

SUBJECT: Revising the State Commission on Judicial Conduct

COMMITTEE: Judicial Affairs — committee substitute recommended

VOTE: 7 ayes — Thompson, Hartnett, Capelo, Deshotel, Hinojosa, Solis, Uresti
0 nays
2 absent — Garcia, Talton

SENATE VOTE: On final passage, March 3 — voice vote

WITNESSES: For — Ken Magnuson; Chuck Rice, Jr., Texas Association of State Judges
Against — None
On — Lisa Mogil, Sunset Advisory Commission; Margaret J. Reaves, State Commission on Judicial Conduct

BACKGROUND: A 1965 amendment to the Texas Constitution, Art. 5, sec. 1-a, established the the State Commission on Judicial Conduct, then known as the State Judicial Qualifications Commission, to preserve the integrity of all judges in the state, ensure public confidence in the judiciary, and encourage judges to maintain high standards of both professional and personal conduct. The commission's primary duty is to investigate and take appropriate action in cases of judicial misconduct or incapacity of judges and judicial officers, including discipline, education, or censure or filing formal proceedings that could result in removal from office. The commission's actions enforce the Code of Judicial Conduct promulgated by the Texas Supreme Court and enforce standards established by the Constitution. The commission exercises jurisdiction over about 3,450 judges and judicial officers.

The commission's board includes 11 members who serve six-year terms. The Supreme Court appoints five judicial members, the governor appoints four public members, and the State Bar of Texas board of directors appoints two attorneys. The board oversees commission operations, sets guidelines for case management performance, and maintains the exclusive right to

determine cases of misconduct. The commission employs 15 people, including six attorneys, one investigator, and eight support staff. It operates with an annual budget of about \$700,000.

Under Government Code, sec. 33.003, the State Commission on Judicial Conduct was subject to Sunset review along other state agencies scheduled for review in 2001, but as a constitutionally created agency would not be abolished.

DIGEST:

CSSB 303 would amend existing statutory provisions relating to functions of the State Commission on Judicial Conduct and would add new requirements concerning complaints filed against judges.

The bill would amend the definition in Government Code, sec. 33.001, of “wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge’s duties,” for which a judge may be removed from office under Art. 5, sec. 1-a of the Constitution. To the current list of what such conduct may include, the bill would add “violation of any provision of a voluntary agreement to resign from judicial office in lieu of disciplinary action by the commission.” It would define a “misdemeanor involving official misconduct,” for which the commission may suspend a judge from office, to include a misdemeanor involving an act relating to a judicial office or involving an act that involves moral turpitude. The definitions of wilful or persistent misconduct and of misdemeanor involving official misconduct would not be exclusive.

The commission would have to distribute to judges, to those filing complaints with the commission, and to the public plain-language materials in English and Spanish that describe the commission’s responsibilities, judicial misconduct, sanctions issued by the commission, including orders of additional education, and the commission’s policies and procedures regarding complaint investigation and resolution.

The commission would have to provide entities that provide education to judges with information on judicial misconduct resulting in sanctions or orders of additional education. The information would have to be categorized by level of judge and type of misconduct.

During investigations of alleged misconduct, the commission could order, rather than ask, a judge to submit a written response to the allegation or to appear informally before the commission. The commission also could ask the complainant to appear informally. Notice of formal proceedings would have to be served on the judge or the judge's attorney by a person designated by the chairperson. The commission would have to adopt a policy providing procedures for hearing from judges and complainants appearing before the commission.

The commission would have to notify a complainant promptly of the disposition of the case, including whether the judge had resigned in lieu of disciplinary action. If the commission dismissed the complaint, the notice would have to include an explanation of each reason for dismissal and information on how to request reconsideration of the complaint.

A complainant could request reconsideration of a dismissed case if, within 30 days of the notification of dismissal, the complainant provided newly discovered evidence of misconduct committed by the judge. If no new evidence was provided within that period, the commission would have to notify the complainant in writing of the denial of reconsideration. If the complainant made a timely request, the commission would have to grant the request and then vote either to affirm the original decision to dismiss the complaint or to reopen the complaint. The complainant would have to be notified in writing of the commission's decision. For a reopened complaint, commission staff members not involved in the original investigation would have to conduct a full investigation. A complainant could request reconsideration of a dismissed complaint only once.

The commission could disclose information relating to an investigation to a law enforcement agency, to a public official authorized to appoint people to serve as judges, to a court, or to an entity that provided commission-ordered education to judges. The information could be disclosed only to the extent necessary for the recipient to perform an official duty.

