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BEFORE THE NEW YORK STATE SENATE
STANDING COMMITTEE ON JUDICIARY

Public Hearing on the
Appellate Division First Department
Departmental Disciplinary Committee,
the Grievance Committees of the
Various Judicial Districts, and the
New York State Commission on Judicial Conduct

Hearing Room 6
Empire State Plaza
Albany, NY

June 8, 2009
10:35 a.m.

PRESIDING:

Senator John Sampson
Chair
Senate Standing Committee on Judiciary

PRESENT:

Senator John A. DeFrancisco (R)
Senator Bill Perkins

	<u>LIST OF PARTICIPANTS</u>	<u>STATEMENT</u>
1		
2		
3	Martin R. Gold	
4	Alan W. Friedberg	
4	First Department DDC	9-34
5	Christine C. Anderson, Esq.	34-48
6	Kevin McKeown	48-63
7	Hon. Thomas A. Klonick	
8	Robert H. Tembeckjian	
8	Commission on Judicial Conduct	63-79
9	Justice Duane A. Hart	80-97
10	Pamela Carvel	98-109
11	Paul H. Altman	109-120
12	Luisa C. Esposito	120-128
13	William Galison	129-143
14	Eleanor Capogrosso, Esq.	143-158
15	Robert Ostertag	
16	NYS Bar Association	158-169
16	John A. Aretakis, Esq.	169-182
17	Michael Kelly	182-185
18	Kathryn Grace Jordan	
19	End Discrimination Now	185-191
20	James A. Montagnino, Esq.	192-203
21	Ruth M. Pollack, Esq.	204-216
22	Kevin Patrick Brady	217-219
23	Carl Lanzisera	
24	Americans for Legal Reform	219-225

1 to get a stack of the 100 complaints that we
2 have from the beautiful people of Brooklyn,
3 Queens, Staten Island and Harlem alone who
4 couldn't make it up here today.

5 CHAIRMAN SAMPSON: So, Mr. McKeown,
6 we're looking forward to that. Thank you
7 very much for your testimony. And we look
8 forward to getting those documentations in
9 at our next hearing.

10 MR. McKEOWN: Thank you, Senators.

11 CHAIRMAN SAMPSON: Thank you very
12 much.

13 The next witness is Robert Tembeckjian,
14 counsel for the New York State Commission on
15 Judicial Conduct, and the Honorable Judge
16 Thomas Klonick, chair of the Commission on
17 Judicial Conduct.

18 Just to make a note of it, we also have
19 representatives -- who are not going to
20 speak -- from the Second, Third and Fourth
21 Department Disciplinary Committees.

22 Thank you very much. Your Honor, good
23 morning.

24 JUDGE KLONICK: Good morning,

1 Mr. Chairman, members of the Judiciary
2 Committee. Thank you for this opportunity.

3 I am Thomas Klonick. I'm an attorney
4 and a part-time town justice from Monroe
5 County. I'm chair of the Commission on
6 Judicial Conduct. I was appointed to the
7 Commission on Judicial Conduct to a
8 four-year term by Judge Judith Kaye in 2005,
9 reappointed by Judge Jonathan Lippman just
10 earlier this year.

11 I am here today with the commission's
12 administrator, Robert Tembeckjian, whom I
13 believe you already know.

14 The commission is pleased to
15 participate in this hearing, which should
16 shed further light on our constitutional
17 mission and how we operate.

18 As you stated earlier, Senator, but I
19 will just briefly review, the commission is
20 comprised of four judges, five lawyers, two
21 law people appointed by the Governor, the
22 Chief Judge, and the four leaders of the
23 Legislature.

24 The commission operates under a very

1 rigorous system of internal checks and
2 balances that has been emulated by other
3 states to assure that all complaints are
4 treated seriously and fairly. For example,
5 the commission members, the 11 commission
6 members view and act upon every complaint
7 that comes into the agency. Last year that
8 was a record number, 1,923, or more than 275
9 complaints every seven weeks.

10 While the administrative staff conducts
11 the investigation, the administrator reports
12 to us regularly on the progress of each
13 investigation. At the conclusion of the
14 investigation, it requires a quorum of eight
15 members of the 11 and the concurrence of six
16 commission members to serve a judge with
17 formal disciplinary charges.

18 The administrative staff prosecutes a
19 case; an impartial referee presides over the
20 hearing and files a report with the
21 commission. The commission then, aided by
22 its own law clerk, adjudicates the matter,
23 subject to review ultimately by the Court of
24 Appeals if requested by the disciplined

1 judge.

