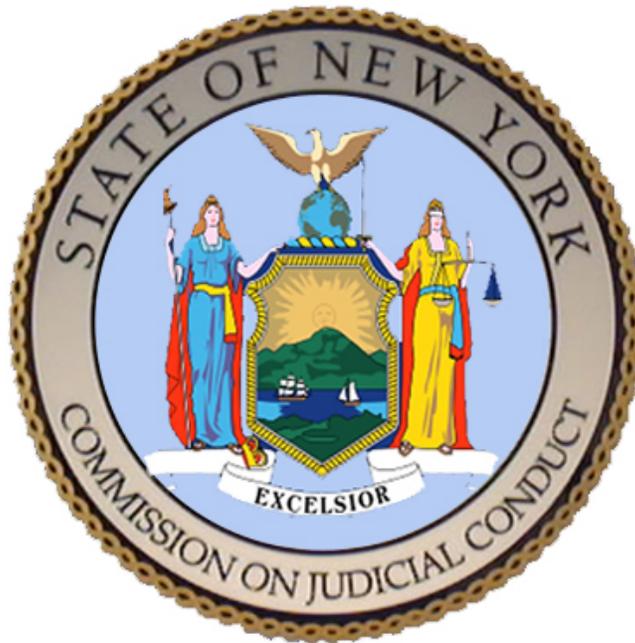


STATEMENT OF
ROBERT H. TEMBECKJIAN
ADMINISTRATOR AND COUNSEL
COMMISSION ON JUDICIAL CONDUCT

TO THE
JOINT LEGISLATIVE BUDGET COMMITTEE HEARING
ON THE
2018-19 EXECUTIVE BUDGET
AS IT PERTAINS TO
PUBLIC PROTECTION



Albany, New York
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New York State Commission on Judicial Conduct
61 Broadway ♦ New York, New York 10006
(646) 386-4800 (NYC) ♦ (518) 453-4600 (Albany)
tembeckjian@cjc.ny.gov ♦ www.cjc.ny.gov

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Introduction

Public confidence in the courts requires a judiciary both independent and accountable. While the vast majority of our state's 3,400 judges are conscientious, the public must be assured that those who misbehave will be held to account.

The Commission on Judicial Conduct is an independent agency of state government, created in the Constitution to enforce judicial ethics by investigating and disciplining judges for misconduct. Where appropriate, we admonish, censure or remove judges from office for serious violations of the Code of Judicial Conduct, or retire judges for disability. Since 1978, we have handled 55,000 complaints and publicly disciplined 830 judges.¹ We are the most active judicial disciplinary entity in the country. Last year we handled nearly 2,100 new complaints (the most in our history), conducted 485 preliminary inquiries and 339 investigations, publicly disciplined 16 judges and privately cautioned 29 others. All on a relative shoestring.

For eight years, our budget has been relatively flat: just under \$5.4 million in 2010, and just under \$5.6 million today. Meanwhile, as our workload has increased, our staff has decreased by 19% – from a high of 51 to the present 41½. We have been forced to make other significant economies that have impeded

¹ 170 removals from office, 71 stipulated resignations and 589 reprimands. However, these numbers should not lead to the misimpression of a judiciary run amok. While 1.5% of our complaints result in discipline, the vast majority – 98.5% – are dismissed after individualized analysis or inquiry.

our operations. Consequently, it takes longer for us to complete our investigations, which is not fair to the innocent judge awaiting exoneration, or to the public which rightfully expects the guilty to be disciplined expeditiously.²

Commission's Relationship to the Three Branches of Government

We are not an agency of the court system. The 11 Commission members – four judges, five lawyers, two non-lawyers – are appointed by leaders of the executive, legislative and judicial branches.³

To avoid an obvious conflict, our funding is not controlled by the judiciary or the Office of Court Administration (OCA). It comes from the Legislature on recommendation of the Executive Budget. Where the Executive and the Commission disagree, I may appeal to the Legislature directly for help. In the past, you have been most receptive.⁴ In 2007, led by Assemblywoman Weinstein and Senator DeFrancisco, the Legislature dramatically increased our funding beyond what then-Governor Spitzer had proposed, rectifying a long

² Of our 339 investigations, 193 were carried over from 2016. And while our 40-year average of public disciplines is 21 per year, in eight years of financial stagnation the number has been significantly less, at least in part because we cannot complete lengthy due process proceedings as efficiently as we would if properly funded. We had 16 public disciplines this past year and 13 the year before. The most recent 8-year average of 15 is well below our historical average of 21.

