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# THE MARYLAND COMMISSION ON JUDICIAL DISABILITIES: WHITHER THOU GOEST?

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Hon. Glenn T. Harrell, Jr.<sup>1</sup>

## I. THE DEVELOPMENT OF JUDICIAL CONDUCT ORGANIZATIONS: WHERE DID THEY COME FROM?

Specialized judicial conduct organizations are a relatively recent development.<sup>2</sup> The last three decades have witnessed the most intense and widespread public interest in the discipline of judges.<sup>3</sup> Scholars who have studied the issue point primarily to a combination of two factors: (1) the increased scrutiny of public officials, and (2) the public dissatisfaction with the traditional common law procedures that were used to deal with judicial misconduct and disability.<sup>4</sup>

The traditional method for dealing with judicial misconduct had been impeachment.<sup>5</sup> By 1960, however, there was a feeling throughout the country that impeachment was "too tedious, too cumbersome, and too expensive for frequent use" and no longer offered a viable mechanism for judicial discipline.<sup>6</sup>

Furthermore, impeachment offered little procedural protection for the judge, and the only remedy it provided was removal. A principal problem with impeachment proceedings is that they are conducted in a partisan atmosphere and tend to become politically charged. Legislators may be motivated by factors other than the merits of the case.<sup>7</sup> As a result, legislators and citizens initiated impeachment only in cases of flagrant misconduct.<sup>8</sup> Most jurisdictions, therefore, employed informal methods of discipline.<sup>9</sup> Informal tactics such as peer pressure however, did not work with an obstinate judge, and administrative or judicial actions such as reassignment or reversal might correct a judge for minor episodes of misconduct, but could not affect the manner of an incurable one.<sup>10</sup>

### A. State Courts

In search of a better solution, California, in 1960, became the first state to establish a permanent formal system for regulating judicial conduct.<sup>11</sup> This agency,

called the California Commission on Judicial Qualifications, had express authority to receive and review complaints against judges, to conduct inquiries and make investigations, and to dispense disciplinary recommendations when necessary.<sup>12</sup> Six states acted quickly to adopt the California prototype, making the change between 1960 and 1966. Twenty-one acted between 1967 and 1972 and twenty-one have acted since 1973.<sup>13</sup> Today, forty-eight states and the District of Columbia have established similar agencies and make recommendations for disposition.<sup>14</sup> About half the states have created commissions by constitutional amendment, the remainder have done so by court rule or the enactment of statutory provisions.<sup>15</sup>

Since California's creation of its Commission on Judicial Qualifications, two forms of state judicial commissions have evolved: (1) the unitary commission, and (2) the two-tier commission.<sup>16</sup> Most states have modeled their agencies after California's "unitary commission." Unitary commissions are usually staffed by an executive director or executive secretary and serve as permanent visible agencies with authority to receive and review complaints against judges, conduct investigations, convene formal hearings, and make disciplinary recommendations to the state's supreme court.<sup>17</sup>

Some states instead have adopted a "two-tier" commission, whereby the investigative and adjudicative functions are divided between two entities.<sup>18</sup> The commission receives and investigates complaints, and if there is probable cause that grounds exist for disciplinary action or removal, the commission presents the charges to a separate permanent board or court for the adjudicatory process.<sup>19</sup>

### B. Federal Courts

Federal courts also have adopted methods for regulating judicial conduct.<sup>20</sup> Rather than specifically created and tenured commissions, the federal courts have relied on established agencies of the federal judi-

cial administration to deal with alleged incapacity or errant behavior on the part of their members. Two statutorily created agencies share this responsibility: (1) a national body, the Judicial Conference of the United States,<sup>21</sup> which is staffed by the Administrative Office of the United States Courts, and (2) judicial councils, which are responsible for the administration of the eleven regional circuits.<sup>22</sup>

The rules of the Fourth Circuit's Judicial Council, for example, state that upon receipt of a complaint against a judge, the chief judge, upon reviewing the complaint, will determine whether it should be: (1) dismissed, (2) concluded on the ground that corrective action has been taken, (3) concluded because intervening events have made action on the complaint no longer necessary, or (4) referred to a special committee. If the chief judge dismisses a complaint or concludes that no further action is necessary, the complainant may petition for review to the judicial council. The judicial council can then "affirm the order of the chief judge, return the matter to the chief judge for further action, or, in exceptional cases, take other appropriate relief."<sup>23</sup>

## II. THE MARYLAND COMMISSION ON JUDICIAL DISABILITIES

In 1966, Maryland became the fifth state to adopt a judicial conduct commission.<sup>24</sup> Created by constitutional amendment,<sup>25</sup> Maryland's Commission on Judicial Disabilities was modeled after California's unitary commission. Prior to the creation of the Commission, Maryland's methods of dealing with disabled and errant judges were typical of most states. Maryland's Constitution, art. IV, § 4, sets forth the constitutional methods for the removal of judges.<sup>26</sup> In 1905, in *Warfield v. Vandiver*,<sup>27</sup> the Court of Appeals concluded that art. IV, § 4 provided three ways to remove an incompetent or disabled judge: (1) removal by the Governor, (2) impeachment under Md. Const. art. III, § 26, or (3) by two-thirds vote of the General Assembly. With the creation of the Commission on Judicial Disabilities, for the first time in Maryland there was an alternative to removal.<sup>28</sup>

### A. Duties, Powers and Procedures of the Commission<sup>29</sup>

Either upon receipt of a verified statement or independently on its own motion, the Commission formerly conducted a preliminary investigation that provided the

judge in question with notice and an opportunity to be heard. If a majority of the Commissioners decided that sufficient cause was present to warrant a formal hearing, notice of the hearing was given and within fifteen days the judge could file an answer. At the recorded hearing the judge had the right to introduce and compel the production of evidence, be represented by counsel, and cross-examine witnesses. If after a hearing, a majority of eligible Commissioners found good cause, the Commission issued a reprimand or recommended censure, removal or other appropriate discipline or retirement to the Court of Appeals.<sup>30</sup>

The Commission's duties were clarified in two subsequent amendments, first in 1970 and then again in 1974. The 1970 amendment gave the Commission the power to administer oaths, subpoena witnesses, require the production of evidence and grant immunity.<sup>31</sup> The amendment also raised the membership of the Commission from five to seven.<sup>32</sup>

The Commission normally meets monthly, though it has met more frequently when required by the press of business. Its seven members are appointed by the Governor for four year terms. Members include four judges presently serving on the bench, two members of the bar admitted for at least fifteen years, and one lay person representing the general public.<sup>33</sup> Although the Commission's expenses are approved by the Chief Judge of the Court of Appeals and paid out of the judiciary budget, none of the Commission members receives a salary. The Commission does not have a discrete line item in the judiciary budget presently.