2 I believe you have the statement
3 submitted by the commission today outlining
4 the processes and procedures. And after a
5 few remarks by Mr. Tembeckjian, we will be
6 happy to answer any questions. Thank you.

7 CHAIRMAN SAMPSON: Thank you very
8 much, Your Honor.

9 Mr. Tembeckjian, I'm sorry I butchered
10 your name earlier. I apologize.

11 MR. TEMBECKJIAN: Thank you. Thank
12 you, Senator.

13 You have a rather extensive description
14 of our process and procedures. I'd like to
15 just highlight three points in these brief
16 remarks before we take your questions, three
17 very important features of the commission
18 system.

19 The first is the independence of the
20 commission itself. It's created by the
21 State Constitution, various appointing
22 authorities, no one of whom controls a
23 majority of appointments. And the
24 commission elects its own chair and it hires

1 its own administrator to manage, as the
2 chief executive officer, the day-to-day
3 operations of the agency.

4 The balance of judges, lawyers, and
5 laypeople is something that assures that all
6 relevant representatives or features of our
7 pluralistic society are represented in the
8 commission process. We are, after all,
9 talking about disciplining members of an
10 independent branch of government.

11 I happen to be only the second chief
12 executive officer that the commission has
13 had in over 30 years, which has provided an
14 extraordinary stability. And the commission
15 model is one that has not only been emulated
16 by other states but I think is one that is
17 worthy of emulation by other state ethics
18 entities throughout New York.

19 Secondly, the commission really plays
20 two roles apart from its own structural
21 independence. It's responsible, obviously,
22 for disciplining those judges who commit
23 ethical misconduct, but it's also
24 responsible for protecting the independence

1 of the judiciary so that judges can decide
2 cases fairly, impartially, as they see and
3 hear them, without undue outside influences.
4 And that's a very important dual role.

5 CHAIRMAN SAMPSON: Let me ask you a
6 question, Mr. Tembeckjian. These
7 proceedings are private or open to the
8 public?

9 MR. TEMBECKJIAN: All commission
10 proceedings, under law, are confidential.
11 It wasn't always that way. In 1978 the law
12 changed. Prior to that, once the -- all
13 investigations, as with a grand jury, were
14 always confidential. But prior to 1978,
15 once the commission authorized formal
16 disciplinary charges against a judge, the
17 process then became open. The charges, the
18 answer, the hearings and so forth were
19 open --

20 CHAIRMAN SAMPSON: Once they were
21 formally charges, you said?

22 MR. TEMBECKJIAN: Yes. Once
23 reasonable cause has been found to go
24 forward with a formal disciplinary process,

1 so after the investigation is over, the
2 commission concludes a reasonable basis that
3 discipline may be justified here, a quorum
4 of eight members, the concurrence of six is
5 required, they vote formal charges. Up
6 until 1978, that process then became public.

7 And the commission's position
8 consistently since then has been that it
9 should be made public at that stage. We
10 were opposed in '78 to the change in the
11 law. And since then, on occasion, the
12 Legislature has taken up the issue, but it
13 has never adopted, in both houses in the
14 same session, the open hearings provision.

15 CHAIRMAN SAMPSON: What would be your
16 position today?

17 MR. TEMBECKJIAN: Oh, the
18 commission's position has consistently been
19 that the law up till 1978 was appropriate
20 and that these hearings should be public
21 once probable or reasonable cause has been
22 found.

23 And opening up that disciplinary
24 process to the public I think would go a

1 long way to dispelling a lot of the
2 misconceptions about how the commission
3 operates and how it makes its decisions.

4 CHAIRMAN SAMPSON: That's a good
5 idea.

6 MR. TEMBECKJIAN: Senator Perkins
7 looks like he's about to ask me a question.

8 SENATOR PERKINS: So you think the
9 law should be changed?

10 MR. TEMBECKJIAN: Yes. The
11 commission has advocated that any number of
12 times, and consistently over the last 30
13 years.

14 SENATOR PERKINS: So you've heard
15 some of the concerns of prior witnesses. I
16 believe that I saw you here. And though I
17 know you're really dealing with judges for
18 the most part, I just also want to get a
19 sense of how you might, if at all, relate to
20 some of the criticisms that have been shared
21 already.

22 MR. TEMBECKJIAN: Well, I haven't
23 yet, although I believe I will later this
24 afternoon, hear some criticisms of the

1 commission's operation. That's really the
2 only agency that I'm comfortable speaking
3 for and about at these proceedings, and
4 really the only one that I'm authorized to.

