Bill as Introduced

HB 568 - AS INTRODUCED

1999 SESSION

99-0530
09/01

HOUSE BILL ***568***

AN ACT establishing a review panel to review judicial officers.

SPONSORS: Rep. Soltani, Merr 10; Rep. Marple, Merr 11; Rep. Christiansen, Hills 23; Sen. Roberge, Dist 9

COMMITTEE: Judiciary

ANALYSIS

This bill establishes a review panel, consisting of legislators and members appointed by governor and council, to review each judicial officer at least once every 7 years following the judicial officer's appointment. The review panel shall make a recommendation to the speaker of the house and senate president after each review.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 568 – AS INTRODUCED

99-0530
09/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord One Thousand Nine Hundred and Ninety-Nine

AN ACT establishing a review panel to review judicial officers.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Subdivision; Judges; Review Panel for Judges. Amend RSA 4 by inserting after section 42 the following new subdivision:

Review Panel for Judges

4:42-a Review Panel Established. There is hereby established a review panel to review each judicial officer of this state as often as necessary and proper, but, at least once every 7 years after the appointment of the judicial officer or the effective date of this law, whichever shall occur first. Members shall receive no compensation.

4:42-b Composition.

I. The panel shall consist of the following members:

(a) Two persons appointed by the speaker of the house, who may be members of the house.

(b) Two persons appointed by the senate president, who may be members of the senate.

(c) Three persons appointed by the governor and council, who may be councilors or other members of the executive branch.

II. No member may be a current judicial officer, including part-time judges or masters or members of the immediate family of any judicial officer.

III. At no time shall the panel include more than 2 attorneys admitted to practice law in this or any state.

4:42-c Term of Office. Members shall be appointed for renewable terms of no longer than 3 years; but the appointments shall be staggered 50 that the terms of no more than 3 members shall expire in the same year.

4:42-d Conduct of Review and Evaluation.

I. The panel may at its discretion utilize a variety of tools and resources in its work, including listening to audiotapes of court proceedings; viewing videotapes or court proceedings; personally observing the conduct of judicial officers; questionnaires; letters from the public, the bar and the bench; or any other appropriate mechanism.

II. The panel shall adopt rules, under RSA 541-A, relative to its proceedings, criteria for review, and evaluation and the conduct of any such evaluation.

III. All officers, employees, and agents of the state shall cooperate with the panel in carrying out its mission under the law.

IV. The panel shall incident to its review and evaluation and prior to issuance of any report, hold a public hearing which shall be publicized in at least one newspaper of statewide circulation, at least 7 days prior to the date of the hearing.

V. Any judicial officer subject to review shall be invited to fully participate in the review process, to include submission of written or oral testing.

VI. The panel's records and proceedings shall be subject to the provisions of RSA 91-A.

VII. The chair of the panel, or the vice-chair, shall have the authority to subpoena witnesses and documents and to administer oaths.

4:42-e Report and Conclusion. The panel, upon the conclusion of its work regarding each judicial officer, shall issue a report which shall include one of the following recommendations:

I. Retain, which shall be supported by the finding that the judicial officer has performed adequately; but not so as to warrant promotion.

II. Promote, which shall be supported by the finding that the judicial office has performed exceedingly well and should be considered for higher judicial office.

III. Retain with reservation, which shall be supported by the finding that the officer has performed less than adequately, or may need retraining and education in any area, but not so as to warrant removal from office.

IV. Remove by address, which shall be supported by the finding that the judicial officer has performed less than adequately, or required retraining and re-education, so as to warrant removal; but has not committed an act which would warrant impeachment as established by the New Hampshire constitution.

V. Remove by impeachment, which should be supported by the finding that the judicial officer has committed an act that warrants impeachment as established by the New Hampshire constitution.

4:42-f Quorum. The presence of any 4 members shall constitute a quorum. The majority of those members present and voting may issue the committee's report; however, the minority may issue a separate report.

4:42-g Disposition. The panel's reports shall be public and shall be, as soon as practicable, transmitted to the governor and each councilor, the speaker of the house, the president of the senate, the chair of the judicial council, and the chairs of the house and senate judiciary committees; who may initiate hearings, draft articles of impeachment, or draft bills of address.

