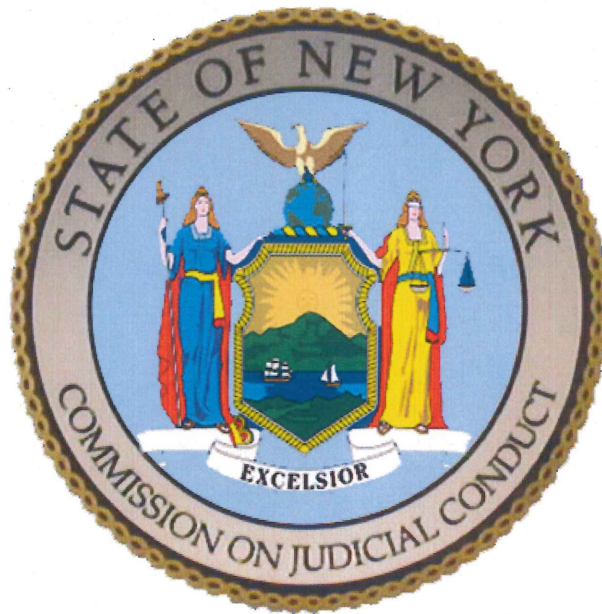


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STATEMENT OF
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TO THE
JOINT LEGISLATIVE BUDGET COMMITTEE HEARING
ON THE
2016-17 EXECUTIVE BUDGET



Albany, New York
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For the sixth year in a row, the Executive Budget recommends a “flat” budget – literally no increase in funding – for judicial ethics enforcement, although it otherwise recommends a 2% growth in spending for other agencies. I ask for a modest increase of \$186,000, for a total appropriation of \$5.77 million, to meet mandated rises in costs and to avoid further reductions in staff and services.

My name is Robert H. Tembeckjian. I am Administrator and Counsel to the State Commission on Judicial Conduct. As you know, the Commission was created in the Constitution as an independent agency of state government, to enforce judicial ethics by investigating and disciplining judges for misconduct.

Although the Commission is not a gubernatorial agency, our budget is submitted to the Legislature in the Executive Budget. Sometimes the Commission and the Executive agree on an amount, sometimes not. This year, we do not.

Persistent Underfunding in the Executive Budget

I cannot contain my disappointment in the Executive Budget, which again recommends not one extra penny for Judicial Conduct despite our rising operational costs, a growing caseload, downsized staff and a mounting backlog. Such “flat” budgeting is actually a cut. The only way to meet mandated increases over which we have no control (such as in our OGS-negotiated rent), on the same dollar amount year after year, is to reduce staff and/or services. Unfortunately, we have had to do both.

For example, our staff has been reduced by 18% over six years – from 55 authorized full-time employees (FTEs) to 45 actual FTEs¹ – which is substantially more than the 8% reduction in overall workforce for the Executive Branch in that period. In other words, we have borne more than a fair share of sacrifice.

Meanwhile, the number of cases pending at year's end increased by 19% last December alone. Cutbacks mean it takes longer not only to discipline those judges who are guilty of misconduct, but also to exonerate those who are innocent.

Shortchanging the Judicial Conduct Commission is indefensible, particularly in a time of heightened attention to public ethics, as to which we have long set a high standard. Since 1978, the Commission has processed or rendered:

- 52,000 complaints
- 10,000 preliminary inquiries
- 8,000 investigations
- 1,500 cautionary letters
- 801 public disciplines of judges (an average of 21 a year), including
 - 168 removals from office
 - 58 publicly stipulated permanent resignations
 - 315 public censures
 - 260 public admonitions

¹ At various times in 2015, our staff complement fluctuated between 44 and 46. We are now at 45, representing a permanent decline of one FTE from last year.

Despite an overall average of 21 disciplines a year, however, in 2014 the number of public dispositions was down to 12, and in 2015 it was 16.