³ The Governor appoints four, the Chief Judge appoints three, and one is appointed by each of the legislative leaders: the Assembly Speaker and Minority Leader, the Senate President Pro Tem and Senate Minority Leader. No branch appoints a controlling number, and the Commission itself elects a Chair and designates a full-time Administrator/Counsel as chief executive officer.

⁴ Three times in the last eight years, the Executive and I agreed on a flat budget. That became impossible in 2014, 2015, 2016 and 2017. This year we are closer than we've been since 2014, but we are still in honorable disagreement.

history of mismatch between our constitutional mandate and heavy workload on the one hand, and the inadequate resources allotted to us on the other.⁵ In recent years, however, we have been in retreat.

Prudent Budgeting and a Responsible Funding Request

Are judicial accountability and ethics enforcement important enough to fund adequately and, in the overall scheme of things, modestly, at \$6.125 million a year? While that is what I proposed to the Division of Budget, the Executive Budget recommends \$5.696 million, *i.e.* an increase of \$112,000 (2%) over last year. It is the first time in eight years the Executive has proposed any raise for us, and I sincerely appreciate the recommendation, especially given the serious financial constraints under which DOB is operating.

I also appreciate the demands on all of you from worthy causes competing for a finite share of resources. If you were able to supplement DOB's recommendation, it would help alleviate the strain under which we have been operating in recent years, as well as prepare us for additional work in the offing, based on a new program proposed by the Governor to audit a judge's workday hours.

⁵ Governor Spitzer had proposed a budget of \$2.8 million in 2007, but after public hearings held jointly by the Senate and Assembly Judiciary Committees, the Legislature increased the Commission's funding to \$4.8 million.

Over the past eight years, we have tried hard to function with less. We have reduced staff, eliminated stenographic transcription services (and took it in-house), curtailed our formal training program and in many cases adopted cost-saving technologies well before they became common in other state agencies. But such efficiencies can only go so far and some, such as eliminating stenographic services, are actually counter-productive because they slow us down and add months to our completion of investigations and hearings.

We are a small agency with no “fat” to trim. Years of flat budgeting and corresponding cuts in staff and services have diminished our capacity to resolve matters expeditiously. A 2% cap is less than we need to cover the 4% we face in mandatory increases. We project \$150,000 in mandated salary adjustments in the coming fiscal year, and \$78,000 in additional rent pursuant to leases ably negotiated for us by the Office of General Services. In other words, we’ll have at least \$228,000 in additional expenses but only \$112,000 in extra revenue, leaving a gap of \$116,000. Thus, even with a 2% increase, we’ll have to **cut** 2% to break even. That may not seem like much in an overall state budget of \$168 billion, but to a small agency with no room to maneuver, it is enormous. Even assuming a staff retirement or departure, and replacements at lower salaries, we will come up short. If we address the gap by deferring the hiring of replacements and other economies, we may be able to survive the year without another staff reduction, but

at a cost; we will not be able to put more resources into casework, engage stenographic transcript services or otherwise conclude our disciplinary proceedings timelier.

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 stagnant budgeting began for us, and adjusting it for inflation – our present budget should be well over \$6.3 million.⁶ Instead, I am asking for a little over \$6.1 million, which would allow us to bring our staffing up to 45 FTEs – less than the 50 we are allotted, but enough to get us back on the right track.⁷

The Toll from Years of Flat Budgeting

Since 2010, 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 19%. Our authorized number of 55 was reduced to 50,

⁶ Our \$5,406,000 budget in 2010-11, compounded annually at 2%, would be worth \$6,334,000 in 2018-19, *i.e.* more than the \$6,125,000 we are actually requesting.

