

Office of the  
LEGISLATIVE AUDITOR GENERAL  
State of Utah

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**A Review of the  
Judicial Conduct Commission**



There is a recognized need for maintaining judicial integrity by reducing and/or eliminating judicial misconduct. There are concerns, however, with the Utah Judicial Conduct Commission's (JCC's) ability to meet that need. Since judges are appointed for six and ten year terms, the JCC is an important avenue to provide judicial accountability. Utah's JCC has been characterized as a closed system that primarily disciplines judges in private hearings and meetings beyond any public scrutiny. Nationally, however, states are turning to more open systems in attempts to increase public trust in the integrity of the judicial system. In Utah, few judges are publically disciplined; most corrective actions are done privately without public knowledge of the case or its elements. Legislative action may be necessary to bring Utah more in line with the majority of other states in providing information to the public in misconduct cases.

There is a continuing struggle balancing judicial independence and judicial accountability. The goal of this balancing act is to maintain and improve the quality of the judiciary and reinforce public confidence in our judges. Historically, the balance has leaned toward judicial independence with limited public disclosure. In Utah, only one facet of the system is open to the public: filings, oral arguments, and the results of cases heard before the Utah Supreme Court. The Supreme Court sees only a few complaints, those when the JCC recommends a formal order of discipline.

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**Utah's JCC has been criticized for disciplining judges in private.**

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Legislation limiting Supreme Court review to only JCC-forwarded cases makes the JCC a potent control and decision-making body. In the past and prior to recent legislation, that control and decision-making was even more centralized in the JCC's executive director who could determine which complaints went before the commission, even before a determination was made by the commission to recommend disciplinary action against a judge and send the case to the Supreme Court. Recent legislation altered JCC operations by requiring that all complaints go before the commission, thus alleviating some concerns regarding control.

Currently, the JCC is an independent, state body constitutionally charged with investigating complaints filed against the 233 judges within its jurisdiction. Based on its investigation and hearings, the JCC may order any one of a number of disciplinary actions. Prior to the implementation of any JCC order, constitutional power is given to the Supreme Court to review and implement, reject or modify the commission's order. The 11-person volunteer JCC has a small staff of three people, including an executive director, a part-time investigator and an office technician. In addition, the staff contracts with a part-time investigator.

### **Audit Scope and Objectives**

The Audit Subcommittee of the Legislative Management Committee directed this office to conduct a comprehensive audit of JCC operations and practices. The JCC has been unwilling to grant auditors access to complaint files because of their interpretation of confidentiality provisions. Since the commission's confidentiality provisions have an exception for disclosure "upon order of the Supreme Court," the commission has sent a letter to the Supreme Court asking for permission to share the confidential files with the legislative auditor. On October 16, 2002, the Supreme Court responded that their present position is that a blanket disclosure is unnecessary because the JCC could redact specific information that would easily identify judges, witnesses and complainants from the documents. To redact files would be time consuming and difficult for JCC's small staff and would not provide auditors with the information necessary to do an independent and comprehensive audit. Further, the Supreme Court's response while addressing the JCC's charge does not address the auditors constitutional right to the information so that the auditors can provide an independent review of this program. A comprehensive review of complaint files would allow auditors to review

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**JCC believes they cannot give auditors access to confidential files without Supreme Court authorization.**

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the consistency of sanctions, the timeliness and efficiency of complaint processing, and compliance with stated JCC policies and procedures. Without the files, the audit scope has narrowed to a review of the organizational structure and confidentiality rules of the JCC.

## **Need for Judicial Conduct Oversight Is Well Established**

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**The JCC  
investigates,  
charges, and  
recommends  
discipline of  
accused judges.**

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All states have judicial conduct organizations that investigate allegations of potential misconduct and, in cases of substantiated misconduct, initiate discipline of judges. Following the national trend, Utah created its Judicial Conduct Commission. Utah, like most states and the federal government, adopted the American Bar Association's Model Code of Judicial Conduct. Appendix A shows the Code of Judicial Conduct which was adopted by the Utah Judicial Council as the basis for determining when misconduct occurs.

Given the power and independence of the judiciary, the Code of Judicial Conduct states that judges must be competent and ethical, and their actions must foster respect for their decisions as well as for the judiciary as a whole. Judges are expected to conduct themselves according to high standards of professional conduct both in the court room as well as in their personal lives. The Code of Judicial Conduct attempts to set a systematic method for dealing with ethical problems not covered by existing laws.

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**The public has high  
judicial conduct  
expectations.**

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The high profile and public image of the judges means that ethics problems can damage public confidence in the judiciary. Although the number of allegations and actual cases of misconduct are low, how the cases are handled is publically scrutinized. Consequently, when there is an allegation of misconduct, even if the charge is eventually unfounded, there is a cost to judicial credibility that can escalate if the public questions the review system or how the allegation was handled.

### **National Trend Toward Oversight**

The development of judicial conduct commissions or similar organizations has been a slow and evolving process taken by all 50 states and the federal system. When proposed controls over judicial conduct

began surfacing, there was some concern that such oversight organizations would pose a threat to judicial independence.

