

The Commission on Judicial Disabilities and Tenure

The District of Columbia Commission on Judicial Disabilities and Tenure, an independent agency created in 1970 by the District of Columbia Court Reorganization Act, exercises jurisdiction over all active and senior judges on the D.C. Superior Court and D.C. Court of Appeals. The commission examines judicial behavior to determine whether discipline is merited and counsels judges about conduct that does not merit formal discipline but that may be of concern. The commission manages the judicial reappointment process, evaluating judges desiring reappointment at the end of their appointed term. Likewise, the commission examines retiring judges interested in appointment to senior status. Finally, the commission determines whether to mandate a judge's involuntary retirement for health reasons.

Commission chair William Lightfoot, vice chair Gladys Kessler, executive director Cathae Hudgins, and general counsel Henry Schuelke met with Washington Lawyer to explain the commission's work and philosophy.

What steps are involved in the judicial reappointment process?

Hudgins: By statute judges have a 15-year term. Six months before the 15-year term expires, judges must advise the commission as to whether they want reappointment by filing a declara-

We're not swayed by the political winds or by changes in the government or administration.

There's a continuity of process and evaluation standards that the judges and the public can rely upon.

William Lightfoot

tion of candidacy with the commission.

The commission then must perform its evaluation, which consists of reviewing the judge's complaint file; interviewing attorneys and court personnel who have worked with the judge; and issuing press releases to the print, television, and radio media asking for comment from the legal community and the general public, and letters to the major legal organizations soliciting comments from members or staff. The judge has to submit a written statement, which is typically pretty lengthy, summarizing his or her 15 years on the bench. We also interview the chief judge of that judge's court. The judge's doctor has to submit a fairly extensive judicial medical form indicating that the judge is physically and mentally fit to continue judicial service.

Once we have all this information, the commission has an interview with the candidate judge. Sixty days prior to the expiration of the judge's term, the commission has to write and submit an





evaluation report to the president of the United States.

In that report the commission must place the judge in one of three categories: well-qualified, which means he or she is automatically reappointed to another 15-year term; qualified, which means the president then has the choice of renominating the candidate or nominating someone else; and unqualified, which means the judge can no longer be appointed or reappointed as a judge of a District of Columbia court.

How much of a role does feedback play in the reappointment process?

Kessler: It's really important that we get feedback from the public. Sometimes we get very few responses. But we very much encourage public participation; we certainly want to know what both the legal community and the nonlegal litigating community think of different judges. That input plays an important role in our considerations.

Are the Bar's judicial evaluations similarly important?

Lightfoot: The Bar poll gives feedback to the judges at times other than reappointment; for a judge it is important to be able to gauge progress over time. Judges may not come to see us until the very end of their term. If that's the first time that they realize there is a concern about their

conduct, it's almost too late to change it.

But they can get those survey results periodically throughout their tenure and determine whether they should change certain practices. For example, I do recall one Bar poll result mentioned a judge not starting on time and taking overly long breaks. I believe the judge, in response to those poll results, changed his or her courtroom behavior.

That's a good thing. If the judge

finds out about a problem early enough in his or her tenure, he or she may be able to change it. If that same information comes to the commission at the end of the judge's tenure, it might reflect badly on the judge. In that case the judge would not have a chance to change conduct.

Do you have access to the Judicial Nomination Commission's files when making your reappointment evaluations?



Cathaee Hudgins

Schuelke: We do not have statutory access to the Nomination Commission's files. That commission does, by statute, have access to Tenure Commission files for the purpose of that commission's function with respect to chief judge appointments.

Is the process for appointment to senior status different from that for reappointment?

Hudgins: It's very similar. The com-

mission views it as a mini-reappointment. We conduct the interviews; the judge has to submit a written statement; we interview the chief judge; we interview the candidate judge; the judge's doctor must submit the detailed medical report; and the call goes out to the public and the legal community asking for comments. So it's similar to a reappointment in abbreviated fashion.

Judges have within one year of retirement to request senior status.

The commission has 180 days to complete its performance evaluation, and then submits a recommendation to the chief judge. This recommendation is final. Either the judge is recommended for appointment to senior status or not recommended for appointment to senior status. The chief judge has 30 days to actually make the appointment.

Schuelke: One difference is that by statute a senior judge is appointed for only a four-year term, until the age of 74, after which it's a two-year term. So, on that much more frequent and regular basis, the judge has to reapply, and the commission is then in a position to assess the judge's health and fitness for continued service.

