

Who's the fairest of them all?

By Louis L. Akin, TLPI

“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law.”

Preamble to the Texas Code of Judicial Conduct

To the people of a democracy, judges are the visible administrators of justice. The people must have faith in their judges as being independent, competent, and fair. To the extent that judges meet those standards, the peoples' minds can be at ease. To the extent that judges are corrupt, incompetent, or biased, the people must fear and loathe them and the foundations of democracy are shaken.

The ethical code for Texas judges is contained in the eight canons of the Texas Code of Judicial Conduct. When judges stray outside the canons they may be called to appear before the State Commission on Judicial Conduct (SCJC) to be examined under oath and ultimately judged by a panel of their peers. The 12-member panel, one truly of their peers, consists of six judges appointed by the Supreme Court. They include justice of the peace, municipal, county court, and district court judges from across the state, two lawyers. The governor appoints four public members. The make up of the Commission is meet and necessary as the Commission has the authority to investigate and discipline municipal judges, magistrates, justices of the peace, constitutional county judges who perform judicial duties, county court at law judges, statutory probate judges, district judges, appellate judges, retired and former judges sitting by assignment, and associate judges and masters including title IV-Masters.

When summoned to a formal proceeding the judge does not have a right to trial by jury; however, the judge is afforded other rights including to be confronted by accusers, to

introduce evidence, to be represented by counsel, to examine and cross-examine witnesses, to subpoena witnesses, and to obtain a copy of the record of testimony.

Commission members keep in mind that while the public interest requires that judges be held accountable for misconduct, judicial careers can be damaged by false allegations and the judiciary itself can be dishonored and lose the confidence of the public. A state without public confidence in the judiciary is a state of anarchy unless it is oppressed by totalitarianism. So there is a balance to be struck. Judges must be held to a higher duty of ethical conduct than other officers of the court, and the judiciary must be respected as a model of fairness and competence free of the intimidation of politicians.

“If we do our job right, all judges will respect what we do and why we do it, not resent or fear us. We want what everyone else should want—to be proud of our judiciary and system of justice” says Seana Willing, the commission’s executive director. “Without a strong Commission you can’t expect to have public confidence in the integrity, independence and impartiality of the judiciary. The reputation of the entire judicial system is at stake whenever the public perceives that judges are engaging in unethical conduct with impunity. Once the public loses confidence in the system, judges lose the ability to have their judgments, orders, and rulings enforced. That leads to chaos, a devastating threat to the entire third branch of government. What then?”

So how does the Commission maintain the balance between disciplining judges and at the same time protecting the judiciary? It seems a thin line to walk and not an easy one at that—too much prosecutorial gusto and one could wreak havoc on the judiciary—too much of a patsy and one could allow the judges to wreak havoc on the judiciary themselves. One of the answers to this question is that some punitive sanctions are made public and some are kept in confidence. One method is criticized as biased in one direction, the other in the opposite.

“Certainly one could make the argument that publicizing the misconduct committed by judges casts public discredit on the judiciary, which I assume would mean that

proponents of that theory would support keeping the work we do confidential and quiet and never draw attention to the State Commission on Judicial Conduct. That kind of commission, however, risks being perceived as being a weak “do nothing” agency. How does an agency with that reputation protect the public and promote public confidence in the Judiciary?” Willing asks.

Willing is quick to point out the danger of an overly zealous commission that adopts a punitive mentality—one that demands strict adherence to the canons, or a zero tolerance policy such as has been popular in prosecutorial circles for the past thirty years “That agency risks being perceived as being focused on punishing and publicly humiliating judges. How does an agency with that reputation protect the public and promote public confidence in the judiciary?”

So there is a third consideration—protecting not only the image and prestige of the judiciary, but the public too by imparting to citizens the order and tranquility that comes from knowing that there are fair and competent judges in the courts to which they take their complaints and grievances or into which they are summoned. How much does that confidence weigh in the minds of the people of a democracy, and how much more effectively does that confidence promote trust, order, and tranquility than police in black ski masks and clothing yelling and pointing assault rifles?

What is judicial misconduct?

The black-letter code can be found on the commission’s website at <http://www.scjc.state.tx.us/> A lay interpretation in commission’s annual report that details the following behavior as misconduct:

- Inappropriate or demeaning courtroom conduct, such as yelling, profanity, gender bias, or racial slurs;
- Using the prestige of judicial office to advance the private interests of the judge or others;
- Improper communication with only one of the parties or attorneys in a case;

- Public comment regarding a pending case;
- Hearing a case in which the judge has a financial interest in the outcome;
- Ruling in a case in which the parties or attorneys are related to the judge within a prohibited degree of kinship;
- Alcohol, drug, or mental health problems;
- A judge's failure to cooperate with the Commission or failure to abide by any provision of a Voluntary Agreement to Resign in Lieu of Disciplinary Action;
- Out-of-court behavior such as sexual harassment, official oppression, bribery, theft, driving while intoxicated, making threats, or making racist comments; and
- Endorsement of a specific political candidate.