⁷ In 2007, we were authorized at 55 full-time employees (FTEs). Bowing to fiscal realities, we gradually gave up five, but except for one year since 2007, we have never filled our complement of 50 FTEs. At present, with 41½ FTEs, we are 16% understaffed.

of which we are only able to fill 41½ due to funding constraints. In 2017, **we lost three staff attorneys** – two retired and one returned to the private sector – and we were only able to **replace them with one half-time attorney**. A 19% reduction in force is significantly higher than the overall state government average of about 9% in the same time frame.

2. **Elimination of Stenographic Services.** To save about \$200,000 a year, we again eliminated all outside stenographic services, as we had done prior to 2007.⁸ 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 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. Depending on the complexity of the case and the number of witnesses, it **adds two to six months** to our disposition time just to prepare transcripts.
3. **Reduction in Fleet and Travel.** We reduced our agency allotment of automobiles 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.
4. **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.

⁸ 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.

- 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. We cannot eliminate them again because those funds that are no longer there.
5. **Curtailment 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.⁹ This produced a one-time saving of \$25,000, which of course represents money we no longer have 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. We have substituted a modest videoconference training program that is less effective and participatory.

Some of these changes, such as staff attrition, are negative and would be reversed if funding permitted. Others are positive and will be permanent, though even the constructive changes made in a given year do not save us money in

⁹ We are an accredited CLE provider.

succeeding years. For example, for Commission meetings we now prepare all agenda materials electronically, *i.e.*, no paper, and no mailing costs.¹⁰ But this only saved us money in 2011, when 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 must pay to upgrade our computers when their warranties expire and keep our annual software licenses up to date.¹¹

After eight 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, we would have run a deficit. Three of our staff attorneys left in 2017 – two retired and one returned to the private sector – but financially we were only able to replace them

¹⁰ 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.

¹¹ Annual software licensing fees and anti-virus protection cost us nearly \$20,000 more annually now than eight years ago.

with one half-time attorney. Such deficit staffing can only mean it takes longer to dispose of cases because we have fewer attorneys to investigate and litigate them.

The Governor's Proposal to Audit Judges and Courts

As one whose career has been devoted to enforcing judicial ethics and accountability, I am following with great interest the Governor's proposal that the State Comptroller audit the working hours of our 1,250 "state-paid" judges.¹²

This proposal has constitutional, logistical and financial implications for the Judicial Conduct Commission. We would be the only entity constitutionally authorized to investigate or discipline judges for alleged violations of any such attendance certification. Were he to allege that a particular judge was not working or filed a false attestation, neither the Comptroller, the Chief Administrative Judge nor the OCA Inspector General would have authority under the Constitution to discipline the judge. Such jurisdiction is vested only in the Commission. Were the Comptroller to allege irregularities as to only 5% of the 1,250 affected judges, it would mean an additional 60 investigations and potential disciplinary litigation around the state for us to undertake. That would represent an 18% increase in our present investigative load.¹³ I hope I have demonstrated that it is hard enough for

¹² Includes all judges of city courts and higher, *i.e.* all judges of the state unified court system except town and village court justices.

¹³ Calculated as a percentage of the 339 active investigations conducted in 2017.

us to manage our current caseload with the resources assigned to us. Expanding it to include this new class of cases would require additional funds sufficient to the task.

Appeal to the Legislature

As I have in the past, I respectfully appeal to the Legislature to recognize not only the sacrifices we have made over the past eight years, but the difficult days ahead, even with a 2% increase this year. I know that none of us wishes to relinquish New York's well-earned leadership in the field of judicial ethics enforcement. I also appreciate that the full \$541,000 I requested of DOB would be difficult for the Legislature to appropriate in this fiscally uncertain time. But even supplementing the Executive recommendation by a more modest \$200,000 would go a long way toward ameliorating staff shortages and reducing the time it takes to complete our cases.

Thank you, as ever, for the warm reception and thoughtful consideration you always give me.