Maryland's Constitution does not set forth the procedure to be used by the Commission in conducting any investigation, but confers upon it "the power to investigate complaints against any judge and provides that the practice and procedure before the commission shall be by rule promulgated by the Court of Appeals."<sup>34</sup> Maryland Rule 1227, adopted pursuant to Maryland's Constitution, art. 40, § 45, detailed the procedures of the Commission prior to July 1, 1995. The Commission's primary function was to receive and investigate complaints against members of the Maryland judiciary. Under Rule 1227, formal complaints to the Commission were to have been in writing and notarized, but no particular form was required.<sup>35</sup> Complaints were accepted from all sources—including members of the public, state and local officials, attorneys, and from judges themselves. In addition, the Commission could

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initiate a preliminary investigation on its own motion.<sup>36</sup>

The Commission handled the preliminary investigation of formal complaints in a variety of ways. Tapes and transcripts of hearings were obtained. When necessary, attorneys and other disinterested parties who participated in any proceedings in question were interviewed. On occasion, the Commission, as part of its preliminary investigation, requested a judge to appear before it. The Commission could investigate complaints through retained counsel, conduct hearings, or take informal action as it deemed necessary, provided the subject judge had been properly notified. If warranted by the preliminary investigation, formal charges were served upon the judge and a hearing was held regarding the judge's alleged misconduct or disability.

The Court of Appeals has explained that proceedings before the Commission are neither criminal nor civil in nature; "they are merely an inquiry into the conduct of a judicial officer the aim of which is the maintenance of the honor and dignity of the judiciary and the proper administration of justice rather than the punishment of the individual."<sup>37</sup> If as a result of the hearing(s) the Commission, by a majority vote, decided that a judge should be retired, removed, censured, or publicly reprimanded, it recommended that course of action to the Court of Appeals. The Court of Appeals then could accept the Commission's recommendation or order a more severe discipline of the judge than that recommended.<sup>38</sup> In addition, the Commission had the power in certain situations to issue private reprimands or warnings.

Initially, all proceedings before the Commission were confidential and privileged, except that a record filed with the Court of Appeals lost its confidential nature.<sup>39</sup> As authorized by the 1974 constitutional amendment, however, the Court of Appeals promulgated new rules that allowed the release of information concerning Commission investigations, and permitting the sealing of part or all of a proceeding filed with the Court.<sup>40</sup>

From July 1, 1993 to June 30, 1994, the Commission considered approximately forty-seven formal complaints, five of which were initiated by practicing attorneys and the remainder by members of the public.<sup>41</sup> Additionally, according to the immediate past Chair of the Commission, there were thirty-two complaints during the 1994 calendar year that were summarily dismissed by the then Chair, after consultation with the

Executive Secretary, because they were facially beyond the Commission's jurisdiction or patently failed to state a claim of cognizable misconduct. Further, there were an additional twenty complaints in 1994 that were dismissed as being facially frivolous.<sup>42</sup>

During the 1993-94 fiscal year reviewed in the *Report of the Judiciary*,<sup>43</sup> it was noted that some of the forty-seven formal complaints considered were directed simultaneously against more than one judge.<sup>44</sup> In several instances a single jurist was the subject of multiple complaints.<sup>45</sup> In all, twenty-seven circuit court judges, twelve district court judges, and two orphans' court judges were the subject of complaints during 1993-94.<sup>46</sup> Four judges were requested to appear before the Commission to defend charges against them.<sup>47</sup> Most of the complaints were disposed of by way of discussion with the jurist involved or by a private warning.<sup>48</sup> In most instances, however, complaints were not serious enough to warrant personal appearances by judges.<sup>49</sup> The charges were dismissed either because the accusations were unsubstantiated or not supported by evidence following investigation, or because, in the Commission members' view, the conduct did not amount to a breach of judicial ethics.<sup>50</sup> Litigation over family law matters, including divorce, alimony, and custody, precipitated some fourteen complaints; criminal cases accounted for ten complaints and "the remainder resulted from conventional civil litigation or the alleged prejudice or improper demeanor of some jurist."<sup>51</sup>

In addition to formal complaints, numerous individuals either wrote or called the Commission's Executive Secretary or its Chair expressing dissatisfaction concerning the outcome of a case or judicial ruling. Although many of these complaints were not technically within the Commission's jurisdiction, the complainants were afforded an opportunity to express their feelings and frequently were informed, for the very first time, of their right of appeal. Thus, the Commission offered an additional service to members of the public. The Commission also supplied judicial nominating commissions with confidential information concerning reprimands issued to, or pending charges against, those judges seeking nomination to higher judicial offices.<sup>52</sup>

### *B. Grounds for Discipline, Removal, and Retirement*

Formal ethical standards are necessary parts of any judicial disciplinary system. These standards help judg-

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es appraise their own conduct, provide rules that can be enforced through the discipline and review procedures, and touch on conduct which, "while not inherently improper, should be restricted so as to prevent the possibility or appearance of misconduct."<sup>53</sup>

Currently, the Maryland Constitution provides for judicial discipline in cases in which the Court of Appeals finds misconduct while in office, persistent failure to perform duties required of the office, or conduct prejudicial to the proper administration of justice.<sup>54</sup> The ABA Code & Canons of Judicial Ethics and the ABA Rules of Judicial Ethics provide guidelines for interpreting and construing these general provisions. The Canons were adopted by the Court of Appeals of Maryland and are binding on Maryland judges as part of the Maryland Rules.<sup>55</sup> The Maryland State Bar Association formally endorsed the original Canons of Judicial Ethics in 1953. However, from 1953 until the Maryland Judicial Conference adopted the Maryland Canons in 1970, the Canons served as mere recommendations. The courts had not formally adopted them, nor were there any enforceable procedures except through impeachment. Finally in 1970, the Judicial Conference adopted the Canons. In 1971 it adopted even more specific disciplinary rules that were set forth in Md. Rule 1231.<sup>56</sup> It was then that the Canons and disciplinary rules of judicial ethics became formally imposed as enforceable rules governing judges' conduct.<sup>57</sup>