There is a long-standing belief that total judicial independence is necessary so that judges can be free to decide cases without fear of retribution or the need to curry favor. It has only been in the last forty years that states have readdressed the issue of judicial misconduct, turning to a more complete view of judicial integrity rather than just judicial independence.

Those supporting JCCs believe that judicial independence is not impaired by oversight. Rather, the combination of independence and oversight fosters public confidence in the courts, essential in a legal system dependent upon voluntary compliance with judicial decisions. According to supporters of JCCs, the nature of the judicial disciplinary systems established across the country poses little threat to judicial independence since they are embedded within existing judicial systems. Most systems are extensions of each state's judicial branch.

**Judicial Conduct Organizations Were Created Because There Are No Real Alternatives for Oversight.** Prior to the creation of judicial conduct commissions, judicial misconduct in the United States was dealt with through the traditional procedures of impeachment, removal upon the *address* of a majority of both houses of the legislature, or recall. All of these procedures were considered inadequate for dealing with judicial misbehavior. The procedures were cumbersome and time-consuming, while their results were uncertain and entangled in politics. The Utah Supreme Court gave a brief review of the commission's history and function in the Worthen decision filed October 22, 1996. The Supreme Court stated:

From 1896 to 1971, there were only two methods for disciplining judges whose conduct violated ethical norms, removal from office and impeachment. "Removal from office" was authorized under article VIII, section 11 of the Utah Constitution (repealed 1984). Removal could be accomplished only by a concurrent vote of both houses of the legislature, with two-thirds of the members of each house concurring in the removal. Utah Const. art. VIII, section 11. The article provides that removal should be "for cause" but does not specify any particular causes. In contrast, article VI, section 19 provided (as it does today) for impeachment of judicial

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**Utah, like most states, has adopted the American Bar Association's Code of Judicial Conduct.**

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officers for high crimes, misdemeanors, or malfeasance in office. Impeachment could be initiated only by a vote of two-thirds of the members of the house of representatives, and trial was had to the senate, with conviction only upon the vote of two-thirds of the senators. Utah Const. art. VI, sections 17, 18. The only penalty which could be imposed was removal from office, section 19.

The Utah Supreme Court concluded that neither of these processes was effective by further stating:

Both processes were too cumbersome, and removal from office was too draconian a penalty for either to be an effective means of dealing with allegations of judicial misconduct, as is demonstrated by the fact that no impeachment or removal from office proceedings were held in the eighty years that these remained the exclusive remedies under the constitution.

**Most States Have Adopted the ABA Code of Judicial Conduct.**

The American Bar Association (ABA) formulated the original Canons of Judicial Ethics and adopted them in 1924. Those canons, occasionally amended, were adopted by most states. In 1972, the ABA promulgated its Model Code of Judicial Conduct. In 1990, the ABA issued a revision of the canons after they determined that current needs and problems dictated needed revisions.

All states except Montana have adopted the Code of Judicial Conduct. The Model Code consists of broad canons, as well as more specific measures, both of which are meant to be applied as “rules of reason,” consistent with constitutional mandates, statutes, court rules, and decisional law.

In 1960, California was the first state to create a permanent state commission charged with regulating judicial conduct. Additionally, the federal government has created a similar system to discipline federal judges.

In addition to the code of conduct, model rules for enforcement were established by the American Bar Association. Utah’s JCC has followed the lead of other states and patterned its enforcement work after the Model Rules for Judicial Disciplinary Enforcement. The stated goals for the Model Rules include:

1. Conformity with the new ABA Model Code of Judicial Conduct.
2. Prompt and fair discipline for judges.
3. Public confidence in the judiciary and in the judicial disciplinary system.
4. Protection of the public and the judiciary.
5. Independence of the judiciary.
6. Establish a model for states to use as a resource to establish improved judicial discipline systems.

**The Federal Judicial Conduct System Is Similar to State Level Systems.** The federal judicial conduct system differs from state systems in that federal judges can only be removed from office through impeachment by the House of Representatives and conviction by the U.S. Senate. Conduct violations and the mechanics of the federal system are, however, quite similar to state judicial conduct organizations. Sanctions for violation of the canons, as with states, can include private or public reprimand, private or public censure, stripping a judge of case assignments, certifying disability, or requesting voluntary retirement.

Complaints against federal judges are filed with the chief judge of the court of appeals in the circuit in which the alleged misconduct occurred. After reviewing the complaint, the chief judge either dismisses the complaint, concludes the proceeding if corrective action has been taken, or appoints a special committee.

As with most state findings, most complaints are dismissed because the complaint is directly related to an appealable decision. If a complaint is not dismissed, a special committee is appointed to investigate the facts alleged in the complaint and file a written report with findings and a recommendation with the circuit judicial council. The council may conduct any additional investigation it considers necessary. The judicial council may dismiss the complaint or can take any one of a number of codified actions such as request that a judge voluntarily retire, be censured, or be reprimanded.

As stated in 28 U.S.C. Section 372(7)(B)(ii), “the judicial council shall promptly certify such determination [disposition], together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.” The complainant and the subject of a complaint can petition the United States Judicial Conference for review of any action taken by a circuit judicial council.