2 Effective Date. The act shall take effect January 1, 2000.

Amendments

Rep. Soltani, Merr. 10
February 10, 1999
1999-0119h
09/01

Amendment to HB 568

Amend RSA 4:42-c as inserted by section 1 of the bill by replacing it with the following:

4:42-c Term of Office. Members shall be appointed for renewable terms of no longer than 3 years; but the appointments shall be staggered so that the terms of no more than 3 members shall expire in the same year.

Amend RSA 4:42-d, V as inserted by section 1 of the bill by replacing it with the following:

V. Any judicial officer subject to review shall be invited to fully participate in the review process, to include submission of written or oral testimony.

Rep. Mock, Carr. 3
October 19, 1999
1999-2122h
09/10

Amendment to HB 568

Amend the title of the bill by replacing it with the following:

AN ACT establishing a program for performance evaluations of judges.

1 New Paragraph; Complaints; Committee on Judicial Conduct. Amend RSA 490:30 by inserting after paragraph III the following new paragraph:

IV. In all cases, whether a complaint is dismissed or not, complaints received by the committee on judicial conduct shall be made available to the administrative judge of the court in which the judge complained against holds office. Furthermore, all complaints against judges received by the administrative judges of the superior court, the district court and the probate court shall be forwarded to the committee on judicial conduct.

2 New Subdivision; Judicial Performance Evaluations. Amend RSA 490 by inserting after section 31 the following new subdivision:

Judicial Performance Evaluations

490:32 Judicial Performance Evaluations.

I. The chief justice and a majority of the supreme court, in consultation with the administrative judges of the superior, district and probate courts, shall design and implement by court rule, a program for performance evaluation of judges. The sole purpose of this program shall be the improvement of the performance of individual judges and of the judiciary as a whole. Notwithstanding any law to the contrary, all information compiled through this program shall be confidential, except as otherwise provided in this section.

II. The program for performance evaluation shall include, but shall not be limited to, review of records of the supreme court's committee on judicial conduct which are public records under supreme court Rule 40; a questionnaire, to be designed by the supreme court; and a self-evaluation form to be completed by the judge. The supreme court shall strive to achieve uniformity among court evaluation questionnaires, recognizing that the questionnaires for each court may differ due to the jurisdiction of the courts. Questionnaires shall be distributed to a representative sample of attorneys, parties, witnesses, jurors, court personnel, and others who have appeared before a judge during the evaluation period, for the purpose of evaluating the performance of the judge. The questionnaire shall include, but shall not be limited to, questions relative to the judge's performance, temperament and demeanor, judicial management skills, legal knowledge, attentiveness, bias and

objectivity, and degree of preparedness. Completed forms shall be returned to the administrative judge, unsigned, within 30 days of issuance. All responses shall remain confidential.

III. The program for performance evaluation shall ensure that each judge is evaluated a minimum of once every 3 years.

IV. The chief justice of the supreme court shall evaluate the administrative judges of the superior, district and probate courts.

V.(a) The chief justice and a majority of the supreme court, in consultation with the administrative judges of the superior, district and probate courts, shall establish judicial evaluation standards, and shall design or determine appropriate programs for judges who need improvement in achieving the judicial evaluation standards. The supreme court shall establish disciplinary rules and may initiate disciplinary action when appropriate. If a judge fails to achieve judicial evaluation standards after 2 consecutive evaluations, or purposely fails to complete assigned programs, the judge's right to confidentiality shall be waived.

(b) Upon consideration of nomination for another judicial appointment, a judge's evaluations shall be made available to the governor upon request. Upon nomination, such evaluations shall be made available to the executive council upon request. The contents of such evaluations shall be kept in strict confidence by the governor and executive council.

(c) Judicial performance evaluations shall be retained by the judicial branch for the duration of the judge's tenure.