Md. Rule 1231 is composed of two parts. The Canons of Judicial Ethics make-up the first part of the Rule and consist of simple advisory statements.<sup>58</sup> The second part of Rule 1231, the Rules of Judicial Ethics, contains particular requirements and prohibitions which use the mandatory word "shall," as opposed to the Canons' permissive "should."<sup>59</sup> In addition, the Rules of Judicial Ethics contain specific consequences for a violation.<sup>60</sup>

In several instances, the Commission on Judicial Disabilities and the court of appeals have turned to the ABA Canons and Rules of Judicial Conduct for guidance in deciding whether and how to discipline a judge.<sup>61</sup> However, attempting to define and apply ambiguous phrases like "conduct prejudicial to the proper administration of justice" without some guidance from the ABA's model code and annotations is difficult.

In the Court of Appeals opinion, *In re Foster*,<sup>62</sup> the ABA Code of Judicial Conduct was quoted favorably in construing the phrase "conduct prejudicial to the prop-

er administration of justice."<sup>63</sup> Deciding to censure Judge Foster, the Commission on Judicial Disabilities found by clear and convincing evidence that Judge Foster had utilized his office to persuade others to contribute to the success of a private business venture.<sup>64</sup> The Court concluded that, since the establishment of the Commission on Judicial Disabilities in 1966, it had been possible to discipline a Maryland judge for "misconduct while in office" or "conduct prejudicial to the proper administration of justice" because objective standards defining these terms were available in the ABA's Canons of Judicial Ethics.<sup>65</sup> Judge Foster was censured for his active participation in a rezoning petition involving land in another jurisdiction in which he held an option.<sup>66</sup> Although the Court found no actual wrongdoing, it held that the judge's actions created the appearance of improperly using the prestige of his judicial office to achieve the desired result.<sup>67</sup>

Since 1966, only three judges have been removed from office as the result of an adjudication of judicial misconduct.<sup>68</sup> In the first removal case, *In Re Diener and Broccolino*,<sup>69</sup> two district court judges were removed from office for conduct that occurred while they were judges of the Traffic Division in Baltimore City.<sup>70</sup> Although there was no evidence of bribery, the judges had routinely "fixed" or reduced fines on parking tickets for friends and political affiliates.<sup>71</sup> Although the Commission on Judicial Disabilities had only recommended that the judges be censured, the Court of Appeals ordered that the judges be removed after determining by "clear and convincing evidence" that the judges were guilty of conduct prejudicial to the proper administration of justice.<sup>72</sup>

Although it is very difficult to mark the boundary between conduct meriting removal and conduct meriting public censure, an examination of reported cases to date suggests that there is a greater tendency to remove a judge for criminal actions or conduct directly affecting the performance of judicial duties, such as in the *In re Diener and Broccolino* case.<sup>73</sup>

In the second removal case, *In re Bennett*,<sup>74</sup> a district court judge was removed from office for having forged a signature of another judge in order to change the disposition of a traffic case at the request of a political supporter.<sup>75</sup> The Commission had unanimously recommended that Judge Bennett be removed from office.<sup>76</sup> In support of its decision to remove the judge, the Court pointed out the number of violations of the

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Canons of Judicial Ethics and the Rules of Judicial Ethics with which the judge was charged.<sup>77</sup>

*C. A Call for Reform: The Legislature and Judiciary Respond to Public Criticism*

Until fairly recently, Maryland's Judicial Disabilities Commission operated in near-obscurity insofar as the public was concerned. But after one confirmed and another controversial, supposed complaint, the Commission received unprecedented attention. Critics said that the Commission was "underfunded, understaffed, reluctant to punish and too packed with judges to render impartial decisions."<sup>78</sup> Comparisons to other states suggest that Maryland had, at one time, one of the least busy judicial discipline commissions in the country, according to the Center for Judicial Conduct Organizations. During the Commission's lifetime, only three judges have been removed as a result of its investigations, all for fixing traffic tickets.<sup>79</sup> For example, in the 1992-93 fiscal year, Maryland's Commission received thirty-four formal complaints, fewer than panels in Nebraska or Alaska, whose populations are much smaller than that of Maryland. In contrast, New York's panel fielded 1,452 complaints. Of course, this may not reflect relatively and fairly the complete workload or paper flow of the Maryland Commission then or now. As noted from the recollections of the past Chair of the Commission, there were other matters that fell short of a "formal complaint" that occupied the Commission. As the old saw goes, it depends on "who is counting" and "what is being counted."

Part of the new focus on the Commission is also attributable to the fact that in recent years there has been a heightened demand for public accountability on the part of all public officials. This new demand on judges can be attributed to the fact that courts are being drawn into the economic and social life of the community to deal with cases involving "complex and controversial questions formerly left to other public and private institutions to resolve."<sup>80</sup> This increase in "public law litigation" has prompted a corresponding increase in the demand for means to assure the judiciary's public accountability.

In response to public criticism that Maryland's Commission is "too secretive, slow and unwilling to punish judicial misconduct," the General Assembly passed a proposed constitutional amendment in the 1995 session that would restructure the Commission on

Judicial Disabilities by essentially adding four additional lay persons to the commission.<sup>81</sup> The amendment goes to the voters in 1996.<sup>82</sup> The proposed amendment would expand the Commission to eleven members.<sup>83</sup> The Commission would then include three judges (one each from the appellate court, the circuit court and the district court, respectively), three attorneys, each of whom must have been admitted to practice for at least seven years (reduced from the current requirement of at least fifteen years), and five lay individuals. Race, gender, and geographic diversity are explicitly stated as goals in the appointment of future members of the Commission.<sup>84</sup> The amendment also limits the duration of Commission membership to two, four-year terms.<sup>85</sup> No change is proposed in the powers and duties of the Commission vis-a-vis the Court of Appeals.