About the complaints process, on

average how many complaints do you receive a year?

Hudgins: The average seems to be going up a little bit. I would say about 40 per year.

From whom do you get the most complaints?

Lightfoot: We receive complaints from almost anybody who has ever been involved with the judicial process. Obviously, some of these complaints have merit. Sometimes judges, for many different reasons, do commit misconduct. We have to be very careful about those situations.

Then there are other situations where, clearly, the litigant is disappointed with the result, or the litigant's attorney is disappointed with the result. We're careful to distinguish these disagreements from the possibility of a judge's conduct being in violation of the code.

We get complaints from prisoners who feel their sentences have been too long. Again, it's understandable, but it might not necessarily be a matter of judicial conduct. Sometimes an instance of misconduct may be the subject of public notice it may appear in the Washington Post or be something on television. Some cases may come to our attention through our day-to-day contacts with the court.

Schuelke: The commission takes the subject of interperate behavior very seriously. The commission has



Gladys Kessler

always been of the view that the judges of our courts are providing a public service and the citizens whose matters are before the court are entitled to be treated with respect at all times.

How does the process work when you receive a complaint?

Schuelke: Every member of the commission reads every complaint. The commission meets once a month. So, for example, in a given month the commission may have received three or four complaints. Each member of the commission will have read all the complaints before the meeting.

Frequently, the commission can determine that complaints from litigants disappointed in the outcome of a case simply raise the question of whether the court's decision was right or wrong. These complaints do not show any violations of the canons of judicial conduct. They are simply not within the commission's jurisdiction. Rather, they may or may not raise issues for the Court of Appeals. A significant number of the total complaints over the course of the year fall within that category: not within the commission's jurisdiction.

If a complainant alleges mistreatment by the judge, rudeness, refusal to hear from the complainant, and so on, obviously one cannot make a judgment about that one way or the other simply from the face of the complaint. In those cases the commission typically asks me to secure transcripts of the proceedings and often an audiotape as well, since oftentimes the written record doesn't give you the complete flavor.

After reading the transcript and listening to the tape, I report my analysis to the commission. Many times I also invite the commission to read portions of the transcript or listen to relevant portions of the tape.

The commission then makes a judgment as to whether misconduct has occurred. If there appears to be support to the complaint, the commission will then move to the next step.

How long does the complaint analysis process generally take?

Kessler: Our process takes some time. Just ordering a transcript usually takes at least a month. So it really

can take a good two to three months to get a given complaint resolved. The people making the complaints don't know about that. They don't know what holds us up or takes so long, and that's unfortunate. In any given case the litigant is not going to know what the problem is. But it's just sort of the nature of the process. It does take a period of time.

What happens if the commission finds merit in the complaint?

Schuelke: In many cases, when it's a question of demeanor and there have been occasions where judges have been peremptory, rude, obnoxious, and so on the commission will typically, if it is a first offense, invite the judge for a counseling session.

To make the judge aware of the problem, the commission would have the judge read the transcript or listen to him- or herself on the tape, which is often a significant, salient experience for these judges. They say, "I can't believe I said that." It's my experience over 24 years that those counseling sessions are quite effective.

Lightfoot: Likewise, it may be that the complaint doesn't rise to the level of a violation of the canons of judicial ethics, but still is something that we may speak to the judge about, for counseling or for some type of corrective action. The public will never know about that corrective action. The counseling will be done because the complaint didn't rise to the level of a judicial ethical violation, but we on the commission were concerned about the fair administration of justice. We'll speak to the judge about that.

Are formal sanctions against judges made public?

