and published in 283 N.C. 771. . . . The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of the [Judicial Standards Commission Act]” (citing NORTH CAROLINA COURTS COMMISSION REPORT at 28).).

within three days of each other in June 1971 . . . The statute by its terms was to become effective on January 1, 1973 provided the voters of the State approved the amendment to Article IV, Section 17 of the Constitution.” (internal citations omitted)); *In re Martin*, 295 N.C. 291, 299, 245 S.E. 2d 766, 771 (1978) (“The Judicial Standards Commission Act, which defines the role of this Court in the censure and removal of judges, was enacted on 17 June 1971, nearly seventeen months prior to the ratification of the amendment to Article IV which authorizes removal of judges other than by impeachment. The effective date of the Act, however, was made contingent upon the ratification of the amendment.” (internal citations omitted)).

As ratified on 2 November 1971, Article IV, Section 17(2) of the Constitution provides as follows:

(2) *Additional method of removal of Judges.* The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C. Const. art. IV, § 17(2). This Court has interpreted this language as imposing a positive mandate on the General Assembly to create an additional method for the

discipline of judges beyond impeachment. *See In re Martin*, 295 N.C. at 299, 245 S.E.2d at 771 (describing this change as a “positive mandate” that “commands the Legislature, in its discretion, to provide a new remedy as an adjunct to the cumbersome, ancient, and impractical remedy of impeachment.”).

B. Structure, Authority And Composition Of The Judicial Standards Commission.

As noted above, in tandem with the amendment to Article IV, Section 17 of the Constitution, and as recommended by the North Carolina Courts Commission, in 1971 the General Assembly passed the Judicial Standards Commission Act, codified in Chapter 7A, Article 30 of the North Carolina General Statutes. North Carolina thus joined the ranks of its sister states using this model for the discipline and removal of judges. Indeed,

[b]y 1981, all 50 states and the District of Columbia had established judicial conduct organizations vested with authority to investigate, prosecute, and adjudicate cases of judicial misbehavior, as well as to impose or recommend to a higher body a variety of sanctions ranging from admonishment to removal, where it has been determined that misconduct has occurred.

Judicial Conduct & Ethics at 1-10. The Commission’s statutory mandate remains as follows:

to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice. The procedure for discipline of any judge or justice of the General Court of Justice **shall** be in accordance with this Article. Nothing in this Article shall

affect the impeachment of judges under the North Carolina Constitution, Article IV, Sections 4 and 17.

N.C. Gen. Stat. § 7A-374.1 (2015) (emphasis added).

Because of the implications for judicial independence in the creation of a new body to “police” the judiciary,⁵ since the inception of the Commission, this Court has referred to the Commission as “an arm of the court.” *See, e.g., In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (“[The Commission] ‘functions as an arm of the Court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.’”); *In re Nowell*, 293 N.C. at 244, 237 S.E.2d at 252 (describing the Commission as “an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable”). To ensure both judicial independence and accountability, however, the General Assembly adopted the central recommendations of the North Carolina

⁵ As noted by Professor Geyh in his treatise on judicial conduct and ethics, the creation of judicial conduct organizations raised the specter of threats to judicial independence – considered a “cornerstone in our legal system” and a fundamental value in this nation to allow judges to “decide cases without fear of retribution or the need to curry favor” and to foster “confidence in the courts, which is essential to a legal system that depends in good part upon voluntary compliance with judicial decisions.” Judicial Conduct & Ethics at 1-10. However, the “hybrid” nature of commission membership, the final say of the courts in what constitutes judicial misconduct, and the focus on behavioral rather than decisional misconduct makes the judicial conduct organization the most effective mechanism in balancing the competing needs of judicial independence and public accountability. *See id.* at 1-11; *see also* NORTH CAROLINA COURTS COMMISSION REPORT at 25-26.

Courts Commission in providing a hybrid commission of judges, lawyers and citizens housed within the judicial branch to recommend to the Supreme of North Carolina the discipline or removal of judges and justices of the General Court of Justice. Under current law, the Commission is composed of thirteen (13) diverse members from the bench, bar and public:

- One Court of Appeals judge appointed by the Chief Justice;
- two superior court judges appointed by the Chief Justice;
- two district court judges appointed by the Chief Justice;
- four members of the State Bar who have actively practiced for at least 10 years and who are elected by the State Bar Council;
- four citizens who are neither judges nor members of the State Bar, two of whom are appointed by the Governor and two of whom are appointed by the General Assembly.