VI. The supreme court shall prepare a report on the implementation of the performance evaluation program described in this section within one year of the effective date of this section and submit such report to the governor, the speaker of the house, the president of the senate, and the chairpersons of the house and senate judiciary committees. Such report shall be made available to the public. Beginning in 2001, the supreme court shall annually file a report on the evaluation process, including, but not limited to, the number of evaluations performed by each court, the percentage of responses received, and, without identifying individual judges, a summary of the overall evaluation results and all actions taken to correct inadequacies and deficiencies. The annual report shall be submitted on or before June 30 of each year to the governor, the speaker of the house, the president of the senate, and the chairpersons of the house and senate judiciary committees. Such report shall be made available to the public.

3 Effective Date. This act shall take effect upon its passage.

1999-2122h

AMENDED ANALYSIS

This bill requires the supreme court, in consultation with the administrative judges of the superior, district, and probate courts, to design and implement, by court rule, a program for performance evaluation of judges.

Rep. Mock, Carr. 3
October 19, 1999
1999-2122h
09/10

Amendment to HB 568

Amend the title of the bill by replacing it with the following:

AN ACT establishing a program for performance evaluations of judges.

1 New Paragraph; Complaints; Committee on Judicial Conduct. Amend RSA 490:30 by inserting after paragraph III the following new paragraph:

IV. In all cases, whether a complaint is dismissed or not, complaints received by the committee on judicial conduct shall be made available to the administrative judge of the court in which the judge complained against holds office. Furthermore, all complaints against judges received by the administrative judges of the superior court, the district court and the probate court shall be forwarded to the committee on judicial conduct.

2 New Subdivision; Judicial Performance Evaluations. Amend RSA 490 by inserting after section 31 the following new subdivision:

Judicial Performance Evaluations

490:32 Judicial Performance Evaluations.

I. The chief justice and a majority of the supreme court, in consultation with the administrative judges of the superior, district and probate courts, shall design and implement by court rule, a program for performance evaluation of judges. The sole purpose of this program shall be the improvement of the performance of individual judges and of the judiciary as a whole. Notwithstanding any law to the contrary, all information compiled through this program shall be confidential, except as otherwise provided in this section.

II. The program for performance evaluation shall include, but shall not be limited to, review of records of the supreme court's committee on judicial conduct which are public records under supreme court Rule 40; a questionnaire, to be designed by the supreme court; and a self-evaluation form to be completed by the judge. The supreme court shall strive to achieve uniformity among court evaluation questionnaires, recognizing that the questionnaires for each court may differ due to the jurisdiction of the courts. Questionnaires shall be distributed to a representative sample of attorneys, parties, witnesses, jurors, court personnel, and others who have appeared before a judge during the evaluation period, for the purpose of evaluating the performance of the judge. The questionnaire shall include, but shall not be limited to, questions relative to the judge's performance, temperament and demeanor, judicial management skills, legal knowledge, attentiveness, bias and

objectivity, and degree of preparedness. Completed forms shall be returned to the administrative judge, unsigned, within 30 days of issuance. All responses shall remain confidential.

III. The program for performance evaluation shall ensure that each judge is evaluated a minimum of once every 3 years.

IV. The chief justice of the supreme court shall evaluate the administrative judges of the superior, district and probate courts.

V.(a) The chief justice and a majority of the supreme court, in consultation with the administrative judges of the superior, district and probate courts, shall establish judicial evaluation standards, and shall design or determine appropriate programs for judges who need improvement in achieving the judicial evaluation standards. The supreme court shall establish disciplinary rules and may initiate disciplinary action when appropriate. If a judge fails to achieve judicial evaluation standards after 2 consecutive evaluations, or purposely fails to complete assigned programs, the judge's right to confidentiality shall be waived.

(b) Upon consideration of nomination for another judicial appointment, a judge's evaluations shall be made available to the governor upon request. Upon nomination, such evaluations shall be made available to the executive council upon request. The contents of such evaluations shall be kept in strict confidence by the governor and executive council.

(c) Judicial performance evaluations shall be retained by the judicial branch for the duration of the judge's tenure.