Coincidentally for the most part and concurrent with the processing of the legislature's proposal, the Court of Appeals of Maryland's Standing Committee on Rules of Practice and Procedure sent to the Court of Appeals a proposal for rule changes governing the Commission, which does not require amending the constitution. On May 9, 1995, the Court of Appeals approved,<sup>86</sup> with modest revisions, the Rules Committee's March 14, 1995 submission of new Rules 1227 through 1227G. The new rules took effect on July 1, 1995. Among the most important changes occasioned by the new rules were: the creation of an Investigative Counsel ("Counsel") position to investigate and prosecute charges of misconduct; a sixty day time limit for the completion of preliminary investigations; and, a provision that once formal charges of misconduct are served upon a judge further proceedings in that matter would not maintain their confidentiality.<sup>87</sup>

Of further note and unlike the predecessor rule, the new rules define both "disability" and "sanctionable conduct."<sup>88</sup> The proposed rules define "disability" as "a mental or physical disability that seriously interferes with the performance of a judge's duties and is, or is likely to become, permanent."<sup>89</sup> Sanctionable misconduct includes:

misconduct while in office, the persistent failure by a judge to perform the duties of the judge's office, or conduct prejudicial to the proper administration of justice. It includes any conduct constituting a violation of the Maryland

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Code of Judicial Conduct . . . . An erroneous ruling, finding, or decision in a particular case does not alone constitute sanctionable conduct.<sup>90</sup>

Under the new rules, the procedure for the Commission is as follows. All complaints are first directed to the Investigative Counsel. The Counsel then opens a file on each complaint received and promptly acknowledges receipt of the complaint.<sup>91</sup> The new rule no longer requires complaints to be notarized; instead, they need only be verified under the penalties for perjury.<sup>92</sup>

Upon receiving a complaint, the Counsel decides whether or not the complaint is "frivolous on its face."<sup>93</sup> If the Counsel concludes that a complaint is frivolous, the Counsel will dismiss the complaint and notify the complainant, the Commission, and, upon request, the judge.<sup>94</sup> If, however, the complaint is not "frivolous on its face" the Counsel "shall conduct a preliminary investigation to determine whether reasonable grounds exist to believe the allegations of the complaint."<sup>95</sup> The preliminary investigation must be completed within sixty days of receipt of the complaint. The new rules also permit the Counsel to make inquiry and undertake a preliminary investigation on his or her own initiative, if the Counsel receives any information from any source indicating that a judge has a disability or has committed sanctionable conduct.<sup>96</sup>

Whenever the Counsel undertakes a preliminary investigation he or she is required to inform the Commission promptly that an investigation is underway.<sup>97</sup> Investigative Counsel, before the conclusion of the preliminary investigation, is required to notify the judge who is the focus of the investigation.<sup>98</sup> Specifically, the Investigative Counsel must notify the judge of three items: (1) whether the preliminary investigation was undertaken on the Counsel's own initiative or on a complaint; (2) the nature of the sanctionable conduct; and (3) the name of the person who filed the complaint, if the investigation was instituted by filing a complaint.<sup>99</sup> In addition, the judge may present to the Counsel any information the judge may wish to present.<sup>100</sup>

After the Counsel finishes the preliminary investigation, he or she reports the results to the Commission. At this point, the Counsel will recommend one of the following: that the complaint be dismissed; that the judge be offered a private reprimand or deferred discipline agreement by the Commission; further investiga-

tion; or, that charges be filed against the judge and that the Commission conduct a formal proceeding on the charges.<sup>101</sup> The new rules then detail the procedures for each of these options.<sup>102</sup>

### 1. Dismissal and Warning

If the Commission opts to dismiss the complaint and terminate the investigation, the judge must be notified.<sup>103</sup> The Commission can, however, along with the dismissal, issue a warning against future sanctionable conduct.<sup>104</sup> The Commission could do this if it felt that sanctionable conduct may have been committed by the judge but is not likely to be repeated and was "not sufficiently serious to warrant discipline."<sup>105</sup> A Committee note to this rule clearly states that a "warning" is not a reprimand and does not constitute discipline.<sup>106</sup>

### 2. Private Reprimand

The rules provide that the Commission can issue a private reprimand if the Commission concludes that the judge has committed sanctionable conduct that warrants some form of discipline but concludes that "the conduct was not so serious, offensive, or repeated to warrant formal proceedings and that a private reprimand is the appropriate disposition under the circumstances."<sup>107</sup> Notably, the judge must waive his or her rights to a hearing or to further challenge the findings and agree that the reprimand shall not be protected by confidentiality in any subsequent disciplinary proceeding.<sup>108</sup> After the reprimand is issued, the complainant shall be notified.<sup>109</sup>

### 3. Deferred Discipline Agreement

In addition to the reprimand, the new rules provide a heretofore unavailable disciplinary mechanism called a "deferred discipline agreement."<sup>110</sup> The Commission may utilize this agreement if it finds that the alleged sanctionable conduct was not so serious, offensive, or repeated to warrant formal proceedings and that the appropriate disposition is for the judge to undergo treatment or educational training, issue an apology to the complainant, or take other corrective action.<sup>111</sup> As with the reprimand, the judge must waive all rights to a hearing and agree that future confidentiality of this agreement is not guaranteed.<sup>112</sup> The Counsel will then monitor compliance with the conditions of the agreement.<sup>113</sup> In addition, the Commission can revoke the agreement if it finds that the judge has failed to satisfy

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a material condition of the agreement.<sup>114</sup> Before the agreement is revoked, however, the judge will be given an opportunity to respond.<sup>115</sup> Again, the Commission must notify the complainant that the complaint has resulted in an agreement with the judge, however, unless the judge agrees, terms of the agreement shall not be disclosed.<sup>116</sup>

#### 4. Further Investigation

If the Commission approves further investigation, the rules require that the judge receive notice that the Commission has authorized the further investigation.<sup>117</sup> In addition, the judge may file a written response. At this stage, the Commission may also authorize the Counsel to issue a subpoena to compel the attendance of witnesses or the production of documents.<sup>118</sup> Any court files pertaining to any motion to compel compliance with a subpoena will be sealed.<sup>119</sup> The Commission also has the power to grant immunity to any person who testifies or produces evidence during the course of the investigation.<sup>120</sup> Finally, the new rule states that this “second” investigation shall be completed within sixty days after it is authorized by the Commission.<sup>121</sup>