N.C. Gen. Stat. § 7A-375(a) (2015).

Confidentiality of proceedings involving judicial misconduct was also central to the scheme proposed by the North Carolina Courts Commission and adopted by the General Assembly under its constitutional mandate set forth in Article IV, Section 17(2). As noted by the North Carolina Courts Commission with respect to proceedings before the new judicial discipline commission,

Its proceedings would be confidential until such time as it made its final recommendations to the Supreme Court. This provision is vital, as allegations of misconduct are frequently groundless, and judges under investigation are entitled to this protection until such time as the charges are found to be

supported. Public confidence in the integrity of the courts is also at stake here; it should not be shaken without reason. Further, confidentiality is essential to protect complainants and witnesses, many of whom would be reluctant to complain or testify for fear of publicity or reprisal.

NORTH CAROLINA COURTS REPORT at 29-30.

In adopting the Act and in later amendments, the General Assembly ensured that proceedings before the Judicial Standards Commission follow specific statutory mandates relating to the confidentiality of judicial disciplinary proceedings. Although the stage in the proceedings at which confidentiality ceases has changed over the years with legislative amendments, confidentiality has remained a cornerstone of the judicial disciplinary process involving sitting judges. In fact, most recently in 2013, the General Assembly passed legislation making proceedings before the Commission entirely confidential unless and until this Court decides to impose public discipline on a sitting judge. N.C. Gen. Stat. §§ 7A-377(a1) and (a5) (2015).⁶

Finally, the mechanism adopted by the General Assembly for the discipline of judges also reflects the desire to maintain judicial independence by requiring that only this Court may publicly discipline a sitting judge of the General Court of

⁶ Only upon the issuance of a public reprimand, censure, suspension, or removal by the Supreme Court do the notice and statement of charges filed by the Judicial Standards Commission along with the answer, all other pleadings, including the Commission's recommendation, lose their confidential status. N.C. Gen. Stat. § 7A-377(a6) (2013).

Justice.⁷ N.C. Gen. Stat. § 7A-377. As this Court found in *In re Hardy*, “original jurisdiction to discipline judges lies solely within the Supreme Court by virtue of statutory authority.” 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978). Accordingly, this Court has final authority in adjudicating the recommendations of the Judicial Standards Commission and making the sensitive judgment whether to censure, remove, remand for further proceedings or dismiss disciplinary proceedings against judges and justices of the General Court of Justice.

With this carefully crafted constitutional and statutory structure in place, the State Bar’s exercise of concurrent authority to discipline sitting judges for judicial misconduct would sacrifice many if not all of the considerations contemplated by the General Assembly and the citizens of North Carolina in amending the Constitution to allow for an additional means to discipline judges for misconduct. For example, the State Bar’s DHC does not require the same “hybrid” approach to membership by the bench, bar and public appointed by each branch of the government that the General Assembly required for disciplinary action against judges. *Compare* N.C. Gen. Stat. § 7A-375(a) (composition of the Judicial

⁷ It should be noted that in the unique circumstances of this case, Judge Tillett’s Order of Public Reprimand was issued by the Judicial Standards Commission on 8 March 2013. (R pp. 34-39) The Judicial Standards Commission’s authority to issue such public reprimands was created in 2006 by N.C. Session Law 2006-187. N.C. Gen. Stat. § 7A-377(a4) was subsequently repealed by N.C. Session Law 2013-404. As a result, in the judgment of the General Assembly, even the issuance of a public reprimand against a sitting judge now requires the concurrence of this Court. N.C. Gen. Stat. § 7A-377(a5).

Standards Commission with appointees from the bench, bar and public with appointment power in each branch of North Carolina government and the State Bar) *with* N.C. Gen. Stat. § 84-28.1 (composition of the DHC with 12 lawyers and 8 citizens appointed by the State Bar and the executive and legislative branches with no judicial branch appointees).