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**The federal judicial conduct system is similar to state systems.**

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The Judicial Conference can refer a complaint to the House of Representatives for consideration of impeachment.

### **Utah Follows National Trend**

In 1971, Utah followed the national trend by creating an entity to review complaints against judges. Section 38, 1971 Utah Laws 113, established a commission concerning judicial qualifications. Between 1971 and 1983, the statute creating the commission had several minor adjustments. In 1984, the Constitutional Revision Commission renamed the entity to the Judicial Conduct Commission as part of the revision of the Judicial Article of the *Utah Constitution*. The provision was approved by the voters in November of 1984 and became effective on July 1, 1985.

The aim of the provision was to provide a specialized and flexible means for investigating alleged misconduct and, ultimately, disciplining judges at a level appropriate for the violation. This provision replaced the prior system that could only discipline judges with the threat of legislatively initiated impeachment or removal from office. The provision became Article VIII, Section 13 of the *Utah Constitution* which established the Judicial Conduct Commission. Figure 1 details the creation and authority of the JCC in the *Utah Constitution*.

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**Utah's JCC has been in existence for over 30 years and allows for judicial discipline at a level appropriate for the violation.**

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**Figure 1. Article VIII, Section 13 of the *Utah Constitution***

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A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge. Following its investigations and hearings, the Judicial Conduct Commission may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge for the following:

- (1) action which constitutes willful misconduct in office;
- (2) final conviction of a crime punishable as a felony under state or federal law;
- (3) willful and persistent failure to perform judicial duties;
- (4) disability that seriously interferes with the performance of judicial duties; or
- (5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

Prior to the implementation of any commission order, the Supreme Court shall review the commission's proceedings as to both law and fact. The court may also permit the introduction of additional evidence. After its review, the Supreme Court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order. The Legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission.

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**Utah's constitution grants the JCC broad authority.**

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While the constitution gives broad authority to the JCC, it took many years to create workable statutes, case law and operating procedures.

### **Limited past Use and Misunderstandings Have Raised Concerns**

Utah's JCC had limited funding and limited use for many years. In recent years several landmark Supreme Court decisions have begun to clarify the JCC's organizational structure and operating procedures. Utah, like most states, has a one-tier discipline system that charges one body with overseeing investigations and ruling on the findings of investigations. Concerns have been raised that this system violates the due-process rights of judges.

### **Historically JCC Used and Funded Little**

Utah's JCC has been in existence since 1971 but was not particularly visible due to minimal appropriations, no permanent office, and no full-time director. We were unable to find records showing the number of

complaints filed against judges prior to 1995. Since 1995, the number of complaints has been compiled but has fluctuated.

**Budget Remained Low for a Number of Years.** Utah’s JCC had a minimal budget from its creation in 1971 until 1995. The minimal funding meant limited investigations and no trial budget. However, in 1996, the appropriation was increased from a mere \$32,000 to \$109,000 and had another large increase in fiscal year 1997. Figure 2 shows the funding history of the JCC.

**Figure 2. JCC’s Appropriation History.** Budget increases capable of changing organizational behavior have only occurred in the last eight years.

Fiscal Year	Appropriation	Change
1971 to 1994	\$4,000 to \$32,000	
1995	32,000	0%
1996	109,000	241
1997	207,000	90
1998	187,600	-9
1999	218,900	17
2000	225,600	3
2001	224,800	-0.3
2002	238,500	6
2003	228,200	-4

Figure 2 shows that the JCC’s budget has increased substantially. It appears the budget was originally used for operating expenses for the then five-person commission. In fiscal year 1996, the Legislature substantially increased the appropriated amount that allowed the office to hire its first executive director in September, 1995. The following year, another substantial increase in the budget allowed the office to hire an investigator, pay for office space, and fund other office expenses.

Since 1998, the budget has fluctuated between \$187,600 and \$238,500 allowing the office to have a permanent location, an executive director, and a small staff. In a review of the American Judicature Society's Survey of Judicial Conduct Organizations' Complaint Dispositions reported in the *Judicial Conduct Reporter*, Fall 2000, Utah's current funding level is comparable with other states. Utah's JCC budget per capita is \$.10. Other states range from \$.01 to \$.40. Utah's JCC budget per judge is \$930. Other states' budget per judge ratio ranges from as low as \$80 per judge to more than \$3,500 per judge.

**Most Complaints Against Judges Are Dismissed.** While the funding for the JCC has increased, the number of complaints filed against judges has not. Most complaints against judges are dismissed because they involve matters that can be appealed to a higher court. The high dismissal rate creates a misconception for some that there are problems with the system. The high level of confidentiality within the system that has allowed some discipline to be handled privately between the accused judge and the JCC also adds to this misconception of problems. The public has only been given information in those few cases that went to the Supreme Court.

**Figure 3. Complaints and Dispositions Per Fiscal Year.** While most complaints against judges continue to be dismissed, the greatest change has been in the level of review and kind of sanctions issued.

