

JUDICIAL DISCIPLINARY HEARINGS SHOULD BE OPEN

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As in any profession, there will always be some judges who engage in unethical behavior. This article, in which aspects of the discipline process are discussed, presents the argument that disciplining such judges is important governmental business that should be transacted publicly, once the responsible enforcement authorities have concluded their investigation and determined that formal charges are appropriate. Citizens have a right to know when a judge's integrity has been seriously questioned, and opening the process to public scrutiny would help to ensure that the process is and appears to be honest, which is a special concern whenever a profession polices itself. Thirty-five states have now adopted sunshine laws or rules regarding formal judicial disciplinary hearings; in so doing, they have put public education and confidence in the process ahead of the individual judge's reputational interest in keeping matters secret for as long as possible.

One hundred thirty-five judges in thirty states were publicly disciplined in 2006 for ethical misconduct (American Judicature Society, 2007). The sanctions ranged from relatively mild admonishments to removal from office in more egregious cases. Not surprisingly, intense local press coverage and public discussion often ensued in these cases, owing not only to the inherent significance in disciplining a judge but also in part to the "Man Bites Dog" nature of the story. Judicial discipline may be well publicized, but it is, after all, relatively rare. The 135 judges who were publicly disciplined last year represented less than one-half of 1 percent of the roughly 29,000 judicial officers serving in the fifty state judiciaries (Ostrom, Kauder, and LaFountain, 2001).

That public commentary would accompany judicial discipline may be a given. When it ensued would depend on the point in the process that the press and public learned about it. That in turn would likely depend on when or even whether a particular state's disciplinary proceedings become public under local law.

Judges are among the most powerful of public officials. They decide who goes to jail, who wins or loses millions of dollars, and who gets custody of children. In the discharge of those duties, and off the bench as well, judges are bound by ethical rules, which in most states have been promulgated based upon the American Bar Association's Model Code of Judicial Conduct. While the vast majority of judges are honorable and take their ethical obligations seriously, there will always be some who engage in disreputable behavior. Disciplining such judges is important business that should be transacted in public, just as any criminal trial and most civil trials would be. This argument is rooted in the Sixth Amendment's guarantee that criminal trials shall be public, in federal and state laws that render most civil proceedings public, and in the debates that shaped the drafting and adoption of the Constitution.

Alexander Hamilton wrote in the Federalist No. 78 that the judiciary has neither a sword to enforce its will nor the purse to fund its mandates. Its power derives

from the integrity of its judgments. Public confidence in that integrity, and in the principle that the litigant will get a fair shake from an impartial magistrate, is essential to the rule of law. It is what encourages people to come to the courts rather than resort to the streets to resolve their disputes. That delicate balance would more likely be upset rather than protected by a system that put the judge's interest in his or her reputation above the citizens' right to know that the judge's integrity was at issue; that shielded from public scrutiny the very judges who must safeguard the right to a public trial for everyone else; and that encouraged skeptics to argue that in a self-policing system, judges and lawyers would protect their own (see Wasby, 1995). It would also deprive the appointing and budgeting authorities of an important tool to measure the *bona fides* of the disciplinary enforcers themselves.

In thirty-five states, judicial disciplinary proceedings are indeed open to the public, typically when the investigative phase is concluded and the judicial conduct commission initiates formal charges of misconduct (Gray, 1998). While there are some variations from state to state—in Massachusetts, for example, the parties may stipulate that proceedings remain confidential, while in Oregon, proceedings become public not when the charges are filed but when the formal fact-finding hearing commences—the fundamental principle embodied by the procedures in these thirty-five states (see Table 1) is that important governmental business should be conducted in a manner that the people can see and evaluate.

In the fifteen remaining states and the District of Columbia, the existence of disciplinary proceedings is not officially revealed until public discipline is imposed. Here, too, there are some variations. In New York, for example, the judge who is the subject of the complaint may waive confidentiality and opt to open up the proceedings, although that has happened only eight times in more than 600 matters over thirty years (NYSCJC, 2007). In general, the fundamental approach in these fifteen states is to shield the judge and the process itself from public scrutiny for as long as possible. The rationale most often advanced is that a judge who may eventually be exonerated would suffer irreparable harm from the public opprobrium that would flow from the mere accusation of wrongdoing (Ross, 2007).