Moreover, the State Bar Council is represented on the Judicial Standards Commission through four (4) of its thirteen (13) members. N.C. Gen. Stat. § 7A-375(a). In this same vein, the General Assembly has required that the State Bar representatives on the Judicial Standards Commission must have at least ten years of experience actively practicing in the state. N.C. Gen. Stat. § 7A-375(a). This particular requirement was adopted to ensure that lawyers who sit in judgment of the professional conduct of judges “have acquired the experience and judgment vital to a proper discharge of their sensitive roles” in evaluating the conduct of sitting judges. *See* NORTH CAROLINA COURTS COMMISSION REPORT at 28. Attorney members of the DHC, on the other hand, are not required to have any requisite amount of professional experience, with the exception of the DHC Chair who must have actively practiced in North Carolina for at least ten (10) years. *See* N.C. Gen. Stat. § 84-28.1 (2015).

Furthermore, while the Disciplinary Hearing Commission process does have some provisions for confidentiality, those provisions often differ with respect to

the level of confidentiality accorded to sitting judges under N.C. Gen. Stat. §§ 7A-377(a1) and (a5). Furthermore, the Commission's Rules, which maintain confidentiality of the proceedings, including disciplinary recommendation hearings, until this Court has determined that public discipline is appropriate. On the other hand, disciplinary procedures at the State Bar remain confidential only until the Grievance Committee has found probable cause that the attorney is guilty of misconduct. *See* 27 NCAC 1B.0129(a)(1) (2016). Similarly, DHC hearings are required to remain open to the public. *See* 27 NCAC 1B.0114(m) (2016).

The DHC process is also not designed to protect the independence and integrity of the judicial branch, nor does it have the necessary safeguards to protect public confidence in the courts. For example, under the Judicial Standards Commission Act, this Court retains original exclusive jurisdiction to impose public discipline on a sitting judge and the authority of the Commission is only to investigate the charges and recommend discipline authorized by statute. *See* N.C. Gen. Stat. § 7A-376. Under the DHC process, however, a disciplined attorney (or sitting judge as in this case) stands in an entirely different posture with respect to judicial review of a disciplinary action, with only the right to appeal a decision rendered in the DHC, and thus subject only to the appellate jurisdiction of the courts. *See* N.C. Gen. Stat. § 84-28(h) (2015); *N.C. State Bar v. DuMont*, 304 N.C. 627, 642, 286 S.E.2d 89, 98 (1982) (in reviewing final orders issued by the DHC,

the Court has applied the “whole record” test, holding that the General Assembly’s “clear intent” was for the test to be the “principle standard of review for administrative findings”). As stated on the website of the State Bar, the “DHC conducts the trial, finds the facts, applies the law, and alone decides which disciplinary sanctions, if any, are appropriate.” *See* ROADMAP OF THE DISCIPLINARY PROCESS, from North Carolina State Bar, <https://www.ncbar.gov/lawyer-discipline/roadmap-of-the-disciplinary-process> (last visited on July 14, 2016).

For these reasons, the Judicial Standards Commission respectfully asserts that the statutory and constitutional scheme for judicial discipline so thoughtfully considered and implemented decades ago was intended to be the only means for professional discipline and removal of a sitting judge for misconduct in office other than the impeachment process.⁸ In addition to these considerations, and as set forth in the following section, there are also serious practical concerns in

⁸ As an additional note, where the General Assembly has deemed it appropriate to authorize regulatory action against sitting judges of the General Court of Judges for ethics violations, it has done so expressly. For example, under the State Ethics Act, N.C. Gen. Stat. § 138A-12(b), allegations of judicial misconduct that would violate the Code of Judicial Conduct are required to be referred to the Judicial Standards Commission without investigation, while other provisions continue to apply to judges. *See, e.g.*, N.C. Gen. Stat. § 138A-3(10) (“covered person” under the State Ethics Act includes judicial officers); § 138A-10(a)(5) (authorizing the State Ethics Commission to initiate inquiries against judicial officers for violation of the State Ethics Act); *but see* N.C. Gen. Stat. § 138A-14(i) (judicial officers exempt from education requirement).

allowing both the Judicial Standards Commission and the State Bar to concurrently exercise disciplinary authority over sitting judges based on professional misconduct.

II. THE PRACTICAL IMPLICATIONS OF CONCURRENT JURISDICTION WITH THE JUDICIAL STANDARDS COMMISSION AND THE STATE BAR FOR DISCIPLINARY ACTION AGAINST SITTING JUDGES UNDERMINES THE PUBLIC INTEREST IN THE EFFICIENT, EFFECTIVE, AND FAIR RESOLUTION OF COMPLAINTS AGAINST JUDGES.