In the year 2005, the Commission disposed of 1107 cases in an average time of 4.5 months. 1049 cases were dismissed. Disciplinary actions were taken in 65, down from 77 the year before. In the disciplinary actions, 6 judges resigned voluntarily, 6 received public reprimands, 3 received public warnings, 3 received public admonitions, and 4 received public sanctions and orders of additional education. One judge received a private reprimand, 8 received private warnings, 8 received private admonitions, and 6 received private sanctions and orders for additional education, 8 more received orders for additional education. Three were issued orders of suspension, and 4 recommendations of suspension were made to the Supreme Court. There was one referral to Amicus Curiae, a program for alcohol or drug impaired judges.

Responsibility to Report

Lawyers have a duty to report judicial misconduct. Many do not because they are concerned about the consequences in similar fashion to police officers who refuse to report misconduct by fellow officers. Lawyers especially fear filing a complaint against judges before whom they have to appear. Judges who report other judges may incur the contempt of those with whom they must work.

“Self-regulation is imperative for achieving those goals. Lawyers should not assume the commission already knows that a particular judge may have engaged in misconduct just because people in the courthouse or in the community are talking about it” says Willing who is sensitive to lawyers’ reticence to report misconduct “We recognize that in some cases, the risks involved are high. We have mechanisms in place to protect the identity of complainants precisely for that reason.”

The system requires self-regulation to work. It’s as simple as that and for obvious reasons. If a judge is not admonished for unethical conduct that causes damage in one case then he or she may be equally as unethical and damaging in the next.

The instances of false allegations being filed against judges are rare according to Willing, and there are mechanisms to protect the judges from them. They are usually screened out in the investigation process or by the members of the Commission when they meet.

What the Commission cannot do

The Commission cannot exercise appellate review of a case or change the decision or ruling of a court. It cannot remove a judge from a case, change a judge’s sentence, order anyone to be released from jail, provide legal assistance, or award damages or monetary relief to complainants. The Commission cannot investigate a judge for making a wrong decision in a case even if the decision flies in the face of the evidence or appears to be based on perjured testimony, or for misapplying the law. Those are matters to be taken up by the appeals process.

Available Commission Actions

The commission has several options available to deal with errant judges. The options include dismissal, sanction, suspension, or allowing a judge’s resignation in lieu of disciplinary action. The commission may order additional education combined with

private or public sanctions. The commission may also initiate formal proceedings that could result in removal of the judge from the bench.

In a case where it appears that a judge was misguided but not acting in bad faith, the Commission may order additional education combined with private or public sanctions.

Private sanctions are issued when sufficient evidence supports a finding of judicial misconduct. If a private sanction, the order is served upon the offending judge and the complainant is notified of the Commission's action. No other information is released to the public.

In cases that effect public confidence when sufficient evidence supports a finding of judicial misconduct the Commission may issue, by order of severity, admonitions, warnings, and reprimands to publicly sanction judges. In such cases, the order is served upon the judge and disseminated to ensure public awareness.

If a judge is indicted for a felony or charged with a misdemeanor involving the judge's official position, the Commission may vote to suspend the judge from office with, or without, pay pending the disposition of the charge.

In some cases, a judge may decide to resign in lieu of disciplinary action. The resignation will be public and may be used in subsequent proceedings before the Commission.

Formal proceedings may be brought by a vote of the Commission. The Commission may hold a trial or request the Texas Supreme Court to appoint a special master to conduct the proceeding and report findings of fact to the Commission. Formal proceedings become public when the Commission files formal charges. The Commission cannot remove a judge. The removal order is given by the Review Tribunal and the Supreme Court retains appellate authority over the decision of the Tribunal.

Side Bar



Executive Director Seana Willing, who hails from Boston, got her law degree from St Mary's University in 1983. She came to the State Commission on Judicial Conduct in September of 1999 at the request of her former boss, Margaret Reeves for whom she had worked at the State Bar. She felt the change from the State Bar to the Commission was something of a lateral arabesque. "The job at the Bar was one of the best opportunities I had in my professional career because the work was so interesting and fulfilling, and the people I worked with were great. Going from that environment to work for the SCJC appealed to me because of the bigger picture—not only would I be doing something good and honorable for the legal profession, I would be tackling misconduct issues that affect the entire justice system."