

STATEMENT OF
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COMMISSION ON JUDICIAL CONDUCT

TO THE
JOINT LEGISLATIVE BUDGET COMMITTEE HEARING
ON THE
2017-18 EXECUTIVE BUDGET



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Members of the Legislature:

Throughout our history, and particularly in times of political change, we have looked to the court system to uphold our shared American values and afford every citizen due process and equal protection under the law. A robust and effective system of judicial ethics enforcement is essential to ensure public confidence in the integrity and independence of our judicial branch, and public acceptance of those judicial determinations.

This year, the Executive Budget is recommending an overall growth of around 3%, yet not one penny of that is intended for Judicial Conduct. Indeed, for the seventh year in a row, the Executive recommends no increase in funding for judicial ethics enforcement. It asks us to hold the line at just under \$5.6 million. Such continued “flat” budgeting for us would mean more service cuts, a greater backlog and less efficiency. A backslide has already begun, eroding the great gains made in our operations 10 years ago when the Legislature took the lead, raised our budget and gave us the tools we needed to manage our heavy caseload. I ask for the Legislature’s help again now, to stem this erosion.

To make up for years of stagnation, I am requesting an additional \$550,000, for a total appropriation of just over \$6.1 million, to meet mandated rises in costs and to restore our operations to the level they would have been at if we had simply keep pace with inflation over these past seven years.

My name is Robert H. Tembeckjian, Administrator and Counsel to the New York State Commission on Judicial Conduct. As you know, the Commission is the constitutionally created independent agency of state government that enforces judicial ethics by investigating and disciplining judges for misconduct. I thank you for the opportunity to discuss the Commission's budget for the coming fiscal year, and I pose a fundamental question: Is judicial ethics enforcement, which is a constitutional mandate, important enough to fund adequately and, in the overall scheme of things, modestly, at \$6.1 million a year?

**Persistent Underfunding in the Executive Budget;
Consistent Help from the Legislature**

I cannot contain my disappointment that the Executive Budget's answer to this question is "no" and that for the seventh-straight year it makes a "zero-increase" recommendation despite rising operating costs, a growing caseload, a downsized staff and a persistent backlog. Nor can I understate the significance of the Legislature's help in previous years, when it augmented the Executive's recommendation and kept matters from getting worse.

"Flat" budgeting is really a cut, because the only way to meet mandated operational increases on the same dollar amount year after year is to reduce staff and/or services. Unfortunately, we have had to do both.

Our staff has been reduced by 18% since the high-water mark of 2007-08, while the number of complaints handled annually has increased 13%.

Meanwhile, over the last five years, we have been unable to sustain a significant dent in our backlog of inquiries pending at year's end, which has been steady at almost 195.¹ The seven-year strain on our budget means it takes longer than it should not only to discipline those judges who are guilty of misconduct, but also to exonerate those who are innocent.

In a time of heightened attention to public ethics, I am proud to say that for nearly four decades, the Judicial Conduct Commission has arguably been the most effective ethics enforcement entity in state government, having rendered 814 public disciplines of judges in 39 years – an average of 21 a year – including 169 removals and 63 stipulated resignations. In our history, we have received and evaluated over 54,000 complaints.

Starting in 2007, when the Legislature took the lead in restoring our agency to adequate funding levels, we reduced the time it takes to render discipline in appropriate cases and significantly reduced our backlog of cases. Unfortunately, those gains are in jeopardy, as the backlog we reduced from 275 in 2006 to 171 in 2014 is back up to 193.²

Over the past seven years, we have tried hard to make do with less. We have made significant changes in our operations: reducing staff, giving up

¹ The five-year average is 195, while at year's end 2016, it was 193.

² At year-end 2006, we had 275 pending matters. At year-end 2014, we were down to 171, representing a 38% drop. However, at year-end 2016, we had 193 matters pending, representing a 13% increase over the prior two years.

equipment, suspending our formal training program and in many cases adopting cost-saving technologies well before they became common in other state agencies. But those kinds of efficiencies can only go so far. We are a small agency with no “fat” to trim. Years of flat budgeting and corresponding cuts in staff and services have diminished our effectiveness. Unless the Legislature acts, as it has in the past, I will be forced to make even more mission-impeding economies.

To put the matter into greater perspective, consider that in 1978, when we had a caseload of 641 complaints a year, we supported a staff of 63 on a budget of \$1.644 million. Under a formula often used to justify other increases – taking our 2010 appropriation, when this era of flat budgeting began, and adjusting it for inflation – our present budget should be over \$6.2 million.³ Instead, I am asking for a little over \$6.1 million. In contrast, with a heavy caseload – last year’s 1940 new complaints were the third highest in our 39-year history – I again will be forced to make cuts because a flat budget of \$5.6 million as recommended by the Executive will not cover our increased expenses, and it will undermine our ability to do our job.