The fair, efficient and effective resolution of complaints of judicial misconduct depends on a process that encourages judges to seek confidential advice when needed regarding what conduct could violate the Code of Judicial Conduct or amount to misconduct in office, protects witnesses and complainants who may be resistant to testifying against judges, and allows staff counsel and judges to be able to negotiate stipulated outcomes that remediate the issues and protect the integrity of the courts. These important practical considerations are undermined if the Judicial Standards Commission and the State Bar could be engaged in independent and parallel disciplinary processes relating to the same conduct. Such duplicative investigations could also result in inconsistent decisions or sanctions for the same conduct, and are likely to result in uncertainty for judges, to erode the public's confidence in the judiciary, and to threaten the judicial independence that is carefully protected by the General Assembly in the structure of the Judicial Standards Commission's authority.

First, under N.C. Gen. Stat. § 7A-377(c), the Judicial Standards Commission has express statutory authority to issue advisory opinions to judges according to the Commission's rules. Under Commission Rule 8, judges may seek either formal advisory opinions or confidential informal advice as to whether certain conduct would violate the Code of Judicial Conduct, or whether such conduct could be considered prejudicial to the administration of justice in violation or otherwise warranting discipline under N.C. Gen. Stat. § 7A-376(b). *See* Judicial Standards Commission Rules ("Commission Rule") 8; Preamble to the North Carolina Code of Judicial Conduct. Judges who rely on such advice are presumed to act in good faith. *See* Commission Rule 8(a) & 8(b). Assuming *arguendo* that the North Carolina Code of Professional Conduct applies to judges while they hold judicial office,⁹ there is the inherent risk of inconsistent advice if the State Bar provides an informal or formal advisory opinion given the fact-specific nature of ethical inquiries. Accordingly, the provision of consistent and relevant information

⁹ The provisions of the Rules of Professional Conduct apply to the practice of law and primarily relate to the attorney-client relationship. *See* N.C. R. Prof. Cond. 1.7 (governing a lawyer's conduct towards clients, as a counselor, as an advocate, with other persons, within law firms and with respect to pro bono legal services). As noted in footnote 2, sitting judges are ethically and legally prohibited from practicing law and representing clients. Even Rule 8.1, *et seq.*, which governs the professional conduct of lawyers generally, clearly distinguishes in its language between the conduct of "lawyers," to which the Rules of Professional Conduct apply, and the conduct of "judges," to which the Code of Judicial Conduct applies. *See* Rules 8.2, 8.3, 8.4 of the Code of Judicial Conduct.

is at risk where multiple codes of conduct, varying interpretations and differing burdens are at play.

Second, members of the public and litigants could easily be confused as to where to address and send complaints about judicial officers. Consistent with N.C. Gen. Stat. § 7A-374.1, which directs the investigation and resolution “of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice” to the Judicial Standards Commission, the State Ethics Commission refers complaints of judicial misconduct directly to the Judicial Standards Commission pursuant to N.C. Gen. Stat. § 138A-12(b).¹⁰ *See also* <http://www.ethicscommission.nc.gov/Complaints/compgeneralinfo.aspx> (the State Ethics Commission, upon receipt of a complaint regarding a judge, refers such complaints to the Judicial Standards Commission where probable cause exists that an ethical violation occurred). Similarly, the North Carolina Rules of Professional

¹⁰ According to its website, the State Ethics Commission retains jurisdiction over judges only to the extent there is an allegation of violation of the State Government Ethics Act (N.C.G.S. Ch. 138A), the Legislative Ethics Act (N.C.G.S. Ch. 120, Art. 14), criminal law by a covered person in the performance of that individual’s official duties (N.C.G.S. § 138A-12(b)(3)), and laws governing promises or threats to obtain political contributions of support (N.C.G.S. § 126-14). *See* COMPLAINTS, from the North Carolina State Ethics Commission, <http://www.ethicscommission.nc.gov/Complaints/default.aspx> (last visited on July 14, 2016) (last visited July 14, 2016).