Reasonable people may differ over individual decisions rendered by a judicial disciplinary commission, and so do those involved in the decision making. For example, as the prosecutor of judicial misconduct cases in New York, I myself am sometimes at odds with the New York State Commission on Judicial Conduct. For example, in *Matter of Doyle* (2007), where the judge testified untruthfully in a commission investigation; *Matter of Carter* (2006), where, among other things, the judge came off the bench and attempted to physically confront a defendant; and *Matter of Allman* (2005), where the judge came off the bench to grab and yell at a defense attorney, I recommended that the respective judges be removed from office, but in each case the commission disagreed and instead censured the judge. The New York Court of Appeals, the state's highest court and the final arbiter of judicial discipline, sometimes disagrees with us both. In *Sims v. Commission* (1984), the court rejected a com-

Table 1
When Confidentiality Ceases

Formal Disciplinary Charges Are Instituted (After Investigation)		Disciplinary Commission or State Supreme Court Renders Discipline
Alabama	Nevada	Colorado
Alaska	New Hampshire	Delaware
Arizona	New Jersey	District of Columbia
Arkansas	North Carolina	Hawaii
California	North Dakota	Idaho
Connecticut	Ohio	Iowa
Florida	Oklahoma	Louisiana
Georgia	Oregon	Maine
Illinois	Pennsylvania	Mississippi
Indiana	Rhode Island	Missouri
Kansas	South Carolina	New Mexico
Kentucky	Tennessee	New York
Maryland	Texas	South Dakota
Massachusetts	Vermont	Utah
Michigan	Washington	Virginia
Minnesota	West Virginia	Wyoming
Montana	Wisconsin	
Nebraska		

Source: American Judicature Society.

mission censure as too lenient and instead removed the judge from office. In *Watson v. Commission* (2003), the court rejected a commission removal decision as too harsh and instead censured the judge.

However, whether one views a particular removal or censure decision as right or wrong, the black hole of confidentiality means the context and nuance of the underlying proceedings are lost, and the subtleties of an individual disciplinary decision tend to receive short shrift in the news. As misconduct cases tend to stretch over months and sometimes years, the conclusion of the process is usually too late to introduce the subject and to convey in a meaningful way the strength of the case, the credibility of the witnesses, and the merits of the defense. Were the press and public able to follow as these cases unfolded, the disciplinary process would not seem sudden and mysterious, and citizens would be better informed, not only about the serious accusations, but also about how their government deals with such allegations against high-ranking officials.

An example of these difficulties is provided by a recent case against the surrogate (probate judge) of Brooklyn, New York; the post-investigative formal discipli-

nary proceedings lasted twenty-two months, and the record was over 13,500 pages long. Among other things, the judge had awarded a longtime friend millions of dollars in fees from estates where there was no executor, on the basis of handwritten Post-It notes that simply stated a dollar amount, without requiring the statutorily mandated affidavits of services rendered that would confirm that the lawyer had done sufficient work to earn such fees. Yet the details were unavailable to the public until the commission rendered its decision in *Feinberg v. Commission* (2005) to remove the judge from office. At that point it was difficult, if not impossible, for the media, even a newspaper, to capture the complexities of such a complicated proceeding and voluminous record in only a single article reporting the final result. Had the proceedings become public at the end of the investigation and upon issuance of the formal disciplinary charges, the testimony and other evidence would have unfolded to a public audience—or at least those interested—with the time to appreciate the story’s significance and to learn important civic information from it.

Keeping judicial disciplinary proceedings private runs the risk of signaling to the public that judges are benefiting from special treatment, particularly by comparison with criminal defendants, parties to civil litigation, or an official of a company sued by shareholders for securities violations. The harm to a judge’s reputation deriving from an as-yet unproved misconduct charge is surely no less than the harm to a defendant indicted for an as-yet unproved crime. Moreover, from the very founding of the United States, the constitutional presumption has been that the accused, as well as the public, are better protected against government tyranny by open processes, with not even the semblance of Star Chambers to have a place in American judicial proceedings.

Although judicial conduct proceedings are disciplinary in nature, the analogy to criminal law and procedure is apt. Grand-jury investigation of potential criminal activity is confidential, to protect and not undermine the integrity of the investigation and to protect the reputation of those persons not yet formally accused. However, once this official body concludes there is probable cause to proceed and an indictment issues, the criminal charges become public and the trial is open. Although the defendant may ultimately be acquitted, the matter is considered too important to carry on behind closed doors.

Despite the effort to do so, maintaining complete confidentiality is often beyond a judicial commission’s control. For example, in any formal disciplinary proceeding where subpoenas are issued, and witnesses are interviewed and prepared to testify by both the commission staff and the respondent-judge, it is not unusual for word to spread around the courthouse, particularly as the hearing date approaches. As more “insiders” learn of the proceedings, the chances for “leaks” to the press increase; this often results in published misinformation and unfounded accusations as to the source of the “leaks.” In such situations, both confidentiality and confidence in the integrity of the disciplinary system suffer.