The additional \$550,000 that I request would be disbursed as follows:
\$219,000 to cover mandated increases in rent, contractual escalations and essential

³ Our \$5,406,000 budget in 2010-11, compounded annually at 2%, would be worth \$6,209,800 in 2017-18, *i.e.* more than the \$6,134,000 we are actually requesting.

IT upgrades, and \$331,000 to cover scheduled “step” increases and COLAs, and to restore our staff to 50 FTEs. At the same time, we shall continue the austerity to which we are accustomed. There is no money in our budget proposal for such things as additional cars, new programs or facilities. And we shall continue to save funds whenever opportunities arise, by retarding the hiring of replacements when veteran staff retire or depart for new jobs, paying new staff less than their predecessors, conducting video conferences in lieu of travel, deferring the replacement of aging office equipment, preparing transcripts in-house rather than contracting for court-reporting services, etc.⁴

Judicial Ethics Enforcement: The Importance of Proper Funding

A properly-funded and prudently-managed Judicial Conduct Commission is essential to promote public confidence in the administration of justice. If the public is to have any assurance that judges are accountable for their behavior, without encroachment on their fundamental independence to call cases as they see them, the Commission must function efficiently as well as fairly.

The resources allocated to the Commission must appropriately reflect its significant responsibility. To protect the public, those judges who are guilty of misconduct should be disciplined, and unfit incumbents removed from the bench,

⁴ Our video equipment, state-of-the-art 10 years ago, has since become antiquated and will soon require replacement.

as promptly as possible, consistent with due process. To protect the independence of the judiciary, unfounded complaints of wrongdoing should be dismissed as soon as possible. Without adequate funding, neither of these goals can be met.

Since 1978, when the law under which we operate went into effect, the Commission has been a model of ethics enforcement and judicial discipline. We have received, analyzed and individually addressed over 54,000 complaints, conducted over 10,000 preliminary inquiries and over 8,800 full-fledged investigations, issued over 1,500 cautionary letters and publicly disciplined 814 judges.⁵ At the same time, we have successfully defended against every challenge to our procedures – over 100 lawsuits in all – initiated in the courts by either a complainant, witness or investigated judge.

The Commission's unique structure – appointed by the leaders of all three branches of government but not controlled by any of them – has been a significant reason for its success and consistency over the years. At a time of renewed attention to government ethics, the Commission is an example to be emulated. Indeed, a bill presently pending to create a commission on prosecutorial conduct is directly modeled after the Judicial Conduct Commission.

⁵ 169 removal determinations, 63 stipulated resignations, 316 censures and 266 admonitions.

Request for a Necessary Increase in Funding

I recognize and applaud the significant efforts of both the Governor and the Legislature to reduce government costs and manage resources. The Commission has fully participated in that effort.

For the last seven years, while our budget has remained essentially flat, our workload was heavy and our mandated costs continued to rise. The effect has been the same as a cut, because in order to address an increasing expense in one part of our operation, we have had to reduce what we spend on another part. As a small agency, our options were and are very limited.

These rising costs in an era of flat budgeting effectively reduced the amount of money available to perform our constitutionally-mandated function. Until now, we have been able to cushion the impact of this effectively reduced funding by utilizing technology and finding efficiencies in our operations. But despite these efforts, seven years of flat budgeting came with consequences, the most significant of which are (1) an 18% reduction in staff from 55 approved full-time employees (FTEs) to 50, as to which we have funds sufficient only to fill 45, and (2) a slowdown in our processing and disposing of complaints.⁶

⁶ At various times in 2016, our staff complement fluctuated between 43 and 45.

The Toll from Years of Flat Budgeting

In 2007, then-Governor Spitzer recommended a budget of \$2.8 million for the Commission, which was virtually identical to our prior-year funding. As a result of Judiciary Committee hearings and the leadership of Senator John DeFrancisco and Assemblywoman Helene Weinstein, the Legislature increased our budget by 70% to \$4.8 million, the first installment in a two-year effort to redress years of inadequate funding, clear up a growing backlog and bring our disciplinary resources and facilities up to date.

With the Legislature's commitment to the Commission in 2007, we increased our staff, modernized our case management and information systems, and reduced a backlog of active investigations by 27% – all in the context of an annual complaint load that significantly *increased* in that same time period by 23%, to an annual average of 1,855, which is more than any other state, and which we exceeded last year by 85, or nearly 5%. The number of preliminary inquiries and investigations has also increased over the years, from 605 in 2007 to an annual average of around 650 – also more than any other state. Since the Commission's inception, its public disciplines have averaged nearly 21 a year, which is likewise more than any other state, although last year the number was 13.