Fiscal Year	Complaints Received	Complaints Dismissed	Private Sanctions	Public Sanctions
1996	84	68	8	0
1997	72	71	5	0
1998	95	65	1	4
1999	125	130†	9	5
2000	97	76	3	2
2001	115	87	3	3
2002	94	77	5	0
<b>TOTAL</b>	<b>682</b>	<b>574</b>	<b>34</b>	<b>14</b>

Since 1996, 84% of all complaints have been dismissed.

Source: Unaudited data from JCC's annual reports.

† Complaints dismissed and sanctions may be from complaints received in a prior year.

Figure 3 shows that since 1996, there have been 682 complaints filed against judges. Fourteen were public sanctions, all but three of which have been stipulated. Stipulated dispositions are punishments agreed upon by the Judicial Conduct Commission and the charged judge, and typically these agreements do not allow for the release of confidential information. The Supreme Court must concur with the stipulated agreement or else the judge may withdraw any admittance of guilt. Three formal hearings and three Supreme Court decisions have been issued.

In 1995, 115 complaints were received, but we were unable to find the disposition of those complaints. We were unable to find complaint data further back than 1995, but since 1996, the annual number of complaints has been between 72 and 125. In a review of the American Judicature Society's Survey of Judicial Conduct Organizations' Complaint Dispositions reported in the *Judicial Conduct Reporter*, Summer 2000, Utah's number of complaints received per judge and complaints per capita were comparable to other states. In Utah there were .54 complaints per judge compared to .06 to 1.50 complaints per judge in other states. Similarly, the complaints per capita were comparable with one complaint for every 17,865 citizens in the state. Other states ranged from one complaint for every 6,636 citizens to one complaint for every 150,607 citizens.

The majority of complaints filed with the JCC have been dismissed by staff action. The JCC's Executive Director drew the conclusion prior to the 2000 Legislative Session that much of the criticism leveled against the JCC was due to the high level of authority exercised by JCC staff. As a result of H.B. 285, every complaint filed with the JCC must be thoroughly reviewed and analyzed by staff as well as the 11 commissioners.

This high level of dismissals, while disconcerting to some, is not uncommon. Utah, like other states, dismisses complaints for a variety of reasons. Reasons for dismissal include the following:

- **No misconduct** – Sometimes a JCC receives complaints that are clearly frivolous or have no basis.
- **No jurisdiction** – Sometimes a JCC receives complaints against people who are not judges.
- **Appellate matter** – Sometimes a JCC receives complaints that involve appellate matters. i.e., matters appropriate for review by

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**Most complaints are dismissed because they involve an appealable matter.**

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an appellate body with the power to correct an erroneous judicial ruling. A JCC has no authority to change the ruling of a court, even if that ruling is incorrect.

- **Lack of proof** – Sometimes it is not possible to obtain proof that would support a sanction or removal, even if the allegations were serious.

Utah is not unique in the high number of dismissed complaints. In the latest survey compiled by the American Judicature Society, the average national dismissal rate was 89 percent. Figure 4 shows how Utah compares to the national average and western states on dismissal and carryover complaints.

**Figure 4. Western State Dismissal Rate Comparison.** Utah’s dismissal and carryover rates compared with other western states with one-tier systems.

State	Average Dismissal Rate	Average Carryover Rate
California	94%	10%
Colorado	99	0
Idaho	95	5
Nevada	96	22
Oregon	98	5
Washington	92	30
<b>Western State Average</b>	<b>96</b>	<b>12</b>
Utah	82	22
<b>National Average</b>	<b>89</b>	<b>15</b>

*Source: American Judicature Society Survey Results reported in the Judicial Conduct Reporter, Winter 1999.*

Figure 4 shows that Utah dismissed 82 percent of all complaints received while nationally 89 percent of all complaints were dismissed, and 96 percent of all complaints in select western states were dismissed. One of the reasons Utah’s dismissal rate may be lower is that Utah carries

**Utah dismisses fewer complaints and carries forward more cases than the national average.**

forward more complaints than is done by other western states and nationally. Carry-forward complaints are those complaints that are not completed in the year they are received and are carried forward to the following year.

Utah carries forward 22 percent of its cases while the six western states only carried forward 12 percent of their complaints. Utah has one of the highest case carry-forward rates in the nation. Of the six western states examined, only Washington and Nevada had carry-forward rates above 10 percent. California, Colorado, Idaho, and Oregon had carry-forward rates 10 percent or lower for the same time period.

**Criteria for Dispositions May Not Be Well Defined.** When a complaint results in a disposition, disciplinary action is recommended by the JCC. It is unclear how the JCC chooses which action to take against a judge because there is no specified formula or grid for arriving at a disciplinary action. There are five available dispositions listed in statute and in the *Utah Constitution*, in what appears to be an increasing order of severity. The dispositions, with a brief description from *Black's Law Dictionary*, are

- reprimand - a public or formal censure or severe reproof
- censure - a formal resolution reprimanding a judge
- suspension - the temporary forced removal without pay
- removal from judicial office - a dismissal from office
- involuntary retirement - forced retirement

It is unclear what the difference is between a reprimand and a censure. Even *Black's Law Dictionary* appears to use the words interchangeably.