#### 5. Filing of Charges and Proceedings Before the Commission

Formal proceedings before the Commission are commenced when the Commission finds *probable cause* to believe that a judge has a disability or has committed sanctionable misconduct.<sup>122</sup> A copy of the charge(s) is mailed to the judge, and the charge(s) must state the nature of the alleged disability, including each Canon of Judicial Conduct allegedly violated by the judge, specify the alleged facts upon which the charge(s) are based, and state that the judge has the right to file a written response.<sup>123</sup> The judge then has thirty days to respond and has the right to inspect and copy all evidence acquired during the investigation.<sup>124</sup> The Commission can then proceed with a hearing, whether or not the judge appears. Hearings are to be conducted in accordance with the Maryland Rules of Evidence as provided in the Maryland Administrative Procedures Act.<sup>125</sup> At the hearing, the judge has the right to be represented by counsel, present evidence, issue subpoenas for attendance of witnesses or production of documents, and cross-examine witnesses.<sup>126</sup>

If the Commission finds by *clear and convincing evidence* that the judge has a disability or has committed

sanctionable misconduct, it must issue a public reprimand or refer the matter to the Court of Appeals; otherwise the complaint shall be dismissed.<sup>127</sup> If the Commission refers the case to the Court of Appeals, the Commission must make written findings of fact and give its recommendations as to retirement or as to censure, removal, or other appropriate discipline. After filing the entire record with the Court, these findings must be served upon the judge.<sup>128</sup> The Court of Appeals may impose the sanction recommended by the Commission or any other sanction permitted by law, dismiss the proceeding, or remand for further proceedings.<sup>129</sup> The Court’s decision is evidenced by an appropriate order and is accompanied by an opinion.<sup>130</sup>

The new rules also clarify when proceedings before the Commission are to be confidential.<sup>131</sup> Specifically, upon service of charges alleging sanctionable misconduct, whether or not joined with charges of disability, the charges and all subsequent proceedings before the Commission on them shall be public.<sup>132</sup> If the charges allege only that the judge has a disability, then the charges and all subsequent proceedings will remain confidential.<sup>133</sup> Any work product and deliberations of the Commission not admitted into evidence will, however, remain confidential. Moreover, all records filed with the Court of Appeals will be public, unless the court orders otherwise.<sup>134</sup>

### III. THE CASE FOR JUDICIAL CONDUCT ORGANIZATIONS

Controversy over the nature and scope of non-legislative methods for judicial discipline stems from differing views as to the “proper extent of judicial independence.”<sup>135</sup> The concept of an independent judiciary has always played a central position in this country’s history. Indeed, the establishment of judicial conduct commissions was based in part on the idea that respect for the judiciary would be increased if the judicial system had the means to clean its own house.<sup>136</sup> Increasingly, however, critics of the judicial discipline commissions argue that judges are no longer capable of judging themselves.<sup>137</sup> In support of their assertions, they point to evidence that shows diminished public confidence in the judiciary.<sup>138</sup>

History has demonstrated, however, that traditional remedies to remove judges, including impeachment or legislative address, have proved inadequate.<sup>139</sup> Thomas

Jefferson described impeachment proceedings as a “bungling way of removing judges—an impractical way—a mere scarecrow.”<sup>140</sup> Legislative remedies are also particularly inappropriate to the enforcement of a code of judicial conduct or to impose sanctions less draconian than removal or suspension. The doctrine of judicial discipline thus plays several important functions. In addition to guarding against unconstitutional abuses by the legislative and executive branches, it permits judges to enforce unpopular laws or protect unpopular views without fear of reprisal from the legislative or executive branches. Further restraints on judicial behavior, beyond the legislative checks of impeachment, recall, or address, could create “timidity in decisionmaking and impede a progressive approach to the administration of justice.”<sup>141</sup>

Ultimately, the principle of an independent judiciary must remain foremost in any approach to judicial discipline. A well-versed critic of judicial discipline has appropriately stated:

A judicial system operating within the judicial branch is better adapted to the fair, expeditious, and comparatively inexpensive disposition of all types of misconduct allegations. Not only can a judicial tribunal best ensure that the accused is afforded the due process of law, but there is every reason to believe that the judiciary itself is deeply concerned with maintaining the highest possible standards of conduct within its own ranks.<sup>142</sup>

A lazy judge or one who shows significant signs of physical or mental impairment will rarely be able to handle a full caseload, and if he or she cannot perform their judicial functions, he or she can hardly promote, in litigants or the public, that confidence in the judiciary necessary for its continuing effectiveness. Similarly troublesome is the judge who engages in questionable practices or is guilty of minor or major offenses. The more complicated the mechanisms for disciplining judges or terminating judicial tenure, the more difficult it is to deal with these problems. Given the fallibility of human nature, we shall always have judges who misbehave or who, having become mentally or physically disabled, do not have the grace to retire voluntarily from office. As

Jefferson also said, “[f]ew die and none resign.”<sup>143</sup> Therefore, it is necessary to have in place some method of dealing efficiently and effectively with judicial misconduct and disability.<sup>144</sup>

One of the most important purposes of the Maryland Commission on Judicial Disabilities is to maintain the public’s confidence in the judiciary. One of the surest ways to “gain and maintain that confidence is to demonstrate to the people that when judicial misconduct or disability does occur, there is a viable institution that can cope with it . . . with scrupulous impartiality.”<sup>145</sup> The ABA has said in its Standards Relating to Judicial Discipline and Disability Retirement, the purpose of the discipline systems is not to punish judges, but to maintain public confidence in the judiciary, preserve the integrity of the judicial process and create greater awareness of proper judicial behavior on the part of judges themselves.<sup>146</sup>

Although public attention to the problem of judicial disability focuses upon the more sensational or scandalous cases of misconduct, the usual case is less dramatic and less serious—habitual tardiness, short work hours, long vacations, and extreme rudeness to lawyers, litigants, and witnesses.<sup>147</sup> As the California Commission on Judicial Qualifications explained in its 1963 report to the Governor, among the ten judges who had resigned or retired that year during investigation by the Commission, “the most common difficulties’ were ‘[d]isabling illness with incapacity to perform judicial duties’ and ‘weakening of mental faculties connected with advanced age and reflected in unacceptable derelictions in court.’”<sup>148</sup> Several years later the California Commission stated that “[o]ver the years the principal factor leading to . . . retirement or resignation has been poor health preventing the proper performance of judicial duties.”<sup>149</sup>

#### IV. THE FUTURE OF JUDICIAL DISCIPLINE COMMISSIONS

In order to obtain and maintain public confidence in the disciplinary system, visible participation by non-judges is crucial. An institutional structure involving participation by lawyers and non-lawyers at some level of the disciplinary process is necessary if the system is to be credible in the eyes of the public. Unfortunately, because the public cannot respect a disciplinary system it cannot see, an inevitable tension will remain between

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the needs for visibility and confidentiality.<sup>150</sup> As Edmund Burke observed, "Where mystery begins, justice ends." Confidentiality is necessary nonetheless, particularly at the investigatory stage, to protect the judge's reputation against frivolous and unfounded charges and to protect persons who make complaints against reprisal. In addition, confidentiality insures that members of the Commission may speak candidly and forthrightly among themselves.