Over the past six years, we have tried hard to make do with less than we need. We reduced staff, gave up equipment, suspended our formal training program, brought transcript production in-house and in many cases adopted expense-saving technologies (such as switching from costly conventional telephones to much cheaper Internet-based telephony) 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. Unless the Legislature acts, as it has in the past, I will be forced to make even more harmful 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 the formula used by the Governor when discussing the minimum wage in his combined State of the State and Budget Message last month – taking the 1978 figure and adjusting it for inflation – our present budget should be \$6 million. But this year I am asking for roughly a quarter-million less than that. In contrast, with a heavy caseload – last year’s 1958 new complaints were the second highest in our history – I again will be forced to make cuts because a flat budget of \$5.584 million, as recommended by the Executive, will not cover our expenses, and it will undermine our ability to do our job.

My request for an additional \$186,000 would cover \$133,000 in non-negotiable contractual increases for rent and other non-personal-service obligations, and \$53,000 in legislatively mandated salary increases to eligible staff.² There is no money in our budget proposal for such things as additional cars, more travel, new programs, staff training or upgraded facilities. I am only asking for sufficient funding to maintain the status quo without making even more cuts.

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, as promptly as possible, consistent with due process. To protect the independence

² We would ordinarily need around \$155,000 to meet these increased personal services costs. However, we are able to keep that part of our request at \$53,000 because of economies we already made. For example, we did not replace a staff member who left last year, and we replaced a senior attorney with a lower-salaried staff attorney. The considerable savings resulting from these decisions are being applied to mandated salary increases for remaining staff, sharply reducing the amount we would otherwise need for this purpose.

of the judiciary, unfounded complaints of wrongdoing should be dismissed as soon as possible. Without adequate funding, neither of these goals can be met.

**Consistent Help from the Legislature to
Offset the Toll from Years of Flat Budgeting**

I could not overstate the significance of the Legislature's help over the years. First, it reversed years of inadequate budgeting. More recently, it has twice disagreed with the Executive's recommendation as to Judicial Conduct and kept a poor situation from getting worse.

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 to its early 1980s level, 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 1,866, which is more than any other state.

However, after several years of flat budgeting, we started to backslide. The backlog in processing new complaints has hovered around 11% in the last three years, which is higher than any time since 2007, when it was only 3%.³

Since 2010, in order to make ends meet on 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. (Examples are offered in Appendix B.)

Some of these changes, such as the loss of staff, are deleterious and, we hope, reversible when budget conditions further improve. Others, such as technological advances, 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.⁴ 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.

³ This is a measure of the complaints processed in the same calendar year as received. Even accounting for the inevitable carryover of complaints received late in the year, the difference between 3% and 11% is significant and largely attributable to staff attrition.

⁴ 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.

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.

After six years of creative belt-tightening on an already small budget, I am out of options, as I was last year, the result of which was another reduction in our FTEs which I want very much to avoid this year.

Budget Request for 2016-17; Appeal to the Legislature

For the reasons set forth above, I submitted a budget request for a modest and necessary increase of \$186,000, which would bring us to \$5,770,000 and allow us to maintain our current staff. 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 six years, I agreed with the Executive and managed on a flat budget. That became impossible in 2014, 2015 and now this year.

As in 2007, in 2014 and in 2015, I respectfully appeal to the Legislature to recognize not only the sacrifices we have made over the past six years, but the

harmful effect that flat budgeting would have on the Commission's 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, a small increase in our budget, which would only permit us to maintain the status quo, seems appropriate.

As you have done all three times I have made such an appeal previously, 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 3,500 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.

APPENDIX B:

EXAMPLES OF COST-CUTTING MEASURES UNDERTAKEN BY THE COMMISSION ON JUDICIAL CONDUCT

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 accomplished this by not replacing staff that retired or left for other employment. An 18% reduction in force is significantly higher than the overall state government average of about 8% 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. 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 \$9,000 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 seems not take into account that we cannot continue to eliminate funds that are no longer there.¹

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,

¹ For example, when phone costs were reduced from \$38,000 to \$5,000, we reduced our overall budget by the resulting difference of \$33,000. With our phone budget now \$5,000, we could not again reduce phone costs by that \$33,000, because that \$33,000 is no longer in our budget.

court administration and records management – negatively impacts our skill and efficiency.

5. *Elimination of Stenographic Services.* To save about \$150,000, we eliminated all outside stenographic services several years ago, as we had done prior to 2007.² 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.

² 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 significant infusion in our funding by the Legislature, we had the resources to resume stenographic services. This not only relieved our staff of a time-consuming responsibility but also contributed to the more prompt disposition of complaints.