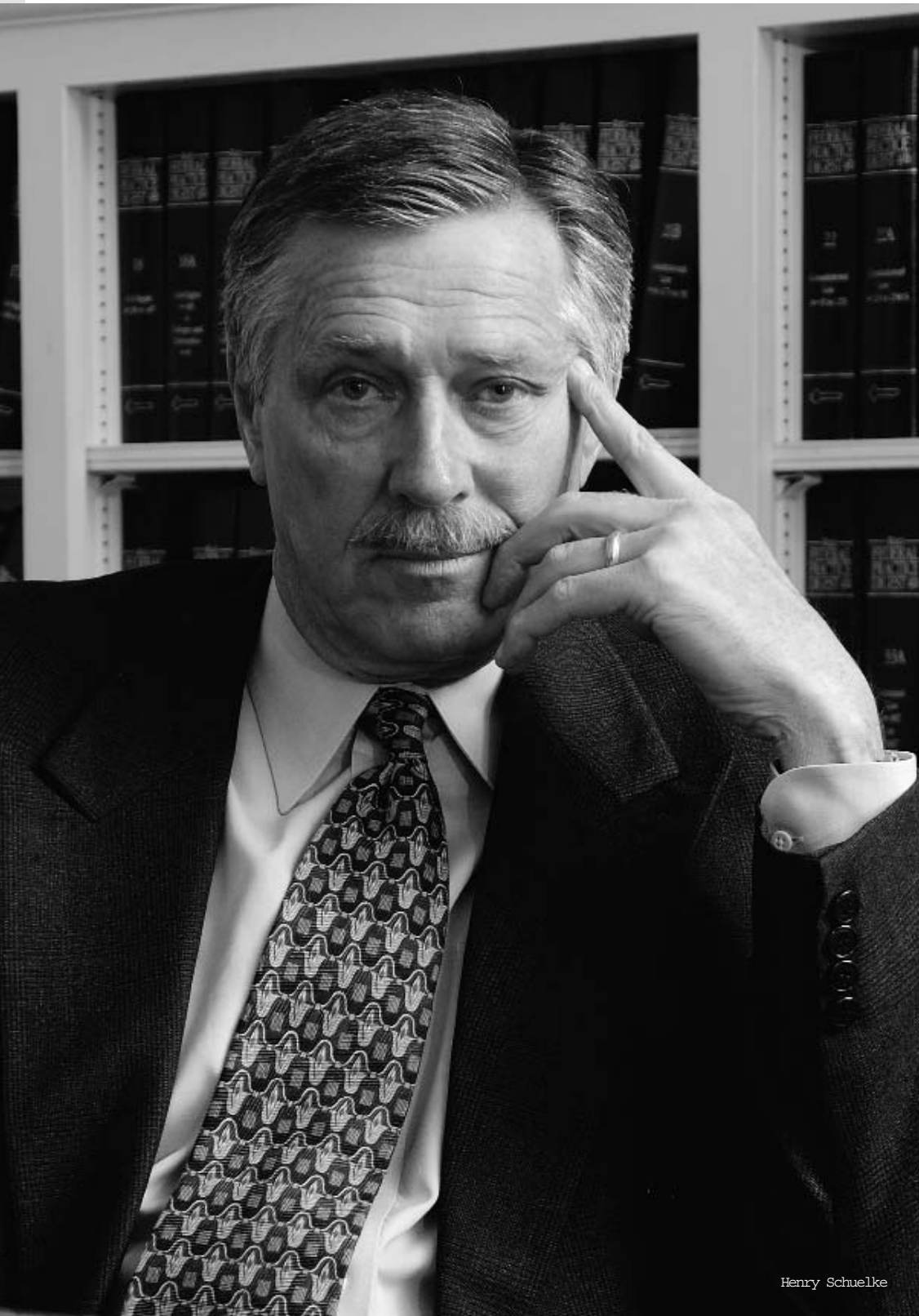
Schuelke: If the commission institutes a removal proceeding for either disability or misconduct, at the conclusion of the formal proceeding the commission enters a removal order. When that order is affirmed by the Court of Appeals, it becomes a public record and the judge is publicly removed.

The commission also has the authority to impose some lesser sanction, such as a reprimand or a censure. If a judge is the subject of a removal proceeding that goes



through the process, but the commission decides not to remove the judge but rather to impose a lesser sanction that is affirmed by the Court of Appeals, that likewise is public.

From time to time, the commission doesn't get to the formal proceeding



Henry Schuelke

The commission has always been of the view that the judges of our courts are providing a public service and the citizens whose matters are before the court are entitled to be treated with respect at all times.

finding against a judge, would that be grounds for an appeal of the case? Schuelke: It might. There are circumstances in which a judge violates a canon of the Code of Judicial Conduct, bringing it within the commission's jurisdiction,

but indicates to the judge that it's prepared to institute a formal proceeding. In some cases the commission and the judge negotiate a public censure or reprimand without going through the entirety of the process. That would be analogous to a plea bargain in a crimi-

nal situation. On those occasions, with the consent of the judge, the commission publishes a document that amounts to a censure or a reprimand.

If the commission makes a public

which might also serve as a ground for appeal. I don't know, however, of any situation in which someone sought an appellate remedy because the commission had made some finding of a violation. Rather, what would happen is that the lawyer represent-

ing someone whom he or she thinks is aggrieved files an appeal on the basis of this matter and makes a complaint to the commission.