5 SENATOR PERKINS: Okay. Thank you.
6 Just wanted to check.

7 MR. TEMBECKJIAN: So that dual role
8 of disciplining those judges where it's
9 appropriate and protecting the independence
10 of the judiciary by absorbing a lot of the
11 unfounded criticism that may be reflected in
12 some of what you hear today and that I know
13 has been submitted to you on other
14 occasions -- and at other hearings that this
15 committee has held over the years -- is
16 really part of what we do.

17 But the suggestion that may, I think,
18 mistakenly be left that the commission is
19 inactive by some of its critics is really
20 not borne out by the facts. We've handled
21 approximately 40,000 complaints in the last
22 30 years, which is by far more than any
23 other state, even those that have equivalent
24 numbers of judges as New York. The

1 commission has publicly disciplined
2 approximately 700 judges and confidentially
3 cautioned about 1200.

4 The vast majority of our complaints are
5 dismissed. But every single one of them
6 gets treated individually and gets seen by
7 the full commission. We conduct preliminary
8 reviews and inquiries, about 350 or more a
9 year. Full-fledged investigations, last
10 year a near record number, 262.

11 CHAIRMAN SAMPSON: Mr. Tembeckjian,
12 when you talk about these investigations,
13 these are mostly complaint-driven? Or at
14 times does the commission themselves, which
15 I know they have the authority to, look into
16 certain situations?

17 MR. TEMBECKJIAN: The commission
18 itself has the authority, and it does quite
19 actively initiate inquiries on its own.

20 CHAIRMAN SAMPSON: How would you do
21 that -- you know, like on your own, make a
22 determination, well, you know, I don't like
23 what this judge is doing? Or how do you
24 come about getting to that point?

1 MR. TEMBECKJIAN: It's never "I don't
2 like what this judge is doing," certainly
3 not on the bench.

4 But, for example, if we read in the
5 newspaper about a judge who has been
6 intemperate or whose conflict of interest
7 has been reported, the staff will bring that
8 article to the commission's attention and it
9 will ask the commission for an authorization
10 to investigate. The full commission has to
11 do that.

12 That was literally what happened on a
13 case involving a judge in Niagara County
14 that you might recall who had incarcerated
15 over 40 people because a cellphone went off
16 in the courtroom and the judge couldn't
17 identify whose cellphone it was. So 46
18 defendants were called up one by one, and as
19 each one denied that it was his phone, they
20 were remanded. That was something we read
21 about in the newspaper. It was not the
22 result of an individual complaint.

23 We brought it to the commission's
24 attention, they authorized investigation, we

1 reviewed the matter, charges were
2 authorized, the judge was removed by the
3 commission, took it up to the Court of
4 Appeals, which unanimously upheld that
5 decision.

6 So the process is quite sophisticated,
7 but where we get that information, we move
8 forward.

9 CHAIRMAN SAMPSON: So once you get
10 that information, it then goes to the
11 commission?

12 MR. TEMBECKJIAN: Yes. Under the
13 law, it's the commission that has the
14 authority to investigate or to discipline.
15 The staff can recommend, but the commission
16 actually makes the disposition.

17 And so we are not screening out
18 material or information that complainants
19 send to us because we might have a
20 predisposition or we might dislike or we
21 might not credit the complainant. We will
22 analyze, review, conduct some preliminary
23 inquiries, forward it to the entire
24 commission, which will then decide whether

1 or not we should go forward.

2 CHAIRMAN SAMPSON: And I know Senator
3 DeFrancisco just noted that you were able to
4 get additional monies to help you clear up
5 some of the backlog that existed maybe a few
6 years ago.

7 MR. TEMBECKJIAN: Yes, thanks in huge
8 part to this committee and to Senator
9 DeFrancisco's leadership.

10 For about 20 years we were grossly
11 underfunded. As our complaints and workload
12 were expanding, our staff was reduced to as
13 few as 20 statewide, and in real dollars, we
14 had lost substantial resources. But this
15 committee two years ago held hearings on the
16 subject, of the commission, of the town and
17 village court system, and one of the
18 beneficial results was that the Legislature
19 made a substantial increase that this
20 committee championed for the commission's
21 resources to meet the growing needs.

22 CHAIRMAN SAMPSON: When you say
23 investigators, who does the investigating?
24 Do you have attorneys or do you have private

1 people, investigators?