Ultimately, a balance must be struck between the need for confidentiality and the need for credibility. The disciplinary process must have an appropriate degree of visibility. The public must be assured that ethical standards are uniformly and evenly enforced and judges must develop a heightened awareness of what is expected of them. An informal reprimand may correct fault in a single judge, but "it will not enlighten his or her brethren about what is required of them and it does nothing to promote the credibility of the disciplinary system."<sup>151</sup>

#### ENDNOTES:

<sup>1</sup>The author, the Honorable Glenn T. Harrell, Jr., Associate Judge of the Court of Special Appeals of Maryland, was appointed on January 11, 1995, by then Governor William Donald Schaefer to a four year term on the Maryland Commission for Judicial Disabilities. He acknowledges, with gratitude, the assistance in preparing this article of Ms. Elizabeth A. Gaudio, a third year student at the University of Maryland School of Law, who served an internship with the judge in the Spring semester of 1995.

<sup>2</sup> While the last two decades have witnessed the most intense and widespread interest in the discipline of judges, the subject has been of concern for more than two centuries. The Declaration of Independence complained that King George III had made judges dependent on his will alone for the tenure of their offices and the amount of payment of their salaries. See Russell R. Wheeler & A. Leo Levin, *Judicial Discipline and Removal in the United States* (Federal Judicial Center, 1979); B. Bailyn, *The Ideological Origins of the American Revolution* 105-08 (1968) (discussing judicial independence as a causal factor of the Revolution).

<sup>3</sup> Florence R. Peskoe, *Procedure for Judicial Discipline: Type of Commission, Due Process and Right to Counsel*, 54 Chi.-Kent L.Rev. 147 (1977).

<sup>4</sup> Benjamin K. Miller, *Assessing the Functions of Judicial Conduct Organizations*, 75 *Judicature* 16 (1991)

<sup>5</sup> Other methods include direct judicial supervision of members of the judiciary and, more recently, the judicial commission. Direct judicial supervision usually consists of a state's highest court hearing cases brought before it concerning allegations of judicial misconduct. Judicial commissions typically have authority to impose a range of alternative sanctions from informal admonition to formal public censure and termination of service which are then subject to judicial review. See Comment, *Discipline of Judges in Maryland*, 34 Md. L. Rev. 612 (1974). For further discussion of state disciplinary procedures, see generally William T. Braithwaite, *Judicial Misconduct and How Four States Deal With It*, 35 *Law & Contemp. Probs.* 151 (1970).

<sup>6</sup> *In re Diener and Broccolino*, 268 Md. 659, 662, 304 A.2d 587, 589 (1973). In a typical impeachment proceeding the lower house of a bicameral legislature drafts charges against the accused official. The upper house acting as judge and jury then considers and weighs the evidence on its merits. As a general rule, the impeaching body will have the responsibility for presenting evidence to the fact-finder. Thus the lower house in most cases may prosecute the matter itself or may appoint the state's attorney general to do so. See Wilbank J. Roche, *Judicial Discipline in California: A Critical Re-Evaluation*, 10 *Loy. L. Rev.* 192, n.1 (1976); see also William T. Braithwaite, *Judicial Discipline and Removal*, Am. Jud. Soc'y Rep. no. 5 at 22-30 (1969) (discussing impeachment proceedings in various state constitutions).

<sup>7</sup> Wheeler & Levin, *supra* note 2, at 25.

<sup>8</sup> From 1900 to 1925 only two judges, one in Montana and the other in Texas, were removed from office by impeachment. See 20 *Am. Jud. Soc'y* 133, 151 n. 86 (1936). A 1952 survey indicated that from 1928 to 1948 only three impeachments were conducted throughout the country. George E. Brand, *The Discipline of Judges*, 46 *A.B.A.J.* 1315 n. 5 (1960). In the same note, the author's independent survey, conducted in 1960, showed that of forty states, for as far back as could be determined, only 17 had instituted impeachment proceedings on a total of 52 instances. *Id.*

<sup>9</sup> Brand, *supra* note 8, at 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Prior to 1960, the laws of California provided only three means for removing unfit judges from office:

impeachment, recall, and concurrent resolution. Each of these had proven to be awkward, inefficient, and incapable of meeting the demands of a viable system of judicial discipline. See Roche, *supra* note 6, at 200.

<sup>12</sup> *Id.* at 204.

<sup>13</sup> Wheeler & Levin, *supra* note 2, at 11.

<sup>14</sup> Irene A. Tesitor, *An Introduction to this Issue*, 63 *Judicature* 204, 205 (1979); see also State Court Organization 104, Table 12 (summarizing each state's investigatory and adjudicatory bodies).

<sup>15</sup> *Id.*

<sup>16</sup> Irene A. Tesitor & D. Sinks, *Judicial Conduct Organizations* 2 (2nd ed. 1980).

<sup>17</sup> *Id.* This single body model has a number of advantages. Its operation is relatively simple; its support costs are minimal. The danger of premature publicity is minimized where relevant files and information are kept in a central repository and there is no need for the transmission of such files among disciplinary bodies prior to the commencement of public proceedings. Further, as the number of entities involved increases, the time needed to resolve the matter lengthens. See Peskoe, *supra* note 3, at 149; see also John H. Gillis & Elaine Fieldman, *Michigan's Unitary System of Judicial Discipline: A Comparison With Illinois' Two-Tier Approach*, 54 *Chi.-Kent L. Rev.* 177 (1977).