VI. The supreme court shall prepare a report on the implementation of the performance evaluation program described in this section within one year of the effective date of this section and submit such report to the governor, the speaker of the house, the president of the senate, and the chairpersons of the house and senate judiciary committees. Such report shall be made available to the public. Beginning in 2001, the supreme court shall annually file a report on the evaluation process, including, but not limited to, the number of evaluations performed by each court, the percentage of responses received, and, without identifying individual judges, a summary of the overall evaluation results and all actions taken to correct inadequacies and deficiencies. The annual report shall be submitted on or before June 30 of each year to the governor, the speaker of the house, the president of the senate, and the chairpersons of the house and senate judiciary committees. Such report shall be made available to the public.

3 Effective Date. This act shall take effect upon its passage.

1999-2122h

AMENDED ANALYSIS

This bill requires the supreme court, in consultation with the administrative judges of the superior, district, and probate courts, to design and implement, by court rule, a program for performance evaluation of judges.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 568 Date 3/2/99

Committee Judiciary

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
Rep. Lars Christiansen			Dist. 23 Hudson		
Rep Richard Marple			Merrimack 11	X	
Sen. Pat Gregg			Dist 16	X	
Roy H. Stewart			Gr St Taxpayers	X	
Sen Sheila Roberge	NH Senate	Dist 9		X	
Rep. David A. Bickford	Dist 1	Strafford		X	
William Cushman	Kenneth	431-5453		X	
HOWARD L. WILSON, POBOX 91, ANDOVER		735-5427	LIBERTARIAN PARTY	X	

Hearing Minutes

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 568

BILL TITLE: establishing a review panel to review judicial officers.

DATE: March 2, 1999

LOB ROOM: 208 **Time Public Hearing Called to Order:** 10:07

Time Adjourned: 12:00

(please circle if present)

Committee Members: Reps. Mock, Peterson, Jacobson, Kean, Bergin, Dokmo, L. Jean, Rowe, Ford, Withee, Dudley, Piccoli, Soltani, Woods, Wall, DePecol, J. Pratt, Craig, Lasky, Mitchell, Solow and Wood.

Bill Sponsors: Reps. Soltani, Marple, Christiansen, Sen. Roberge

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Tony Soltani, sponsor, supporting
-outlined general principles of government
-does not require isolation or insulation of the Judiciary
-judiciary should not prescribe new ideas
-faulted Republic administration for the state of the courts; i.e. being close to an administration being the criteria for appointment
-there is no harm to become a member of the Judiciary if they submit to review
-Judicial Conduct Committee is too limited in their scope – they are re-active not pro-active, they are secret and in opposition to open government
-they are unresponsive in that they are appointed by judges
-today's Judiciary follows the Act of Oligarchy
-responded to committee questions regarding structure of review panel – about lack of criteria
-responded that the criteria should be established by committee
-gave the numbers of judges that could be affected
-responded to further questions by committee

Rep. Dick Marple, sponsor, supporting
-spoke of passive acquiescence of the citizenry
-spoke in general support of Rep. Soltani's testimony

Rep. Christiansen – deferred to Sen. Roberge

-Sen. Roberge reminded the committee that everyone else is reviewed every two years – "the vote"
-that this is a consumer bill in that the public deserves the best

Kimon Zachos, attorney
-opposes bill
-gave brief testimony in support of the present Judicial Council
-cited separation of powers
-do not confuse an independent judiciary with an accountable judiciary
-gave examples of same
-thought review panel would be too cumbersome
Question – Rep. Rowe remarked that the Judicial Conduct Committee is not pro-active, but re-active
Rep. Rowe questioned the effectiveness of the use of questionnaires
-responded to further questions

Rep. Pepino and Rep. Bruce Hunter
-submitted pink cards supporting bill – do not wish to speak

Rep. Christiansen, co-sponsor, supporting bill
-spoke to the various complaints that were brought to his attention and experienced the difficulty in gaining information from the court system

Peter Millham, Gilford
-opposing
-has never seen an incompetent judge
-acknowledges that judges step over the line but has faith in the present system
-responded to questions by the committee

Rep. Richard Kennedy, supports
-served on Fairbanks committee
-perhaps if something like this had been in place, Fairbanks would not have happened

David Gottlesman – opposing
-line 23-26 "a variety of tools to work with"
-complaints have always been acted upon
-feel complaints will be "acted on" by this committee
-judges should not be held to a political standard