A voluntary agreement to resign in lieu of disciplinary action would be made public on the commission's acceptance of the agreement. The agreement and any related agreed statement of facts would be admissible in subsequent

proceedings before the commission. An agreed statement of facts would be released to the public only if the judge violated the agreement.

If a judge was convicted of or granted deferred adjudication for a felony or was charged with a misdemeanor involving official misconduct, the order of suspension would remain in effect until the commission took further action on it. The commission could not sanction a judge for participating in a meeting or function sponsored by a nonprofit professional association of judges that had the purpose of improving the legal system, the law, or the administration of justice.

The commission could obtain from the Department of Public Safety the criminal history record of a judge subject to investigation or of a complainant or witness in the investigation. The information would be confidential and could be disseminated only in the investigation. After final determination of the matter, the information would have to be destroyed.

In an investigation that involved a judge's physical or mental incapacity, the commission could order the judge to submit to a mental examination by one or more qualified psychologists. The bill would delete the requirement that an examination be performed in the city in which the judge lives or at a location to which the judge consents.

On issuance by the commission of a public reprimand or public requirement of additional education, the record of informal appearances and documents presented to the commission that were not protected by attorney-client or work-product privilege would have to be made public.

The commission could release to the chief disciplinary counsel of the State Bar information indicating that an attorney or a judge acting as an attorney had violated the Texas Disciplinary Rules of Professional Conduct. If the commission issued an order suspending a judge indicted for a criminal offense, all records related to the suspension would be public.

The bill would require the *Texas Bar Journal* to publish public statements and summaries of sanctions issued by the commission.

The bill would make the compensation for a special master the same as that for a visiting judge. It would extend immunity from liability to people employed by the commission's special counsel and to people appointed by the commission to help it perform its duties.

CSSB 303 also would add standard sunset provisions requiring equal opportunity employment; information and training on the State Employee Incentive Program; appointments to the policymaking body be made without regard to the appointee's race, color, disability, sex, religion, age, or national origin; conflicts of interest; grounds for removal of a commission member; training; standards of conduct; policies that separate the functions of agency staff and the policymaking body; and complaints.

The bill would take effect September 1, 2001. The commission would have to develop the plain-language materials and to adopt a policy on hearing procedures not later than January 1, 2002.

SUPPORTERS
SAY:

CSSB 303 would change the statute governing the State Commission on Judicial Conduct to make the commission's proceedings more even-handed and fair for judges and complainants alike and to open up the complaint process to public scrutiny.

The commission would have to inform the public and judges in plain language what constitutes judicial misconduct and how to file a complaint. Because members of the public generally are unaware of and confused about the process for filing a complaint against a judge, they may feel that judges who act inappropriately can escape sanctions. Clear and understandable information from the commission could help alleviate this problem.

The commission would have to explain to a complainant why any complaint was dismissed. Such explanations would help alleviate mistrust that develops when complaints are dismissed outright without explanation. Insufficient explanation of dismissals causes the public to feel ignored or disregarded.

The bill would require the *Texas Bar Journal*, rather than the commission's annual report, to publish public statements and summaries of sanctions issued by the commission. This would provide timely notice of commission

actions and would keep judges aware of the application of sanctions, perhaps deterring them from engaging in similar behavior. It would help reduce public mistrust in the system by demonstrating that the system is responsive and would help the public understand when filing a complaint is appropriate.

Complainants should be allowed only to request confidentiality, rather than have the right ensured to them. The commission protects confidentiality to the extent possible, but in some circumstances, the commission needs the complainant's open cooperation to pursue its investigation. Ensuring a right to confidentiality could hinder the commission's ability to carry out its investigation.

CSSB 303 would allow the commission to ask a complainant to appear informally. The complainant would have the same access to the commission that judges have. This would give the commission the opportunity to hear more information about a case before making a decision.

The bill would require the commission to adopt rules that provide procedures for hearing from complainants and judges. The absence of clear procedures could discourage the public from filing valid complaints and could undermine public confidence in the judicial system.

A complainant should be allowed to request reconsideration of a dismissed complaint within 30 days of being notified of the dismissal if additional new evidence is available. Judges can appeal sanctions and orders of education, so complainants should have equal rights. The commission should require staff who did not previously review the matter to work on reconsidered cases to prevent preconceived notions from biasing the case.

