

STATEMENT OF
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TO THE
JOINT LEGISLATIVE BUDGET COMMITTEE HEARING
ON THE
2014-15 EXECUTIVE BUDGET



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Members of the Legislature:

My name is Robert H. Tembeckjian, and I am the Administrator and Counsel to the New York State Commission on Judicial Conduct. As you know, the Commission is the constitutionally created independent agency of state government that enforces judicial ethics by investigating and disciplining judges for misconduct.

I thank you for the opportunity to discuss the Commission's budget for the coming fiscal year, as proposed in the Executive Budget.

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

For over 35 years, the Commission has been a model of ethics enforcement and judicial discipline. We have received, analyzed and individually addressed nearly 50,000 complaints, conducted over 10,000 preliminary inquiries and over 8,000 full-fledged investigations, issued over 1,500 cautionary letters and publicly disciplined nearly 800 judges, including more than 200 removals or publicly-stipulated resignations from office. At the same time, we have successfully defended against every challenge to our procedures – over 100 lawsuits in all – initiated in the courts by either a complainant or an investigated judge.

The Commission's unique structure – appointed by the leaders of all three branches of government but not controlled by any of them – has been a significant reason for its success and consistency over the years. At a time of renewed attention to government ethics, the Commission is an example to be emulated.

Request for a Modest but Necessary Increase in Funding

I recognize and applaud the significant efforts of both the Governor and the Legislature to reduce government costs and manage scarce resources during an extended fiscal crisis. The Commission has fully joined in that effort.

For the last six years, we have virtually been at the same dollar amount: currently \$5.384 million. But during those six years, while our budget remained

flat, our mandated costs and workload continued to rise. The effect has been the same as a cut, because in order to address an increasing expense in one part of our operation, we have had to reduce what we spend on another part. As a small agency, our options were and are very limited.

These rising costs in an era of flat budgeting effectively reduced the amount of money available to perform our constitutionally-mandated function. Until now, we have been able to cushion the impact of this effectively reduced funding by utilizing technology and finding efficiencies in our operations. But despite these efforts, six years of flat budgeting came with consequences, the most significant of which is a 16% reduction in staff from 55 approved full-time employees (FTEs) to 46 present FTEs, and a slowdown in our processing and disposing of complaints.

Now, however, as the Division of Budget has proclaimed improved fiscal conditions and forecasts a surplus, I believe the time is right for a modest correction in the Commission's budget. Continued flat budgeting would mean more service cuts, a greater backlog and less efficiency.

The Executive recommends another flat budget for the Commission in FY 2014-15: the same \$5.384 million we have had for years. I am asking for a \$270,000 increase – the first such request in six years – to \$5.654 million. The additional funding would be used to fill two staff vacancies and meet mandated

contractual increases. The effect would be to stop a developing backlog that is attributable to the reduction in agency resources.

As described more fully below, six years of flat budgeting have taken a toll on my small agency. Our budget may have remained flat, but our complaint load and mandatory costs (such as rent) have only been going up. As a result of serious economies necessitated by the years of flat budgeting, we are now beginning to backslide on the great gains made seven years ago in managing our heavy caseload and keeping current.

The Toll from Years of Flat Budgeting

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.

As a result of the Legislature's commitment to the Commission in 2007, we increased our staff, 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%

(more than 340 a year), to an annual average of 1,841, which is more than any other state.¹ The number of preliminary inquiries and investigations has also increased over the years, from 605 in 2007 to an annual average of 649 – also more than any other state. (Last year's number, 654, was slightly above average.) Our public disciplines average 20 a year, which is likewise more than any other state. (Last year's number, 17, was slightly under average and still more than any other state.)

However, after years of flat budgeting, the backlog in processing new complaints is now 12%, which is higher than any time since 2007, when it was only 3%.²

Since 2008, in order to make ends meet on the same dollar amount while rent and other mandated costs have increased, we have made significant cuts, some of which are negative and should be reversed, others of which 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

¹ In 2006, just before the increase in our resources, we logged 1,500 complaints, which to that point was a record. From 2007 to the present, we have averaged 1,841 a year. Thanks to the increased resources, the number of investigations pending at year end dropped from 275 to 201. More significantly, the number of matters pending more than a year dropped by about 50% overall, to a low of about 50, but it has inched up in the last two years and is now at 63. To be sure, some of those matters are complex, involve voluminous records and many witnesses, and could not be completed quickly even if we were fully funded; but some are taking longer because of insufficient resources, particularly the vacancies in staff.

² Of the 1770 complaints received in 2013, 203 (12%) were not processed in the same statistical year. In 2007, the year of our significant funding increase, only 51 (3%) out of 1711 new complaints were not processed in the same statistical year.

Commission meetings, we now prepare all agenda materials electronically, *i.e.*, no paper, and no mailing costs. However, 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.

Meanwhile, our contractual lease costs will increase by nearly \$85,000 in 2014, and without an increase in funding to cover it, we will have to cut back on something for which we are currently paying. After six years of creative belt-tightening on an already small budget, I am out of options.

1. ***Reduction in Staff.*** Our allotment of full-time employees (FTEs) has effectively dropped by 16%. Our authorized number of 55 was reduced to 50, of which we are only able to fill 46 due to lack of funding. We accomplished this by not replacing staff that retired or left for other employment. A 16% 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 \$150,000 a year, we again eliminated all outside stenographic services, as we had done prior to 2007.³ We now produce approximately 12,000 transcript pages

³ 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 had to produce them 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

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. (See item 5B in *Administrative Cost-Cutting* below.)

3. ***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, which is a positive development that we would continue in any event.

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.

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 we no longer have in our budget and therefore cannot save 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.
5. *Administrative Cost-Cutting.* With technology that became affordable 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.

As previously noted, all of these administrative savings were one-time economies. Once the money went out of our budget in one year, we no longer had it to "save" in subsequent years. To the extent possible, we redirected those savings 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.

Budget Request for 2014-15

For the reasons set forth above, I submitted a budget request for a modest increase of \$270,000, which would bring us to \$5.654 million. However, the

Executive Budget submitted to the Legislature proposes another flat budget for the Commission, which would keep us at \$5.384 million.

Appeal to the Legislature

As I did in 2007, 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 continued flat budgeting will have on the Commission's operation and the fulfillment of its constitutional mandate. As you did the last time I made such an appeal in 2007, I hope you respond positively.

Given the encouraging revenue projections made by the Division of Budget, and the emphasis elsewhere in the Executive Budget on enhancing the resources of other ethics enforcement entities, it seems only appropriate to assist what has arguably been the most effective ethics agency in state government over the last 35 years.

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.