Conduct direct lawyers to contact the Judicial Standards Commission in cases of judicial misconduct. N.C. R. Prof. Cond., Rule 8.3(b) (complaints regarding violations of the North Carolina Code of Judicial Conduct shall be directed to the Judicial Standards Commission or other appropriate authority); *see also* RPC Opinion 208 (“Opinion #2: Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed to the ethical duty of a judge [to verify an attorney received notice of a proceeding over which he is presiding].” (July 21, 1995)). Indeed even the State Bar’s complaint form asks individuals to identify the “lawyer” about whom they are complaining, which can cause confusion if the complaint is against a “judge” – a distinction that is made clear in Rule 8 of the North Carolina Rules of Professional Conduct. *See* N.C. R. Prof. Cond. 8.2(a) (prohibiting lawyers from making false statements concerning the qualifications or integrity of a judge); N.C. R. Prof. Cond. 8.3(b) (advising lawyers to report misconduct by judges to the Judicial Standards Commission); N.C. R. Prof. Cond. 8.4(f) (prohibiting lawyers from assisting judges in conduct that violates the Code of Judicial Conduct).

Third, the statutory structure created by the General Assembly unequivocally confers the authority to investigate judicial misconduct with the Judicial Standards Commission. N.C. Gen. Stat. §§ 7A-374.1, -374.2 (2015). The integrity of the Commission’s investigation, which depends on the cooperation not

only of witnesses but of judges, is essential to allow this Court to discharge its duty to review the Commission's recommendations and render an appropriate disciplinary sanction. Duplicative investigations and disciplinary actions raise the very real possibility of compromised investigations because witnesses and judges might be adverse to cooperating where they are either inconvenienced by multiple investigations, or worse, apprehensive about having to repeatedly give testimony under oath on the same facts in different proceedings.

Furthermore, the Commission's established practice of negotiated disciplinary resolutions where appropriate will be undermined if a judge fears the possibility of further disciplinary investigations and sanctions for the same judicial misconduct. *See* Commission Rule 22 (“[a]t any time prior to the conclusion of a disciplinary recommendation hearing, the respondent judge may stipulate to any or all of the allegations of the Statement of Charges in exchange for a stated disposition, which may include a stated recommendation to the Supreme Court for discipline”). Stipulated dispositions are effective because they allow the Commission to quickly resolve issues of judicial misconduct without a lengthy and expensive contested hearing process, and they are similarly important in protecting the integrity and reputation of the courts by allowing the opportunity to remediate the conduct, educate the judge in question about future conduct, and present a

balanced, fair and efficient process for the Supreme Court's review of recommended sanctions.

Finally, the unique concerns of the judiciary and the administration of justice require a disciplinary process and rules that address those burdens. For example, under the Judicial Standards Commission's rules, judges do not receive notice of a complaint until a formal investigation has been initiated. *See* Commission Rule 9(d). The Commission's rule on notice serves a number of salutary purposes. First, because the vast majority of complaints against judges involve criminal defendants or dissatisfied litigants, continual notice regarding such complaints can be distracting and burdensome to judges. Moreover, it is not uncommon for a disgruntled litigant (or possibly a lawyer) to file a complaint against a judge solely for purposes of creating a potential conflict of interest to support a motion for disqualification and enable judge-shopping. To address this concern, and in addition to Rule 9(d)'s limitation on when a judge receives notice, the Commission has a formal advisory opinion to allow judges to continue to hear cases in those circumstances. *See* Formal Advisory Opinion No. 2014-02, *available at*: <http://www.aoc.state.nc.us/www/public/html/pdf/JSC/14-02.pdf> (last visited July 14, 2016). This practical concern is also directly related to the expectations of the citizens of North Carolina that the judges of this State will perform the duties of their office without undue distraction or an impediment to decision-making.

Accordingly, for all of these reasons, manifest difficulties that would undermine public confidence in the state's courts would arise in recognizing the authority of the State Bar DHC to investigate, prosecute and discipline sitting judges for professional misconduct alongside the existing authority that the General Assembly has conferred on the Judicial Standards Commission and this Court.

CONCLUSION

For the foregoing reasons, the Judicial Standards Commission respectfully requests that this Court reach a resolution on the question presented in this appeal that preserves the constitutional and statutory role of the Judicial Standards Commission and of this Court in investigating and resolving allegations of misconduct by justices or judges of the General Court of Justice.

Respectfully submitted this the 14th day of July, 2016.