Caroline Douglas, attorney
-supports bill
-the system that the judiciary has devised to police itself is not working
-cited Act:8 public right-to-know law
-submitted written evidence from Judicial Conduct Committee
-cited arrogance of judges and the rather arbitrary manner in the use of discretion
-attorneys routinely testify against any reform bills out of fear of the judiciary
-judges, she suspects, have ex parte conversations and make decisions on them and not on testimony and evidence in the courtroom and that is judicial misconduct
-addressed concerns about the administrative questionnaire
-cited a problem about favoritism toward powerful attorneys, and the retaliatory nature of the courts toward attorneys

Charles Rogers, East Hampstead, supports bill, 640:2
-official oppression includes judges

Joseph Haas, spoke in favor of bill
-gave anecdotal oral testimony

Bill Cushman, Newcastle, supporting

Respectfully submitted,

Rep. Loren J. Jean, Clerk

PINK CARDS
SPEAKING – SUPPORTING

Sen. Sheila Roberge
Rep. Richard Kennedy
Rep. Leo Pepino
Rep. Bruce Hunter
Rep. Lars Christiansen
Joseph S. Haas, representing VOCALS, P. O. Box 218, Ashland
Charles F. Rogers, P.O. Box 604, E. Hampstead
Rep. Richard Marple
Rep. Tony Soltani
Caroline Douglas, Two Eagle Sq., Concord, representing self as attorney
Rep. Richard Kennedy

SPEAKING – OPPOSING

Nina C. Gardner, Rm 424, 25 Capitol St., Concord, representing Judicial Council
David Gottesman, 39 E. Pearl St., Nashua, NH Trial Lawyers Assn.
Kimon Zachos, 1000 Elm St., Manchester
Peter Millham, 426 Belknap Mtn. Rd., Gilford

HB 568

Rep Soltani

Introduced bill. Outlined the general principles of govt. Does not require isolation, insulation, of the Judiciary. The Judiciary should not prescribe new ideas. Faulted Republican administration for the state of the courts i.e. being close to an administration being the criteria for appt. There is no reason to become the Judiciary if they submit to review.

Judicial conduct committee is to limited in their scope. They are re-active not pro-active and they are secret, in opposition to open govt. They are unresponsive in that they are appt. by Judges. Todays Judiciary follows the art of Oligarchy.

Responded to committee ? regarding structure of the committee. ? about lack of criteria. responded that the criteria should be established by committee. Gave numbers of judges that would be effected.

Responded to further ?

Rep Maeple Co. Sponsor. Spoke of possive agreement of the citizenry. Spoke in general support of Rep Soltanis testimony.

Rep Christiansen deferred to Sen Roberge.

Roberge reminded committee the everyone else is renewed every two years "the vote". That this is a consumer bill in that the public deserves the best.

Kimon Zachos atty Manchester: Opposed bill. Gave brief testimony in support of the present Judicial council. Cited separation of powers. "Do not confuse an independant Judiciary with an accountable Judiciary" gave examples of same. Thought review panel would be too cumbersome ?

Rep Rowe ? and remarked that the Judicial

conduct Comm. is not pro active but Re active.

Rep Raw ? the effectiveness of the use of questionaires Responded to further ?

Rep Pepino + Hunter Submitted pink cards but chose not to speak.

Rep Christenson Co Sponsor. Spoke to the various complaints that were brought to his attention and expereinced the difficulty in gaining information from the court system.

Peter Millham: opposes atty Laconia:
"Has never seen an incompetant judge"
acknowledges that judges step over the line but has faith in the present system. Responded to Committee ?.

Rep Kenneally: Supports. Served on Fairbanks committee. Perhaps if something like this had been in place; Fairbanks would not have happened

David Gatsman — opposes.
Line 23-26 — "a variety of tools to work with"
Complaints have always been acted upon —
Full complaints will be "acted on" by this committee. Judges should not be held to a political standard.

Carolyne Douglass Atty. supports bill "The system that the judiciary has devised to police itself is not working" cited art. 8 public right to know.
Art. 35 The New Hampshire Const. has the highest standard of any State. Submitted written evidence from conduct Committee.
Cited arrogance of judges and the rather arbitrary manner in the use of discretion. Attorneys routinely testify against any reform bills out of fear of the judiciary. Judges she suspects have ex parte conversations and make decisions on them and not on testimony + evidence in the courtroom and that is judicial misconduct.