Some discipline is handled privately while others are handled publicly. According to the past Executive Director of the JCC, "private" sanctions were set up so that a judge could admit his/her guilt and make corrections, especially if this was a first time problem and the judge did not know he/she had violated the code of judicial conduct.

Some reprimands and censures can be stipulated where the punishment is agreed upon by the JCC and the judge. These agreements may allow for the release of confidential information. Otherwise, the stipulated disposition will be the only item available to the public.

Frequently, Judges seek to avoid hearings by submitting to stipulated agreements.

Public dispositions, unlike private dispositions, release some confidential information to the public. Public dispositions must be included in the *Utah Voter Information Pamphlet* when a judge is considered for retention election. Judges that receive a public disposition must appear before the Judicial Council and show cause why they should nevertheless be certified as a judge qualified for retention election. If the council does not recertify the sitting judge, the judge cannot run for retention election.

As part of the certification process, judges must receive at least 70 percent positive feedback from the Utah Judicial Council Survey of Judicial Performance to qualify for retention election. The survey is divided into two parts: Part I–Certification information; and, Part II–Judicial Self-Improvement. A sample of attorneys who have appeared before each judge anonymously respond to the survey which provides Part I information to be used by the Judicial Council “as an aid in its decision to certify a judge for retention election.” The Part II self-improvement information is sent directly to the judge to assist the judge in his or her courtroom performance. See Appendix B for a copy of the Utah Judicial Council Survey of Judicial Performance instrument for both the Trial Courts and the Appellate Court.

### **JCC Operations Have Evolved with Court Decisions**

The JCC operated with few guidelines from 1971 to 1995, but since 1996, the JCC has received direction from Supreme Court decisions and from legislative mandates. The first major changes occurred in the Worthen decision. In this decision, the justices gave very specific operating instructions to the JCC. The JCC’s executive director drafted rules to comply with statutes and the Supreme Court decision. It took several appearances before the Administrative Rules Committee before the JCC’s rules were brought into compliance.

Shortly after the Worthen decision, the Supreme Court provided additional instructions and direction for the Judicial Conduct Commission. The court emphasized the requirement that the “Commission should specifically link its findings with the individual canons of the Code of Judicial Conduct as required by our decision in

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**The landmark Worthen decision and other Supreme Court decisions have provided direction to the JCC.**

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**The Legislature is responsible for the composition and procedures of the JCC.**

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Worthen.” The court further requested the “Commission be more specific in referencing its own guidelines and explaining the reasoning it employed in reaching its recommendation as to sanction...”

- The Young III case reminded the Judicial Conduct Commission of the court’s finding in the McCully case that “we [the Utah Supreme Court] will not overturn the Commission’s findings of fact unless they are arbitrary, capricious, or plainly in error, but we reserve the right to draw inferences from the basic facts which may differ from the Commission’s inferences and grant no deference to the Commission’s ultimate decision as to what constitutes an appropriate sanction.” The Worthen, McCully, and Young cases helped establish some Judicial Conduct Commission guidelines; however, the Legislature has provided for most of the commission procedures and rules.

Article VIII, Section 13 of the *Utah Constitution* gives the Legislature the authority “to provide for the composition and procedures of the Judicial Conduct Commission.” Recently, the Legislature passed House Bill 285 during the 2000 General Session and House Bill 136 during the 2002 General Session clarifying commission procedures and duties. Proponents of the bills claim that changes in Judicial Conduct Commission procedures will increase the effectiveness and the fairness of the judicial discipline in Utah.

Major changes brought about by passage of House Bill 285 during the 2000 General Session include the following: that all complaints must be heard by the commission and complaints may not be dismissed without approval of the commission; should the commission, during the course of its investigation, find information that a judge committed a misdemeanor or felony, then the information shall be referred to the local prosecutor; and all policy matters shall be referred to the commission.

Additionally, the JCC has the ability to internally initiate a complaint should the external complaint-generation process fail. This ability is important because it initiates possible misconduct cases that would not be investigated due to some individuals’ reluctance to file formal written complaints for fear of retaliation, intimidation, or loss of employment.

House Bill 136, passed during the 2002 General Session, added to the JCC one member of the Utah Court of Appeals and replaced three Utah

State Bar Commissioners with two lawyers appointed by the Utah Supreme Court. The act also added another public member. The act requires the commission to decide whether certain information alleging misconduct should be investigated and to immediately refer an allegation involving criminal conduct to the Utah Supreme Court. The act established an eight-year term limit on commission members and provides that the burden of proof be a preponderance of the evidence.

Finally, the act requires that certain information be included in the record when any order is sent to the Supreme Court for review. Proponents of the bill believe that giving the entire record to the Supreme Court allows the Supreme Court to make better decisions. The act reiterates the Supreme Court’s constitutional power to modify any order of the commission and also requires that the Supreme Court provide a detailed written summary of judicial misconduct for publication in the *Utah Voter Information Pamphlet*.

House Bill 285 and House Bill 136 are included in Appendix C. These bills made changes to *Utah Code* 78-8 which constitutes the standard procedures for the Judicial Conduct Commission.