An episode reported in the *New York Law Journal* in 2004 is illustrative (News Brief, 2004). Based on a leak from an unidentified source, the *Journal* accurately reported that in the confidential disciplinary proceeding in *Feinberg*, a stipulation favorable to the respondent had been offered regarding the testimony of a prominent and highly respected judge who was unavailable to appear in person. (If not for the facts that the information was favorable to the respondent and this was the only substantive account of the hearing to appear in the press, the average reader would likely have assumed the leak came from a commission source.) It turned out, however, that the prominent judge had not so stipulated and, indeed, had advised the respondent that she would not testify on his behalf. Had she not read about it in the *Journal*, she would never have known that her name was being used in such an unauthorized fashion. She reported the matter to the commission's administrator, who then successfully moved to vacate the stipulation (*Matter of Feinberg*, 2005). Such episodes are, of course, far less likely where disciplinary proceedings are open to the public as they happen and confidentiality cannot be used as a shield behind which either side may conceal false or misleading information.

The argument that public hearings would irreparably harm the innocent judge's reputation is difficult both to quantify and to disprove, yet the body of anecdotal evidence seems to suggest that this argument is exaggerated. While removal from office is sometimes dramatically described by defense attorneys as a "judicial death sentence," judges who are publicly reprimanded and permitted to remain on the bench nevertheless get reelected or reappointed and are even elevated to higher judicial positions. As with most public offices, incumbency and name recognition are potent assets for continued tenure. From those facts, one may fairly extrapolate: if the judge found guilty of misconduct and publicly reprimanded is nevertheless likely to be returned to office, the exonerated judge is not likely to suffer permanent professional or reputational harm.

This is not at all to minimize the trauma associated with being charged with misconduct and the special anxiety generated among the relative few who may actually be wrongfully accused. However, as in criminal law and virtually all other aspects of our legal system, the equities must be balanced, and some important value may have to give way to an even greater principle. This gives rise to the following questions. Is the public benefit in an open governmental process outweighed by the possible harm to a few judges that their reputations may wrongfully be injured? Is it probable that more judges would be protected by an open process that would likely be more honest than a closed one? Is the government as represented by a judicial commission more likely to be restrained and less likely to intrude on judicial independence if its work is open and subject to scrutiny? Would an open proceeding shed important light on even the relatively rare instance in which a complaint about a judge has resulted in a formal charge that is later dismissed without any disciplinary action, and provide the public with the means to assess that the dismissal was

deserved and the system was honest and not “tanking” cases? The more citizens know about what goes on at a judicial commission, the more likely they will appreciate that no case is cut-and-dried; that all cases are painstakingly examined, developed, and decided; and that justice is being done.

Where do major organizations interested in the judiciary stand on such matters? The ABA *Model Code of Judicial Conduct*, which articulates ethical standards for judges to observe, does not address such procedural issues as whether disciplinary proceedings should be public or confidential. The ABA *Model Rules for Judicial Disciplinary Enforcement*, which does address procedural issues, provides for investigations to be confidential and for formal disciplinary proceedings to be public from the point at which charges are filed and served on a respondent judge (Rule 11).

The American Judicature Society has also taken a strong position in favor of openness, declaring in a 1996 policy statement that “ending confidentiality when a formal complaint is filed against a judge strikes the best balance between protecting a judge against unfounded charges and opening the judiciary and the commission to the same public scrutiny borne by other public officials and other public agencies” (Gray, 1996:10). The statement continues by asserting that open proceedings would demonstrate not only “confidence that the public can fairly assess the charges against judges” but also “trust in the efficacy of public proceedings [as] one of the hallmarks of American democracy in general,” and by claiming that in a legal system built on transparency, “public hearings for judges charged with misconduct complements the pride judges justifiably take in the openness of the judicial system” itself.

The AJS also notes how confidentiality may actually undermine both the judiciary and the judicial commission.

When scandal hits a state’s judiciary, . . . the state judicial conduct organization, formerly overlooked by the press and unknown to the public, becomes a target of the criticism . . . , maligned [for its] “secrecy” and blamed for [its] perceived cover-up of judicial misconduct. This outcry demonstrates how confidentiality can undermine the public confidence in the judicial discipline process and in turn the judiciary.

Although acceding to public demands to discipline a particular judge would be a forfeiture of the commission’s independence and duty, acknowledging the public’s interest in holding judges and the commission accountable through public hearings and decisions is consistent with the best principles of open government and democratic responsibility (Gray, 1996:10).

What about the states? There has been relatively little change over the last decade in the lineup of states that have opted for public proceedings. New Hampshire amended its confidentiality rules in 1999 in the direction of more openness, as did Arizona in 2006. For the most part, however, the landscape is unchanged. For example, in 2003, Chief Judge Judith S. Kaye of New York proposed legislation to

open up the disciplinary process when a judge is formally charged with misconduct. Unfortunately, the legislature did not act, and disciplinary proceedings in New York remain closed.

The public process for judicial disciplinary proceedings, like that which exists in thirty-five states, tends to transform judicial discipline from a secretive game to one in which the judicial commission's judgments are open to scrutiny and improvement as the process moves along, while there was time enough to make a difference. Public confidence in the judiciary, and in the disciplinary system that holds them accountable, requires nothing less. **jsj**

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