Adressed concerns about the administrative Questionaire. Cited a problem about favoratism toward powerfull attorneys, and the retaliatory nature of the courts toward attys.

Charles Rogers: East Hampstead: supports bill. 640:2 official oppression includes judges.

Joseph Haas: Spoke in favor. gave anecdotal oral Testimony

Bill Cissman Newcastle: Submitted written testimony

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 568

BILL TITLE: establishing a review panel to review judicial officers.

DATE: 3/2/99

LOB ROOM: 208 **Time Public Hearing Called to Order:** 10:07 AM

Time Adjourned: 12 noon

(please circle if present)

Committee Members: Reps. Mock, Peterson, Jacobson, Keans, Bergin, Dokmo, L. Jean, Rowe, Ford, Withee, Dudley, Piccoli, Soltani, Woods, Wall, DePecol, J. Pratt, Craig, Pasky, Mitchell, Solow and Wood

Bill Sponsors: Reps. Soltani, Marple, Christiansen, Sen. Roberge

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Sub-Committee Actions

HOUSE COMMITTEE ON JUDICIARY

RE-REFER SUBCOMMITTEE WORK SESSION ON

BILL TITLE: HB 568

DATE: 9/22/99

Subcommittee Members: Reps. Mock, Keans, Laskey, Woods, Jean, Piconni, Greig, Soltani, Wall

Comments and Recommendations: STRICK BILL. ADD TWO AMENDMENTS WHICH ARE BEING PUT IN LEGAL FORMAT DEALING W RSA 490:32 & RSA 490:30

Amendments:

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. Soltani

Seconded by Rep. Jean

Vote: 9-0

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. _____

Seconded by Rep. _____

Vote: _____

Respectfully submitted,

Rep. Sandra Keans

Subcommittee Chairman/Clerk

HOUSE COMMITTEE ON JUDICIARY

RE-REFER SUBCOMMITTEE WORK SESSION ON

BILL TITLE: HB 568

DATE: 9/22/99

Subcommittee Members: Reps. Mock, Keans, Lasley, Woods, Jean, Piconeri, Craig, Soltani, Wall

Comments and Recommendations: STRICK BILL. ADD TWO AMENDMENTS WHICH ARE BEING PUT IN LEGAL FORMAT DEALING W RSA 490:32 & RSA 490:30

Amendments:

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Sponsor: Rep. _____ OLS Document #: _____ Adopted/Failed

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. Soltani

Seconded by Rep. Jean

Vote: 9-0

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. _____

Seconded by Rep. _____

Vote: _____

Respectfully submitted,

Rep. Sandra B. Keans

Subcommittee Chairman/Clerk

Sub-Committee Minutes

Henry P. Mock
Chairman
Andrew R. Peterson
Vice Chairman

State of New Hampshire

HOUSE OF REPRESENTATIVES
Legislative Office Building, 33 North State Street
Concord, NH 03301-6328
TEL: (603) 271-3184
TDD Access: Relay NH 1-800-735-2964

COMMITTEE ON JUDICIARY

MEMORANDUM

TO: **"Judicial Reform" Subcommittee Members**

Rep. James W. Craig
Rep. Loren J. Jean
Rep. Sandra B. Keans
Rep. Bette R. Lasky
Rep. Al J. Picconi
Rep. Robert H. Rowe
Rep. Tony F. Soltani
Rep. Janet G. Wall
Rep. Phyllis L. Woods

FROM: **Representative Henry P. Mock, Subcommittee Chair**
PO Box 237, Jackson, NH 03846-0237
(603) 356-5109 / majorchip@landmarknet.net

DATE: **August 19, 1999**

SUBJ: **Subcommittee Work Sessions**

The next subcommittee work sessions for the "Judicial Reform Subcommittee" will be held on Wednesday, September 1 and September 8, 1999 at 10:00 a.m. to continue the work on the bills listed below. At our first work session held today, only four of the ten subcommittee members were present. I know this is a busy time of year, however, please make every effort to be present for the next two work sessions.