### **Single Tier System Is National Norm**

One concern is that Utah’s one-tier system violates the constitutional due-process rights of judges. A case is before the Utah Supreme Court to address this issue. The issue has already been addressed by other states’ Supreme Courts. The process has survived due-process challenges in several states because, in this type of system, the Supreme Court has the ultimate authority to review over again (de novo) and impose sanctions.

Utah, like 34 other states, has a one-tier judicial disciplinary system. A one-tier system combines all functions—investigation, prosecution, hearing and recommendation—in a single process. The primary reason voiced in favor of this type of system is cost efficiency. Appendix D lists the organizational structure of each state’s JCC.

Nationally, judges have argued that this discipline system violates their constitutional due-process rights because the commission both investigates and prosecutes complaints and makes decisions. They claim that the commission is acting as both prosecutor and jury. Their argument is that it is unfair for a commission that has decided to file

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**One-tier systems are the norm nationally and have been upheld by the courts.**

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formal charges to also decide whether the charges were proven. According to the American Judicature Society, that argument has been rejected by every state Supreme Court that has considered it because commission decisions are reviewed by the Supreme Court.

Although a separation of the prosecutorial and adjudicative roles is not required by constitutions, some states have adopted it as a matter of policy using a two-panel, or a two-tier, system. Two-panel systems are where the investigative and adjudicative roles are handled by different panels of the commission, each with their own counsel. The use of two panels is based on the American Bar Association Model Rules, although no state has adopted the precise structure suggested by the Model Rules.

A step beyond the two-panel system is the two-tier system. In eight states, complaints against judges are investigated by one body (often referred to as the first tier) which decides whether to file formal charges; the formal charges are then heard and decided by a second body that has a different name and a different membership (second tier).

The main drawback to separating the prosecutorial and adjudicative roles is cost. Utah currently has a commission made up of 11 commissioners representing judges, attorneys, the legislature and the public. The commission has a support staff including an executive director, part time investigator and part time office staff that costs the state about \$230,000 per year. Currently, representation is from around the state. To create a two-panel or a two-tier system could substantially increase the cost of the commission and the time necessary to review each case.

### **Utah Deviates from Other States' Practices in Some Areas**

Utah's Judicial Conduct Commission differs from the majority of states in two areas: degree of confidentiality and level of legislative participation. Utah's JCC maintains the confidentiality of most records and proceedings of alleged misconduct against Utah judges. Confidentiality ceases only when cases go to the Utah Supreme Court for public discipline. Most other states do not maintain the same level of confidentiality of their proceedings as does Utah.

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**The two-panel or two-tier systems appear more fair but may be more costly and time consuming.**

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**Utah maintains more confidentiality than other states.**

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Utah also differs from the majority of states because legislators serve on the Utah JCC. While a unique practice, legislative involvement is called for in the *Utah Constitution*, and the Supreme Court has ruled that legislators can remain on the JCC. Alteration in either area may require constitutional action.

### **High Level of Confidentiality Is Elemental to Utah’s System**

Utah’s closed system is intended to protect judicial integrity. Other states are opening up their judicial conduct reviews because they believe that overly confidential systems appear to hurt judicial integrity. Believing that when the public does not know what is happening, there is concern that complaints may be swept under the rug. Utah, however, maintains strict confidentiality of the records, proceedings, and dispositions of the Judicial Conduct Commission and confidentiality only ceases when the case goes before the Supreme Court or the accused judge waives confidentiality. *Utah Constitution* Article VIII states:

A Judicial Conduct Commission is established which shall investigate and conduct **confidential** hearings regarding complaints against any justice or judge. (Emphasis added)

**Utah’s System Is Closed.** Only in a minority of cases, where the commission files a recommendation for public discipline with the state’s Supreme Court, does some documentation become public. Otherwise, the materials are strictly confidential. Since most cases are dismissed or resolved prior to going to the Supreme Court, the public has little access to information on misconduct cases.

All states have adopted provisions to keep the records and proceedings of judicial disciplinary actions confidential until the conduct organization files formal charges of misconduct against a judge. Utah’s provisions, however, keep all records confidential unless a public disposition results in a Supreme Court order of discipline. Of the 682 complaints filed since 1996, only 14 have been publically disclosed. An additional 34 cases had merit, and the judge involved received some form of a private reprimand.

In May 1996, the Judicial Conduct Commission organized a special task force to examine when confidentiality should cease in the commission’s judicial-disciplinary proceedings. After studying the issue, the commission voted to maintain the same level of confidentiality. Two

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**Utah is one of 13 states with a closed judicial conduct system.**

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**The ABA suggests that an open judicial conduct system inspires public confidence.**

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**Most states eliminate confidentiality requirements after formal charges are filed.**

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commission members wrote a dissenting report concluding that Utah should join the majority of states and open the judicial discipline process after formal charges have been filed.

**Other States' Processes Are More Open.** Many states allow public access to charging documents or fact-finding hearings. The American Bar Association (ABA) recommends that judicial-discipline proceedings become more open to ensure public confidence. According to the commentary on Rule 11 in the ABA's Model Rules for Judicial Disciplinary Enforcement,

once the formal charges have been filed and served upon the judge, the policy emphasis shifts from confidentiality to the public's right to know. The integrity of the judicial system is better protected by an open hearing than by a closed hearing. This is particularly true in those instances in which the conduct is publicly known and the commission proceedings are the subject of rumor and speculation. Once formal charges have been filed and served, there is no longer a danger that the charges are frivolous.