NORTH CAROLINA
DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing proposed **AMICUS CURIAE BRIEF OF NORTH CAROLINA JUDICIAL STANDARDS COMMISSION**, which was filed electronically with the appellate courts' official website, was served on this the 14th day of July, 2016, upon all parties, electronically via email, to counsel's correct and current email address as follows:

- ☐ Hand-delivering a copy hereof to each said party or to the attorney thereof in open court;
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Judicial Conduct and Ethics

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§ 1.04

JUDICIAL CONDUCT AND ETHICS

judicial misconduct or disability.³³ This Court, however, could order no sanction short of removal, and it did not convene for the first time until 1959, and then not again until 1962.³⁴ Also in 1947, New Jersey enacted a state constitutional amendment authorizing a new system of judicial discipline, but the legislature did not implement it until 1970.³⁵ In 1959, the Supreme Court of Michigan promulgated rules to establish a procedure for discipline of judges.³⁶

In 1960, the first permanent state commission charged with regulating judicial conduct was created in California,³⁷ and in 1965 other states began to follow suit.³⁸ By 1981, all 50 states and the District of Columbia had established judicial conduct organizations vested with authority to investigate, prosecute, and adjudicate cases of judicial misbehavior, as well as to impose or recommend to a higher body a variety of sanctions ranging from admonishment to removal, where it has been determined that misconduct has occurred.³⁹

When the creation of judicial conduct organizations was first proposed, there was some concern that the organizations would pose a threat to judicial independence.⁴⁰ In this nation, there has been a long-standing belief in judicial independence so that judges can be free to decide cases without fear of retribution or the need to curry favor. Furthermore, judicial independence fosters public confidence in the courts, which is essential to a legal system that depends in good part upon voluntary compliance with judicial decisions. Thus, judicial independence is a cornerstone of our legal system, manifest in the common-law rule that judges possess absolute immunity from civil liability for their judicial acts, as well as in Article III of the Constitution of the United States, which mandates that federal judges may not be removed from office except for misbehavior, and that their salaries may not be reduced while they are in office.

Because judicial independence is an integral part of our legal system, the argument that it is threatened by a system of judicial discipline cannot be lightly dismissed. However, the nature of the judicial disciplinary system that has been

³³ Schoenbaum, 54 Chi.-Kent L. Rev. 1 at 17.

³⁴ Schoenbaum, 54 Chi.-Kent L. Rev. 1, at 10.

³⁵ Schoenbaum, 54 Chi.-Kent L. Rev. 1, at 10.

³⁶ Schoenbaum, 54 Chi.-Kent L. Rev. 1, at 18.

³⁷ Cal. Const. art. IV, § 6.

³⁸ See I. Tesitor & D. Sinks, *Judicial Conduct Organizations* 19-27 (2d ed. 1980).

³⁹ I. Tesitor & D. Sinks, 19-27 (2d ed. 1980).

⁴⁰ See Freedman, *Removal and Discipline of Federal Judges*, 31 Mercer L. Rev. 681 (1980); Kaufman, *Chilling Judicial Independence*, 80 Colum. L. Rev. (1980).

established is designed to minimize the threat to judicial independence.⁴¹ First, the system operates essentially through judicial self-regulation. In every state system, judges are included in the composition of judicial conduct commissions, and in some states, judges constitute a majority of the commission membership.⁴² Second, the decisions of the commissions ordinarily are appealable to a court, which has the final say as to what constitutes judicial misconduct.⁴³ With this sort of self-regulation, any threat posed to judicial independence is greatly diminished. Third, the system of judicial discipline that has been installed is designed to safeguard judicial independence. Canon 1 of the Code of Judicial Conduct expressly states that the integrity and independence of the judiciary should be preserved, and that the Code should be construed to further that objective.⁴⁴ Modern judicial discipline is directed primarily at promoting what was previously described as “behavioral” accountability, and not “decisional” accountability that can raise legitimate judicial independence concerns.⁴⁵ For instance, judges have been disciplined for harassing litigants or attorneys, for willfully and persistently failing to perform the duties of their office, for using the influence of their office to obtain favors for relatives or friends, for hearing cases in which they have a self-interest, and for committing acts such as deciding cases by a flip of a coin.⁴⁶ Under the modern judicial disciplinary system, it is distinctly recognized that judges may not be censured or penalized for making erroneous or unpopular decisions. The system follows the standard originated by Article III of the Constitution, which protects the independence of judges, but only “during good Behavior.” This standard has been incorporated in the modern judicial discipline system, which does not permit judicial discipline to be used as a substitute for appeal or as a means of regulating judges for rendering mistaken or disfavored decisions.⁴⁷

Given this approach, the judicial disciplinary process can actually strengthen judicial independence by bolstering the principle that judges should not be liable to reprisal merely because their decisions are wrong or out of favor. Admittedly,

⁴¹ See Shaman, “An Introduction” (to special issue on judicial discipline), 69 *Judicature* 64 (1985).