<sup>18</sup> See generally Tesitor, *supra* note 16.

<sup>19</sup> For an explanation of how the multibody judicial disciplinary process works, see Frank Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 *Chi.-Kent L. Rev.* 69 (1977).

<sup>20</sup> Wheeler & Levin, *supra* note 2, at 12. While the federal courts have developed ways to deal with judicial unfitness, the problem has generally been regarded as of much smaller proportion and the response much less formal than in the state courts. Rather than specifically created tenure commissions, the federal courts have relied on established agencies of federal judicial administration to provide a framework within which judges can deal with alleged incapacity or errant behavior of their colleagues. In larger measure such dealings are informal and with publicity. *Id.*

<sup>21</sup> The Conference consists of the Chief Justice of the United States Supreme Court as Chair, the chief judge of each federal circuit, a district judge elected from each circuit, two bankruptcy judges, and chief judges of two special jurisdictions. Wheeler & Levin, *supra* note 2, at 13. Working through an extensive committee system,

the Conference's responsibilities are to prepare procedural rules for the federal court system, to present and comment on legislation affecting federal judicial administration, to prepare plans for the temporary assignment of judges, and to submit suggestions to the various courts in the interest of uniformity and expedition of business. *Id.*

<sup>22</sup> The Judicial Councils have been viewed by the Judicial Conference as vested with the authority and the responsibility for discipline in the federal system. The circuit's Judicial Council is composed of all active judges of the court of appeals in that circuit. The Councils' mandate includes making all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The Judicial Councils have been assigned at least 19 specific statutory duties and the Judicial Conference has published administrative guidelines for their activities. Wheeler & Levin, *supra* note 2, at 14; see also S. Flanders and J. McDermott, *Operation of the Federal Judicial Councils* (Federal Judicial Center, 1979).

<sup>23</sup> Rules of the Judicial Council of the Fourth Circuit, 4-5.

<sup>24</sup> See *Discipline of Judges in Maryland*, *supra* note 5 at 615.

<sup>25</sup> The Maryland Constitution as amended in 1974 states that "[u]pon any recommendation of the Commission, the Court of Appeals . . . may remove . . . censure or otherwise discipline . . . or . . . may retire the judge." Ch. 886, § 1 [1974] Md. Laws 2961-62.

<sup>26</sup> Art. IV, § 4 provides that for incompetency or misbehavior "any judge shall be removed from office by the Governor, . . . or by impeachment or by the address of the General Assembly, two-thirds of each House concurring." Md. Const. art. IV, § 4.

<sup>27</sup> 101 Md. 78, 60 A. 538 (1905).

<sup>28</sup> *In re Diener and Broccolino*, 268 Md. 659, 664, 304 A.2d 587, 590 (1973), *cert. denied*, 415 U.S. 989 (1974).

<sup>29</sup> This section of the article discusses the Commission insofar as it was controlled by Md. Rule 1227 as it existed prior to July 1, 1995. Moreover, to the extent that the discussion under this subheading is premised on constitutional provisions, it does not account for a proposed constitutional amendment that will be placed before the voters in the 1996 election, discussed *infra* Part II, C.

<sup>30</sup> *Discipline of Judges in Maryland*, *supra* note 5, at

- 616.
- <sup>31</sup>*In re Diener and Broccolino*, 268 Md. at 666, 304 A.2d at 592.
- <sup>32</sup>The Commission originally consisted of three judges, one attorney, and one lay member. After the 1970 amendment, an additional judge and an additional lawyer were added. *Id.* at 665, 304 A.2d at 591.
- <sup>33</sup>*Id.* at 663, n.3, 304 A.2d at 590.
- <sup>34</sup>Md. Const. art. IV, § 4B.
- <sup>35</sup>Md. Rule 1227.
- <sup>36</sup>Md. Rule 1227(f)(2).
- <sup>37</sup>*In re Diener and Broccolino*, 268 Md. at 670, 304 A.2d at 594.
- <sup>38</sup>*Id.* at 659, 304 A.2d at 587.
- <sup>39</sup>*Discipline of Judges in Maryland*, *supra* note 5, at 616.
- <sup>40</sup>*Id.*
- <sup>41</sup>*Report of the Judiciary, 1993-1994*, Maryland Administrative Office of the Courts 132 (1994).
- <sup>42</sup>*Id.*
- <sup>43</sup>*Report of the Judiciary*, *supra* note 41, at 132.
- <sup>44</sup>*Id.*
- <sup>45</sup>*Id.*
- <sup>46</sup>*Id.*
- <sup>47</sup>*Id.*
- <sup>48</sup>*Id.*
- <sup>49</sup>*Id.*
- <sup>50</sup>*Id.*
- <sup>51</sup>*Id.*
- <sup>52</sup>Although the *Report of the Judiciary, 1994-95* had not been delivered to the General Assembly at the time this article went to press, official statistics for the fiscal year covered thereby were available from the Commission. During the past year, the Commission considered 73 formal complaints--of which 9 were initiated by practicing attorneys, 7 by inmates, and the remainder by members of the public. Some complaints were directed simultaneously against more than one judge, and sometimes a single jurist was the subject of multiple complaints. The complaints totalled 32 against circuit court judges, 20 against district court judges, and 1 against an orphans' court judge. Some of the complaints were made about attorneys and others outside of the Commission's jurisdiction. This year, litigation over some domestic matter (divorce, alimony, custody) precipitated 17 complaints; criminal cases, including motor vehicle violations, accounted for 31, and the remainder were the result of typical civil litigation or the alleged prejudice or improper demeanor of a particular jurist.
- <sup>53</sup>*Discipline of Judges in Maryland*, *supra* note 5, at 619.
- <sup>54</sup>*See* Md. Const. art. IV, § 4.
- <sup>55</sup>Md. Rule 1231.
- <sup>56</sup>*See* former Md. Rule 1231 (as adopted by Judiciary Conference of 1971).
- <sup>57</sup>*Discipline of Judges in Maryland*, *supra* note 5, at 617.
- <sup>58</sup>*See* Md. Rule 1231.
- <sup>59</sup>*Id.*
- <sup>60</sup>*Id.*
- <sup>61</sup>*See In re Foster*, 271 Md. 449, 318 A.2d 523 (1974).
- <sup>62</sup>*Id.*
- <sup>63</sup>*Id.* at 471-72, 318 A.2d at 534-35.
- <sup>64</sup>*Id.*
- <sup>65</sup>*Id.*
- <sup>66</sup>*Id.*
- <sup>67</sup>*Id.*
- <sup>68</sup>*See In re Diener and Broccolino*, 268 Md. 659, 664, 304 A.2d 587, 590 (1973), *cert. denied*, 415 U.S. 989 (1974).
- <sup>69</sup>*Id.*
- <sup>70</sup>*Id.*
- <sup>71</sup>*Id.* at 689, 304 A.2d at 603.
- <sup>72</sup>*Id.* at 682, 304 A.2d at 599.
- <sup>73</sup>*In re Turney*, 311 Md. 246, 533 A.2d 916 (1987) (censure for failure to recuse in case implicating a family member of the judge); *In re Hormes*, 291 Md. 673, 436 A.2d 457 (1981) (censure for failure to make full financial disclosure regarding a loan to the judge).
- <sup>74</sup>*In re Bennett*, 301 Md. 517, 483 A.2d 1242 (1984).
- <sup>75</sup>*Id.*
- <sup>76</sup>*Id.* at 519, 483 A.2d at 1243.
- <sup>77</sup>*Id.*
- <sup>78</sup>*Sitting in Judgment on Maryland's Judges*, Balt. Sun, Sun., Feb. 5, 1995 at 1C.
- <sup>79</sup>*See In re Diener and Broccolino*, 268 Md. 659, 304 A.2d 587 (1973), *cert. denied*, 415 U.S. 989, (1974); *In re Bennett*, 301 Md. 517, 483 A.2d 1242 (1984).
- <sup>80</sup>Miller, *supra* note 4, at 16.
- <sup>81</sup>Md. House Bill 916 (1995).
- <sup>82</sup>*Id.*
- <sup>83</sup>*Id.*
- <sup>84</sup>*Id.*
- <sup>85</sup>*Id.*
- <sup>86</sup>Judge Eldridge dissenting.
- <sup>87</sup>*See generally* Md. Rules 1227-1227G.