Since 2008, in order to make ends meet on virtually the same dollar amount while rent and other mandated costs have increased, we have made

significant cuts in staff and modernized our operations to achieve significant cost savings. For example:

1. ***Reduction in Staff.*** Our allotment of full-time employees (FTEs) has effectively dropped by 18%. Our authorized number of 55 was reduced to 50, of which we are only able to fill 45 due to funding constraints. We absorbed this reduction by not replacing certain staff that retired or left for other employment. An 18% reduction in force is significantly higher than the overall state government average of about 9% in the same time frame.
2. ***Reduction in Fleet and Travel.*** We reduced our agency allotment of automobiles by 22%, from nine to seven. We have reduced investigative field travel, which has delayed the resolution of some matters and affected the comprehensiveness of our investigations. There is no substitute for visiting and developing an appreciation for the scene and context in which misconduct is alleged to have occurred. And, many witnesses, particularly from remote parts of the state, are unable to take time off or otherwise travel to our offices in New York, Albany or Rochester, necessitating our travelling to them. We have also reduced intra-agency meeting travel, relying instead on video conferencing.

3. **Administrative Cost-Cutting.** With technology that became affordable to us only as a result of the 2007 increase in our funding, we have achieved significant savings, such as follows. (A) We switched from conventional telephone service to VOIP service (Internet-based telephony), cutting our local and long-distance billing to virtually *zero*. We pool our rate-plan coverage for those staff assigned cell phones. Overall, where we used to spend nearly \$38,000 a year on telephone services, we now spend around \$7,500 a year. (B) We scan virtually all documents into “pdf” format and distribute them electronically. Consequently, our photocopying, paper and postage costs have dropped dramatically, particularly as it pertains to the 11 sets of voluminous materials we must produce for our 11 Commission members for each Commission meeting. Where we used to spend over \$17,000 a year on postage, we now spend less than \$5,000. Where we used to spend over \$8,000 a year on paper, we now spend around \$3,000. (C) Where we used to spend more than \$14,000 a year on law books, periodicals and newspaper subscriptions, we now rely more and more on low-cost or no-cost Internet-based options and spend around \$2,000. All of these were one-time savings, but the Executive Budget does not take into account that we cannot continue to eliminate funds that are no longer there.

4. *Elimination of Annual Training & Education Program.* We no longer conduct an annual two-day training and education program for staff at the Carey Conference Center in Rensselaerville, New York. This produced a one-time saving of \$25,000, which of course represents money we no longer have in our budget and therefore cannot reduce again. The loss of this invaluable program – during which all staff participated in such training exercises as interviewing witnesses, properly memorializing such interviews, fielding complainant inquiries, identifying and analyzing court records, etc., and heard from guest lecturers on such topics as professional ethics, court administration and records management – negatively impacts our skill and efficiency.
5. *Elimination of Stenographic Services.* To save about \$150,000 a year, we again eliminated all outside stenographic services, as we had done prior to 2007.⁷ We now produce approximately 12,000 transcript pages every year in-house, by audio-recording testimony and then having our own staff type and proofread it. This process, which is much more time-consuming than a professional stenographic service, slows us in at least

⁷ We had given up steno services prior to 2007 as a cost-cutting measure, but with a statutory mandate and due process obligations, we still have to produce transcripts in order to create a record of our various investigative and formal disciplinary proceedings. In 2007 and 2008, after the infusion in our funding by the Legislature, we had the resources to resume stenographic services. This not only relieved our staff of this time-consuming responsibility but also contributed to the more prompt disposition of complaints.

two ways. (A) Transcript production is delayed in individual cases; therefore disposition of those cases is slowed. (B) Employees who are tied up preparing transcripts are not free to work on other matters, thus slowing down resolution of those matters.

Some of these changes, such as the loss of staff, are negative and should be reversed when budget conditions further improve. Others are positive and will be permanent. However, even the positive and permanent changes made in any given year do not save us money in succeeding years. For example, for Commission meetings we now prepare all agenda materials electronically, *i.e.*, no paper, and no mailing costs.⁸ But this only saved us money in 2011, the year we implemented the paperless agenda. Having saved thousands of dollars in paper and mailing costs that first year, we no longer have those items in our budget and therefore cannot cut them again.

All of these savings in prior years were used to cover mandated increases in costs and, to the extent possible, redirected toward new necessities. For example, with our increasing reliance on IT in lieu of more traditional media (*e.g.* scanning and emailing documents rather than photocopying and mailing them), we

⁸ The success of our paperless management is such that representatives of government agencies from New York and other states have come to study and emulate it.

must pay to upgrade our computers when their warranties expire and keep our annual software licenses up to date.⁹

After seven years of creative belt-tightening on an already small budget, I am out of options. If not for the retirement or departure of certain staff this past year, and the consequent saving of money by not replacing them right away, we would have run a deficit.