The trend of opening the judicial discipline process is apparent. Since 1996, the American Judicature Society reports that 12 states have reduced their confidentiality standards. Currently, 34 states have eliminated complete confidentiality after formal charges are filed. In contrast, Utah permits public disclosure only when the commission files a recommendation for public discipline with the state's Supreme Court.

There are valid reasons to maintain the confidentiality of judicial commission proceedings and records since many of the allegations are frivolous or proven untrue in an investigation. However, there is also a strong interest in having the proceedings and records open to the public in those cases where the misconduct is substantiated. According to noted experts, the integrity of the judicial system is better protected by an open public hearing than by a closed hearing. Open hearings increase the public's confidence in the judiciary.

Rule 11 of the American Bar Association's Model Rules for Judicial Disciplinary Enforcement reads that

1. Before the filing and service of formal charges, all proceedings shall be confidential.

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**The ABA recommends that all proceedings shall be public after the filing and service of formal charges.**

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2. After the filing and service of formal charges, all proceedings shall be public, except incapacity proceedings.

The commentary on this rule describes confidentiality as necessary in the initial stages of the disciplinary case to protect a judge's reputation from unfounded charges and to protect witnesses from possible recriminations while a claim is being investigated. Once the formal charges have been filed and served upon a judge, the policy emphasis shifts from confidentiality to the public's right to know.

According to the American Judicature Society, the provisions governing confidentiality in judicial disciplinary actions can be grouped into four general categories. Appendix E shows the states in each of the four categories.

- Thirty-four states permit public disclosure once a commission, after an investigation and finding of probable cause, files formal charges against a judge. In these states, the hearing is public.
- One state permits public disclosure at the start of the fact-finding hearing.
- Thirteen states including Utah permit public disclosure when the commission files a recommendation for discipline with the state's Supreme Court. In these states the hearings are confidential. Any commission recommendation for public discipline is public, and all others are private.
- Two states and the District of Columbia permit public disclosure where a Supreme Court orders public discipline. In these states the proceedings are confidential unless and until the Supreme Court orders public discipline.

### **Legislative Membership On JCC**

Utah and Rhode Island are unique in that they are the only states with legislators on their judicial conduct commissions. While unique, legislative involvement on the commission is not inappropriate and can be a positive experience. Legislative involvement on the commission was determined appropriate by the drafters of the state's constitution and was approved by popular vote. Legislative involvement is allowed according

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Utah's legislative membership was upheld by the Supreme Court in 1999.

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to the *Utah Code* 78-8-102 and four members of the Utah State Legislature shall be appointed for service on the Judicial Conduct Commission.

Legislative involvement has been upheld as constitutional by the Utah Supreme Court. The JCC has had legislative members on the commission since 1971, with a six-month removal in 1998-99 while the Utah Supreme Court decided if legislators could be on the commission without violating the principle of separation of powers.

Legislator service on the Judicial Conduct Commission was interrupted for six-months in 1998-99, due to the Young Supreme Court ruling resulting from a Separation of Powers case. In the first Young case filed July 10, 1998, Judge David Young asserted that the Judicial Conduct Commission violated the Separation of Powers provision of the *Utah Constitution* due to legislative membership on the commission. The Court agreed with Judge Young and held that the "Commission as constituted...violated Article V, section 1 of the Constitution." The ruling thus removed legislators from the Judicial Conduct Commission.

Six months later, the Supreme Court reversed the previous ruling stating "that legislative membership on the Judicial Conduct Commission should be held constitutional." The Supreme Court, not the Judicial Conduct Commission, has ultimate decision-making responsibility concerning JCC recommendations, and the court stated that the presence of legislators on the commission could not violate Article V, section 1 of the Constitution. Historical evidence was presented which clearly proved that the 1984 Constitutional Revision Committee understood the separation of power issues and established the JCC with the understanding that legislators would be among the members.

In the Young II case filed January 22, 1999, the Supreme Court validated legislative standing on the commission stating,

...it seems plain that the Constitutional Revision Commission intended the commission [Judicial Conduct Commission] to remain an entity exercising powers available to be shared by other branches of government. [Further,] the function performed by the commission is not the exclusive province of the judiciary, . . . the function exercised by the legislators sitting on the commission is not appertaining to the judicial branch. [Finally], as we said in re Worthen, this court, not the [Judicial Conduct] Commission, has

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**The public voted in favor of legislative membership on the JCC.**

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ultimate responsibility for determining both whether conduct that warrants sanctions has been proven and what those sanctions should be. . . . there is no basis for finding that the presence of legislators on the Judicial Conduct Commission could violate the first clause of article V, section 1 [separation of powers clause].  
[added text]

Utah voters, to whom the amendment was presented, were told that this was to be a commission upon which legislators and others would sit. The overturning of the decision indicated that cooperative commissions with members from different branches of government existed throughout the state—not just in the JCC—and that legislators were not authorized to make decisions. Decision-making authority clearly rests with the Supreme Court.