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- <sup>88</sup>See Md. Rule 1227(e) and (g).  
<sup>89</sup>Md. Rule 1227(e).  
<sup>90</sup>Md. Rule 1227(g).  
<sup>91</sup>Md. Rule 1227B(a).  
<sup>92</sup>Md. Rule 1227B(d).  
<sup>93</sup>Md. Rule 1227B(b)(1).  
<sup>94</sup>*Id.*  
<sup>95</sup>Md. Rule 1227B(b)(6).  
<sup>96</sup>Md. Rule 1227B(b)(2).  
<sup>97</sup>*Id.*  
<sup>98</sup>Md. Rule 1227B(b)(4).  
<sup>99</sup>*Id.*  
<sup>100</sup>Md. Rule 1227B(b)(5).  
<sup>101</sup>Md. Rule 1227B(c).  
<sup>102</sup>Md. Rule 1227D.  
<sup>103</sup>Md. Rule 1227D(a).  
<sup>104</sup>*Id.*  
<sup>105</sup>*Id.*  
<sup>106</sup>*Id.*  
<sup>107</sup>Md. Rule 1227D(b)(1)(c).  
<sup>108</sup>*Id.*  
<sup>109</sup>Md. Rule 1227D(b)(2).  
<sup>110</sup>Md. Rule 1227D(c).  
<sup>111</sup>Md. Rule 1227D(c)(1)(a).  
<sup>112</sup>Md. Rule 1227D(c)(1)(b).  
<sup>113</sup>Md. Rule 1227D(c)(2).  
<sup>114</sup>*Id.*  
<sup>115</sup>Md. Rule 1227D(c)(3).  
<sup>116</sup>Md. Rule 1227D(c)(3).  
<sup>117</sup>Md. Rule 1227C(a).  
<sup>118</sup>Md. Rule 1227C(b). If at all possible, the subpoena should not divulge the name of the judge under investigation.  
<sup>119</sup>Md. Rule 1227C(b)(2).  
<sup>120</sup>Md. Rule 1227C(b)(4).  
<sup>121</sup>Md. Rule 1227C(c).  
<sup>122</sup>Md. Rule 1227E(a).  
<sup>123</sup>Md. Rule 1227E(b).  
<sup>124</sup>Md. Rule 1227E(c) and (d).  
<sup>125</sup>Md. Rule 1227E(e)(4).  
<sup>126</sup>Md. Rule 1227E(f).  
<sup>127</sup>Md. Rule 1227E(i).  
<sup>128</sup>Md. Rule 1227E(j).  
<sup>129</sup>Md. Rule 1227F(d).  
<sup>130</sup>Md. Rule 1227F(e).  
<sup>131</sup>Md. Rule 1227G.  
<sup>132</sup>Md. Rule 1227G(a)(2).  
<sup>133</sup>Md. Rule 1227G(a)(3).  
<sup>134</sup>Md. Rule 1227G(a)(4).  
<sup>135</sup>Comment, *Toward a Disciplined Approach to Judicial Discipline*, 73 N.W.U. L. Rev. 503, 507 (1978).  
<sup>136</sup>Wheeler & Levin, *supra* note 2, at 3.  
<sup>137</sup>Miller, *supra* note 4, at 16.  
<sup>138</sup>*Id.*  
<sup>139</sup>Frank Greenberg, *The Task of Judging the Judges*, 59 *Judicature* 458 (1976).  
<sup>140</sup>*Id.*  
<sup>141</sup>*Id.* at 508.  
<sup>142</sup>*Toward a Disciplined Approach to Judicial Discipline*, *supra* note 135, at 510-11.  
<sup>143</sup>Greenberg, *supra* note 139, at 508.  
<sup>144</sup>See generally Miller, *supra* note 4.  
<sup>145</sup>Greenberg, *supra* note 139, at 462.  
<sup>146</sup>Testitor, *supra* note 14, at 205.  
<sup>147</sup>See Braithwaite, *supra* note 6, at 20-21.  
<sup>148</sup>*Id.*  
<sup>149</sup>*Id.*  
<sup>150</sup>Greenberg, *supra* note 139, at 463.  
<sup>151</sup>*Id.*
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