Should you have any questions, please do not hesitate to contact me.

CACR 2	relating to supreme court rules. Providing that supreme court rules shall be subject to review and approval by a special legislative committee.
CACR 22	relating to 7-year terms for state judges. Providing that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.
HB 53	establishing a process for reviewing judges.
✓ **HB 568**	establishing a review panel to review judicial officers.

cc: Judiciary Committee Members

Judiciary Committee
Subcommittee Assignments for 1999 Re-Referred Bills

Subcommittee on "Judicial Reform"

CACR 2 relating to supreme court rules. Providing that supreme court rules shall be subject to review and approval by a special legislative committee.

CACR 22 relating to 7-year terms for state judges. Providing that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.

HB 53 establishing a process for reviewing judges.

✓ **HB 568** establishing a review panel to review judicial officers.

Members:

Rep. Mock, Chair	Rep. Craig
Rep. Rowe	Rep. Soltani
Rep. Jean	Rep. Keans
Rep. Lasky	Rep. Woods
Rep. Wall	Rep. Picconi

Subcommittee on HB 575

limiting railroad liability for passenger and tourist rail service.

Members:

Rep. Bergin, Chair	Rep. Ford
Rep. Withee	Rep. Mock
Rep. Solow	Rep. Wood
Rep. Mitchell	

Subcommittee on SB 85-FN

including the judiciary as a public employer under the public employee labor relations act.

Members:

Rep. Dokmo, Chair	Rep. Keans
Rep. Picconi	Rep. Craig
Rep. Jean	Rep. Mock

Judiciary and Family Law Committee
Judicial Reform Subcommittee Organizational Meeting

August 19, 1999
10:00 a.m. – Room 303 LOB

CACR 2	Relating to supreme court rules. Providing that supreme court rules shall be subject to review and approval by a special legislative committee.
CACR 22	Relating to 7-year terms for state judges. Providing that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.
HB 53	Establishing a process for reviewing judges.
HB 568	Establishing a review panel to review judicial officers.

Present: Subcommittee Members Reps. A. Picconi, B. Lasky, S. Keans, H. Mock; Committee Researcher Kevin Moquin; Reps. J. Pratt, N. Ford, M. Smith; Eileen Fox, Supreme Court Counsel; John MacIntosh, N.H. Bar Association.

Chairman Mock stated his feeling is that the general public has a problem with the courts because of their immunity to sanctions.

One approach we should take is to develop a standard of criteria that needs to be met in order to be nominated by the Governor. Rep. Ford has federal criteria list.

Chairman Mock has asked that we take the section from the Family Court bill that deals with criteria of marital masters and put in a separate, stand-alone piece of legislation.

Seven-year reappointment issue. Problems: (a) within a matter of 7 years the total judiciary could be turned over without regard to qualifications; (b) how would someone in 6th year of term react to politically connected defendants.

Rep. J. Pratt would be interested in the role the Bar Association plays both in this state and others. J. MacIntosh: For years the Bar has had a process candidly done in confidence and then ranks the individuals, including demeanor. Governor may ignore. Mr. MacIntosh will supply the process.

Rep. Smith cautioned the committee not to "over fix" the problem or "throw the baby out with the bath water" in their zeal to compensate for the few bad judges.

Rep. J. Pratt: CACR 2 goes into effect at the federal level unless, within 90 days, the Congress turns it down.

The subcommittee will reconvene on September 1st at 10:00 a.m. for the full day.