For example, the Code of Judicial Conduct provides that in a number of circumstances a judge must recuse him- or herself from participation in a case. This would include circumstances where the judge has a relationship with one of the parties or a financial relationship with a corporate defendant. Hypothetically, the commission could find that such a judge violated the code and ought to be disciplined in some form for having failed to recuse him- or herself.

Similarly, the Court of Appeals could and has in situations like this determine that the party is entitled to a new trial in front of a different judge who doesn't have this conflict. That's the sort of situation in which you could have both. But the Court of Appeals has no legal basis to act simply upon a commission finding.

Do you think that's a common misunderstanding regarding the respective roles of the commission and the Court of Appeals?

Kessler: It's important to keep in mind that we're not here to supplant the judges or second-guess them. They have their job to do, and we are very respectful of judicial independence. That's why we have the provision that if the complaint goes to the legal merits of a case, then a person needs to take an appeal to the Court of Appeals. We shouldn't be judging that. It comes up in criminal cases all the time, and it's a line that we have to very carefully.

It's particularly true on sentencing. The judges have to wrestle with that difficult problem. That's not for us to comment upon, provided that a judge has acted within the law. Otherwise it will be for the Court of Appeals to decide. We would determine whether a judge acted disrespectfully to a defendant at sentencing, used improper language, or spoke too informally all sorts of things that would constitute improper demeanor. But we do try to walk that line very carefully so that we're not second-guessing them.

How would you compare the D.C.

judicial disciplinary system with that of other major cities?

Schuelke: The D.C. courts, the Superior Court in particular, are not markedly different in terms of the business they do from any major metropolitan high-volume court New York, Chicago, Los Angeles, Detroit, and so on. We find from reviewing what's going on in this business around the country that it's not at all unusual in those courts for judges to be disciplined for accepting bribes and all manner of what's also criminal conduct. That's virtually unheard of here.

What sort of disabilities does the commission deal with?

Schuelke: The disability function of the commission pertains to health, temperance or intemperance that is, alcohol or substance abuse and mental and physical disability.

What process is used to handle disabilities? How is the commission notified about these problems? From complaints?

Kessler: If we're going to discipline someone, that discipline usually arises from a complaint, from a member of the public or a member of the Bar. Not always, but usually. However, if we're considering reappointment or senior status, particularly senior status, we may call in someone for an interview as provided by the statute and decide that there are issues raised in the interview.

Schuelke: Theoretically, you could have a situation where a complainant, be it a lawyer or litigant, says, I think Judge So-and-So was inebriated on the bench. That could happen. It would prompt an appropriate investigation by the commission, which could, quite apart from reappointment or senior status, lead to removal action based on that investigation.

What confidentiality rules does the commission have?

Schuelke: The statute provides a broad confidentiality provision. All the work of the commission all of its records, all of its deliberations is confidential, to be disclosed only in specifically enumerated circumstances.

One of those circumstances is upon the request from the Nomination Commission in connection with a chief judge nomination. Another exception is when a removal action becomes public and a witness who was a complainant would be called to testify. In that situation the respondent judge has the due process right to be confronted by the witness against him or her. The other exception is if the commission should have occasion to refer what it believes to be perjurious testimony of a witness for prosecution for perjury. Those are the only exceptions.

What would you say to someone who may have a grievance against a judge but is concerned about coming forward?

Lightfoot: All input complaints, feedback, and so on is confidential. So whatever people may say about a judge, good or bad, we keep that among ourselves in the commission for the purpose of our deliberations.

Nonetheless, we're doing a thorough investigation on many of the claims that come before us, starting with the reading of the complaint; gaining the transcript from the court proceeding; either reading the transcript or listening to the tape recording to find out what was actually said and the person's demeanor; and interviewing witnesses. We may submit a written letter to a judge requesting more information. There may be follow-up interviews with other people or the judge. So there's a thorough investigation that does occur, but it is strictly confidential.

Doesn't this strict rule limit the commission's effectiveness?

After all, attorney disciplinary records are available to the public.

Kessler: The confidentiality provisions serve a number of purposes, and I think they're often misunderstood. First of all, they protect people making complaints. It is my experience that people are very nervous about making complaints. Lawyers are very nervous that it will get out that they have complained and that they'll be retaliated against in some way. I think members of the public may be a little less nervous because they don't practice down there. So it is vitally important that those confidentiality