Rhode Island faced a similar Supreme Court case concerning the three legislators serving on its 14-member Judicial Conduct Commission. A judge under investigation by the commission challenged legislative commission membership as a violation of the state’s constitution clause requiring separation of powers of the three branches of government. The Commission argued that it was merely an investigative arm of the Supreme Court (as is the case in Utah) with no enforcement authority of its own. Therefore, legislators could serve without violating the separation of powers principle. The Supreme Court was equally divided on this issue—it concluded that the presumptions of constitutionality should prevail. The Supreme Court ruled legislators would remain on Rhode Island’s judicial conduct organization.

Utah judges have similarly argued that the Judicial Conduct Commission: 1) violated their constitutional due process rights; or, 2) violated the separation of powers provisions. According to the American Judicature Society, the due process arguments have been rejected by every state Supreme Court considering it because the decisions of the Commission are reviewed by the Supreme Court.

In addition, the *Utah Constitution* clearly calls for legislators to be closely involved with the Judicial Conduct Commission. According to *Utah Constitution* Article VIII, Section 13:

The Legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission.

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**The Legislature cannot set proper procedures or composition without access to confidential information.**

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Although the Judicial Conduct Commission has legislative members and the Legislature is constitutionally required to provide for the JCC's composition and procedures, the JCC does not believe it can grant the Legislature access to its case file information. The JCC has requested a legal ruling from the State Supreme Court to give access to these files to the Legislature. Legislative access is necessary to determine whether or not the Legislature should make composition and procedural changes as stated in the constitution.

Currently, the Legislature does not have the ability to analyze the Judicial Conduct Commission operations without access to complete information. Therefore, legislators are unable to determine whether or not changes in composition or procedure are required for the proper administration of judicial misconduct investigations, hearings, and dispositions. See Appendix F for related correspondence.

## **Recommendations**

1. We recommend that the Legislature consider clarifying, in statute, JCC composition and procedures to address issues of confidentiality. Specifically, they need to address or clarify
  - The intent and degree of confidentiality of JCC proceedings once an allegation of misconduct is substantiated.
  - Legislative need for and ability to audit JCC controlled information.

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## **Appendices**

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**Agency Response**



Colin R. Winchester  
Executive Director

# State of Utah

## JUDICIAL CONDUCT COMMISSION

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Salt Lake City, Utah 84111  
Telephone: (801) 533-3200  
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November 6, 2002

Wayne L. Welsh, CPA  
Utah Legislative Auditor General  
130 State Capitol  
Salt Lake City, Utah 84114

Dear Mr. Welsh:

Thank you for the opportunity to review and provide comments on the Exposure Draft of "A Review of the Judicial Conduct Commission." During the last several days, I have taken the opportunity to discuss the Exposure Draft with members of your staff, and have suggested a few minor amendments, all of which your staff members have been happy to address. They have also incorporated minor changes at the request and recommendation of JCC Chair Ruth Lybbert, who met with them last week. This letter is therefore limited to a substantive response to the two recommendations contained in the Exposure Draft.

As for the confidentiality of JCC proceedings, I encourage the Legislature to thoroughly study the issue, and to make well-reasoned decisions in that regard. I am not opposed to opening the process to the public at an earlier stage, but I do not believe that the main reason for doing so should be that other states do. The Utah Supreme Court, in In re Worthen, 926 P.2d 853 (Utah 1996), listed five factors supporting confidentiality in judicial conduct proceedings. They are: (i) protect complainants and witnesses from retribution or harassment; (ii) protect innocent judges wrongfully accused; (iii) maintain confidence in the judicial system by avoiding premature disclosure of alleged misconduct; (iv) encourage retirement in place of formal hearings; and (v) protect commission members from outside pressures. These factors have merit still, and should not be hastily abandoned merely to conform to the practices of other states.

Wayne L. Welsh, CPA  
November 6, 2002  
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As for access to the JCC's confidential files by the Legislative Auditor, the JCC felt that it *could not* provide access to the files under the current statutory scheme absent Supreme Court authorization. That position was not taken in an obstructionist manner, but rather, in an effort to comply with existing law. As you know, the JCC has requested permission to provide access to the files from the Supreme Court. Although the issue is still pending, it may well be resolved during the next few weeks.

Because the JCC only meets once a month, several JCC members have not had an opportunity to review the Exposure Draft. This response is *my* response. It has neither been reviewed by, nor approved by, the JCC, and it may not necessarily reflect the views of Commission members. They will have the opportunity to discuss the Exposure Draft and this response at their next meeting on November 12, 2002. You and your staff are, of course, invited to attend and participate in that discussion.

If you have further questions or concerns, please don't hesitate to contact me. Thank you again.

Sincerely,

Colin R. Winchester  
Executive Director

## **Appendix F**

- Auditor's request for confidential information: August 26, 2002
- JCC's request to the Supreme Court: September 12, 2002
- Supreme Court's response: October 16, 2002
- Auditor's response: November 6, 2002

## **Appendix C**

- House Bill 285, 2000 General Session
- House Bill 136, 2002 General Session