⁴² See I. Tesitor & D. Sinks, *supra* note 38, at 28–39.

⁴³ See I. Tesitor & D. Sinks, *supra* note 38, at 12–18.

⁴⁴ Model Code, Canon 1.

⁴⁵ See § 1.03.

⁴⁶ Shaman, *supra* note 41.

⁴⁷ See, e.g., *In re Quigley*, 32 N.Y.S. 828 (1895); *Murtagh v. Maglio*, 9 A.D.2d 515, 195 N.Y.S.2d 900 (1960); *In re Mattera*, 34 N.J. 259, 168 A.2d 38 (1961); *In re Troy*, 364 Mass. 15, 306 N.E.2d 203 (1973); *People ex rel. Harrod v. Illinois Courts Comm’n*, 69 Ill. 2d 445, 372 N.E.2d 53 (1977); *State ex rel. Oklahoma Bar Ass’n v. Sullivan*, 1979 OK 1, 596 P.2d 864 (1979); *West Va. Judicial Inquiry Comm’n v. Dostert*, 165 W. Va. 233, 271 S.E.2d 427 (1980).



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2014-02

April 11, 2014

QUESTION:

Is a judge required to disqualify from matters wherein a party moves for the disqualification of the judge based upon the fact that the party has filed a complaint about the judge with the Judicial Standards Commission?

COMMISSION CONCLUSION:

The mere filing of a complaint with the Judicial Standards Commission, nothing else appearing, does not establish a reasonable basis upon which one may reasonably question the subject judge's impartiality in proceedings involving the complainant.

DISCUSSION:

Canon 3C(1) together with subsection (a) of the Code of Judicial Conduct reads, "[O]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where: (a) The judge has a personal bias or prejudice concerning a party ..." Canon 3D provides that "nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative." A judge should always disqualify when the judge questions his/her own ability to remain impartial.

The Commission recognizes the likely abuse of the judicial process which would arise should a party be permitted to "judge shop" by way of motions to disqualify a judge based upon the mere filing with the Commission of a complaint against the judge. The Commission further notices that the majority of complaints it receives arise from civil litigants and criminal defendants who disagree with a judge's decision and attribute the judgment to ethical misconduct without supporting evidence.

The Commission further advises that should a judge be notified of the initiation of a formal investigation, receive a private letter of caution, or be served with a statement of charges initiating

disciplinary proceedings as the result of a complaint, the judge should disqualify from all matters involving the complainant.

The Commission distinguishes the scenario presented within this opinion from the situation underlying the case of *In re Braswell*, 358 N.C. 721 (2004), which held that a judge is disqualified from hearing a case when one of the parties has a pending lawsuit against the judge. The Commission notices that in the Braswell case, one of the parties had a pre-existing civil lawsuit filed against the judge in a matter unrelated to matter in which the judge was presiding and then asked the judge to recuse. Where a pre-existing conflict, such as a civil law suit, exists prior to a litigant's appearance before the judge, a reasonable appearance of bias or conflict of interest may arise. Similarly, a pre-existing complaint filed with the Judicial Standards Commission arising from another matter which results in discipline being taken against the judge could also create a reasonable appearance of bias or conflict of interest that might require recusal. However, the Commission concludes that any new lawsuit, or complaint, arising solely to complain about the adjudication of the present matter, and then used as the sole justification for disqualification or recusal, could be viewed as obstructive, dilatory, and purposed to thwart the administration of justice. In such situations, recusal should not be required under the Code of Judicial Conduct, unless the judge is notified of the initiation of a formal investigation, receives a private letter of caution, or is served with a statement of charges initiating disciplinary proceedings as the result of the complaint.

References:

North Carolina Code of Judicial Conduct
North Carolina Judicial Standards Commission Annual Reports
Canon 3C(1)(a)
Canon 3D
In re Braswell, 358 N.C. 721 (2004)