Formal hearings of judicial misconduct should be public once the formal charges are filed. While the statute says that formal hearings are open to the public, the hearings essentially are closed because they do not become public until the hearing begins. Notice when charges are filed would ensure that the public was aware of the proceedings ahead of time, instead of when the hearing began. All records related to the proceedings should be made public. Thirty-three other states follow these procedures.

Orders to suspend a judge under criminal indictment should become public at the time they are issued. This would assure the public that a judge was being suspended from duty pending resolution of the charges. Suspension files contain information on indictments, which otherwise are usually public record. Notice of a post-suspension hearing in which a judge must demonstrate that continued service would not impair public confidence would alert the public to cases in which their confidence was an issue. Withdrawals of suspensions also should be made public, so the public would know that the matter had been resolved.

To protect the public interest, the commission should be allowed to share information relating to an investigation with certain entities such as law enforcement agencies. The information also could be used to verify a judge's eligibility to serve on the bench and to match a judge with appropriate special masters and educational training mentors. The commission could share only the information necessary for each entity to perform its function.

CSSB 303 would allow the commission to obtain the criminal history of a judge under investigation and of a complainant or witness in any commission investigation. The information would be kept confidential and destroyed after final determination of the case. Such information would aid the commission in its investigations by allowing it to assess better the credibility of witnesses, to determine if a judge had been involved in previous misconduct, and to determine the appropriate outcome to the case.

The commission should have to provide judicial schools information relating to judicial misconduct. Many types of misconduct can be addressed through training, such as behavior that exceeds a judge's authority or contradicts procedural rules. Providing information about misconduct that warrants sanctions would help the schools develop training that addresses the common problems resulting in sanctions and orders of additional education. It also would provide judges with information regarding acceptable professional behavior. Requiring the commission to categorize the information by type of judge and misconduct would help make this training more meaningful to judges, while preventing and reducing complaints.

OPPONENTS
SAY:

Formal hearings should be kept confidential until the proceedings actually begin. Confidentiality protects judges from being tried by the media before they can present their side of a case. It also helps protect a judge's reputation from allegations that may prove to be baseless and that could undermine public confidence in the judicial system. Confidentiality also helps prevent unscrupulous complaints made to harass judges and threats made to intimidate judges.

People who bring complaints against judges should have the right to remain confidential to protect complainants who fear reprisal from judges. This would encourage the public to bring cases without fear of retaliation. Like a judge, the complainant should be allowed to waive confidentiality.

The commission should allow complainants to appeal, but only within 30 days from the date of the dismissal rather than the date the complainant is notified of the dismissal. In order to ensure that the procedure is functional, the time period imposed should be calculated from a date certain. This would ensure even-handed application of the reconsideration process.

The commission should not be allowed to obtain the criminal history of a complainant or witness in an investigation. This could result in putting the complainant or witness on trial rather than the judge. Some portions of their records could be prejudicial to complainants and witnesses but irrelevant to the present case.

The bill should require the commission to adopt a policy that allows the staff to dismiss certain cases administratively. The staff should be able to dismiss cases that do not allege misconduct, that are moot because a judge has resigned or died, or that are concerns for an appellate court. This would save valuable agency resources, time, and money, and would prevent people who file complaints from waiting an unnecessarily long time for a resolution. Even clearly baseless complaints now receive a thorough preliminary investigation by the staff, distracting the staff for months from investigating valid complaints. Safeguards, such as a team leader or executive director reviewing decisions to dismiss administratively, would ensure that the complaint received the attention it deserves. The complainants could be allowed to request reconsideration. Other state agencies, such as the State Bar and the Commission on Human Rights, allow staff to dismiss cases.

To increase public confidence in the system, the public should be allowed to testify at commission meetings. Law students should be allowed to review complaints to learn more about the judicial system. Also, to ensure that justice is done and to prevent further harm from a judge accused of misconduct, the commission should have the power to put on hold the court cases of the judges under investigation and should be allowed to videotape courtrooms to be able to observe judges' behavior.

The bill should require the commission to prepare opinions answering written requests from judges about the application of laws or rules under the commission's jurisdiction to an existing or hypothetical situation. This could prevent errors on the part of the judge that would lead to complaints.

NOTES:

The committee substitute removed from the proposed definition of "wilful or persistent conduct inconsistent with the proper performance of a judge's duties" the failure to cooperate with the State Commission on Judicial Conduct. The substitute removed provisions that would have allowed complainants to request confidentiality from the commission. It added the provision prohibiting the commission from imposing sanctions on a judge solely because the judge participated in a function of a legal professional association.