Budget Request for 2017-18

For the reasons set forth above, I submitted a budget request for an increase of \$550,000, which would bring us to \$6,134,000 and allow us to maintain our current staff and fill five longtime vacancies. However, the Executive Budget submitted to the Legislature again proposes a flat budget for the Commission, which would keep us at \$5.584 million and force more cuts.

Three times in the last seven years, the Executive and I agreed on a flat budget. That became impossible in 2014, 2015, 2016 and now this year.

Appeal to the Legislature

As I did in 2007, 2014, 2015 and 2016, I respectfully appeal to the Legislature to recognize not only the sacrifices we have made over the past seven years, but the harmful effect that flat budgeting will have on the Commission's

⁹ Annual software licensing fees cost us approximately \$12,000 more per year now than when this period of flat budgeting began seven years ago, and anti-virus protection costs us approximately \$4,000 more per year.

operation and the fulfillment of its constitutional mandate. Given the state's encouraging revenue projections, and the emphasis by both the Executive and Legislature on strengthening New York's commitment to government ethics, an overdue increase in our budget seems appropriate.

As you have done three times previously when I have made such an appeal, I hope you respond positively.

APPENDIX A:

BRIEF HISTORY OF THE COMMISSION ON JUDICIAL CONDUCT

The Commission's Constitutional Authority and Independence

The Commission was created in 1978 in the Judiciary Article of the Constitution (Article 6, Section 22). Its enabling statute is the Judiciary Law (Article 2-A, Sections 40-48). The Commission's 11 members are appointed by six different officers of government, none of whom commands a majority: four (4) by the Governor, four (4) by the leaders of the Legislature and three (3) by the Chief Judge of the State of New York. The Commission elects its own Chair and appoints its own chief executive officer (the Administrator, who in law is the agency head). It was purposely designed in such a fashion so as to work cooperatively with all three branches of government but not to be dominated or controlled by any one of them.

Although the Commission is not an Executive agency, historically its budget request has been submitted to the Legislature by the Executive, as have the budget requests of other independent officers of state government: the Attorney General (Department of Law) and the Comptroller (Department of Audit and Control). Usually, such budget requests are mutually arrived at. Occasionally, the Commission has disagreed with the Executive and appealed directly to the Legislature.

Notwithstanding its constitutional independence and the occasional budget disagreement, my office continues to enjoy mutually respectful and cooperative relations

with the Governor and the Legislature, as well as the Attorney General, the Comptroller and the Office of Court Administration.

The Commission's Core Function and Mission

The Commission is the sole state agency responsible for receiving, initiating, investigating and conducting evidentiary trials with respect to complaints of misconduct or disability against judges and justices of the New York State Unified Court System, which is comprised of approximately 3,500 judges and justices. Where appropriate, at the end of such proceedings, the Commission has authority to render disciplinary decisions of confidential caution, public admonition, public censure, removal or retirement from office.

The Commission, which was originally created by the Legislature as a temporary agency in 1974, began operations in January 1975 and expanded its authority as a result of constitutional and statutory amendments that took effect in April 1978 and remain in effect to the present.

The agency has only one program, *i.e.* its core constitutional mission. With their varying responsibilities, all agency staff – lawyers, investigators, administrative – are deployed and devoted to fulfilling the agency's sole and core mission: inquiring into and deciding complaints that judges have engaged in misconduct.

The agency also handles its own appellate caseload. By law, disciplined judges have the right of review in the New York State Court of Appeals. In addition, the agency works in conjunction with the Attorney General's Office in defending itself against outside litigation, such as when complainants or judges commence lawsuits

attempting to compel or enjoin the Commission from investigating or prosecuting complaints.

The September 2008 Report by the Special Commission on the Future of the New York State Courts highlights the unique and critical role played by the Judicial Conduct Commission in enforcing disciplinary rules among the far-flung statewide network of approximately 2,300 justices in approximately 1,250 town and village courts.

The Commission, which provides the only forum for complaints of misconduct against the nearly 3,300 judges and justices in the state Unified Court System, undertakes comprehensive and efficient investigations of such complaints; exonerates those judges who have been falsely accused; takes appropriate disciplinary action against those who have violated the high standards of conduct applicable to judges; and, by its presence and actions, makes the judiciary more sensitive to ethics standards and less likely to commit misconduct.

This mission is of vital importance in protecting both the public and judges from potential abuse. Every judge wields considerable power and as such must follow high standards of ethical conduct. If a judge fails to follow these standards, it is in the public interest to provide the appropriate discipline, expeditiously yet with careful regard to due process; but if a judge is falsely accused, he or she should not be subject to prolonged procedures. Undue delay detracts from the Commission's mission and accomplishments and could inhibit the independence of the judiciary. It is therefore essential to insure that the Commission has resources appropriate to its important mission and significant caseload.