2 MR. TEMBECKJIAN: We have attorneys
3 and investigators on staff. And every
4 complaint that is going to be investigated
5 is actually assigned to an attorney, and
6 that attorney works with an investigator to
7 interview witnesses, to make field visits,
8 to analyze court records, to try to get to
9 the bottom of whether the allegation of
10 misconduct is actually established.

11 And then we will present progress
12 reports along the way, and then a final
13 report to the full commission, as Judge
14 Klonick indicated, and then that full
15 commission will decide whether to
16 confidentially caution the judge or
17 authorize formal charges or, if the
18 complaint is unfounded, to dismiss.

19 And that's really where our role in
20 protecting the independence of the judiciary
21 comes in. Because we absorb a lot of the
22 complaints and criticisms that judges might
23 otherwise get from complainants who are
24 essentially unhappy with the results of a

1 case. And rather than inhibit the judiciary
2 with having to answer to all of those, we
3 preliminarily inquire, we deal directly with
4 the complainant, and if it's determined not
5 to be founded, we don't go forward.

6 And we take a lot of the heat, but that
7 goes with the territory of what it is that
8 we do.

9 CHAIRMAN SAMPSON: And if in fact if
10 a judge is being elevated to, say, the
11 Appellate Division, Court of Appeals,
12 whatever it is, does the commission -- do
13 those committees request from the commission
14 if there are any complaints, anything lodged
15 against these judges? Or do you come forth
16 with it? How does that work?

17 MR. TEMBECKJIAN: Yes. If any judge
18 who is subject to Senate confirmation or
19 appointment by the Governor without Senate
20 confirmation or is running for election and
21 is going before a screening committee, they
22 are required to submit a waiver of
23 confidentiality so that the commission, when
24 presented with that waiver, will give to the

1 screening entity not only the record of
2 public action that's been taken but any
3 confidential cautions, any adverse
4 confidential dispositions against that
5 judge.

6 So those committees have it, without
7 mentioning names, when the Commission on
8 Judicial Nomination provides us with those
9 waivers, when the Governor's screening
10 committee for Court of Claims or Appellate
11 Divisions provides us with those waivers, we
12 provide not only the public record but also
13 any confidential adverse dispositions that
14 were made against the judge to that body.

15 CHAIRMAN SAMPSON: And does the
16 commission keep records in instances where,
17 you know, against judges where it has been
18 dismissed but, you know, you see a pattern
19 of increased complaints with respect to
20 judges? Do you have an opportunity to refer
21 back? Or do you just -- once it's
22 dismissed, are they sealed or do you have an
23 opportunity to go back to look to see if
24 there's a pattern being created?

1 MR. TEMBECKJIAN: We have an
2 opportunity to go back and look at a
3 pattern, subject to the State Administrative
4 Procedures Act regarding the disposition of
5 records.

6 But for example, if a subsequent
7 complaint comes in alleging new information
8 or a new perspective on a previously
9 dismissed complaint that was not disposed of
10 on the merits after a hearing but was deemed
11 not to have shown sufficient merit on its
12 face to be investigated, we can go back and
13 reexamine whether or not the appropriate
14 disposition was made in the first instance.

15 But I must say that that's very rare.
16 Because if a type of misconduct is part of a
17 pattern or practice, it's usually alleged
18 up-front, and we have the opportunity then
19 to go in, for example, sit in on the court
20 to observe whether the judge is intemperate
21 on a frequent or an infrequent basis, if
22 that's the complaint that's been made.

23 It's very rare for someone to say the
24 judge is intemperate and not allege, if it

1 is in fact part of the pattern, that any
2 number of attorneys or litigants might be
3 able to verify that. And we will reach out
4 to litigants and lawyers to determine
5 whether or not these complaints are part of
6 a pattern or practice.

7 CHAIRMAN SAMPSON: Questions?

8 Mr. Tembeckjian, thank you very much
9 and, Your Honor, thank you very much for
10 giving us that outlay. We truly appreciate
11 it.

12 MR. TEMBECKJIAN: Thank you.

13 JUDGE KLONICK: Thank you very much.

14 CHAIRMAN SAMPSON: At this point in
15 time we're going to have Judge Hart present
16 testimony.

17 Good morning, Your Honor.

18 JUSTICE HART: Good morning. It's
19 good that Mr. Tembeckjian is staying here.

20 My name is Duane Hart. I'm a sitting
21 Supreme Court justice in Queens, New York.
22 While I gave the members of the committee a
23 long package, I'm just going to give you a
24 few anecdotes of the type of attorney we're