Respectfully submitted,

Representative Sandra B. Keans

State of New Hampshire

FILE

STATE HOUSE

CONCORD

TDD Access: Relay NH 1-800-735-2964

Work Session of the Judicial Reform Subcommittee

9/1/99
10:00 AM to 10:40 AM
Legislative Office Building, Room 208

Meeting called by: Rep. Henry Mock

Type of meeting: Work Session

Attendees: Rep. Rowe, Rep. L. Jean, Rep. Lasky, Rep. J. Wall, Rep. Craig, Rep. Soltani, Rep. Keans, Rep. Woods, Rep. Picconi

Agenda

1. Evaluation/Qualifications for Judges
2. Qualifications/Appointment/Review of Marital Masters
3. RSAs/Constitutional Articles/Case Law Relating to Lesislative Authority Over Judicial Appointments
4. The Role of the New Hampshire Bar Association in Judicial Appointments

Additional Information

Resource persons: Kevin Moquin, House Committee Research, Tel: 271-3600

Special notes:

SUBCOMMITTEE WORK SESSION

COMMITTEE: **Judicial – Subcommittee on Judicial Reform**

BILL NUMBER: **CACR 2, relating to supreme court rules.**

CACR 22, relating to 7-year terms for state judges.

HB 53, establishing a process for reviewing judges.

HB 568, establishing a review panel to review judicial officers.

DATE: **Wednesday, September 1, 1999** LOB ROOM: **208**

TIME CALLED TO ORDER: **10:00 a.m.** TIME ADJOURNED: **12:45 p.m.**

SUBCOMMITTEE MEMBERS PRESENT: **Reps. Mock (Chair), Keans (Chair), Rowe, Lasky, Craig, Soltani, Woods, and Picconi.**

OTHERS PRESENT: **Rep. Solow, Kevin Moquin (Committee Researcher), Eileen Fox (Counsel to the Supreme Court), Jennifer Comer (Executive Director of NH Trial Lawyers), Kevin Duggan (NH Trial Lawyers), Jon MacIntosh (NH Bar Association)**

Evaluation of Judges

Rep. Mock commented that during session he found there was not a lot of support for term limits and thought a more productive approach would be looking at an evaluation process.

Eileen Fox, Counsel to the Supreme Court, said forms are used currently in the system.

I. District Court – sent to police, DCYF, county attorney, NH Public Defenders Office, NH State Police, various lawyers/prosecutors using court. The committee is developing questions to ask administrative judges when they appear next week.

II. Superior Court – sent to attorneys and staff in court.

Howard Zibel, Clerk of Supreme Court of NH, requested to appear on September 8, if possible.

Kevin Duggan, NH Trial Lawyers (Manchester), said he opposes bills relating to judicial review and term limits and believes the longstanding protections are adequate. He does not understand the motivation for this legislation, but suspects it is Claremont and one case should not change the longstanding procedures and constitution. Judge Nadeau has been in touch with trial lawyers

to get an opinion. If there are problems, how do we to correct them? The Association has developed a survey for the membership to rate judges. He said it was an eye-opener, i.e. the comments on extremes of both ends (most moderate on check off). The form was used for Municipal Courts, Superior Courts, and Probate Courts. The Association has not rated candidates for judgeships and recognizes the nature of the business is adversarial, therefore, so many unhappy litigants particularly in divorce cases (hates to see). He opposes the bill changing the court rule authority as well. To do, believes there is a benefit to ranking the process politically.

Jon MacIntosh, New Hampshire Bar Association, said a screening procedure was recommended by NH Bar Association and offered to the Governor, which may or may not participate. Governor John Sununu refused. Some doubt that with the constitutional power to appoint, the Legislature can set qualifications. Rep. Rowe asked if there was a problem if a lawyer has complaint and brings to administrative judge and it becomes known to judge, must disclose to client. His experience is that most judges offer recusal before lawyer requests. He will supply historical data on correlation between assessment with actual appointment.

RECOMMENDATION TO THE FULL COMMITTEE:

❒ See Below
❒ No Recommendation Yet

RESPECTFULLY SUBMITTED,

Rep. Sandra B. Keans, Clerk
For the Subcommittee

Rev. 7/99

SUBCOMMITTEE WORK SESSION

COMMITTEE: **Judicial – Subcommittee on Judicial Reform**

BILL NUMBER: **CACR 2, relating to supreme court rules.**

CACR 22, relating to 7-year terms for state judges.

HB 53, establishing a process for reviewing judges.

HB 568, establishing a review panel to review judicial officers.

DATE: **Wednesday, September 8, 1999** LOB ROOM: **208**

TIME CALLED TO ORDER: **10:00 a.m.** TIME ADJOURNED: **4:10 p.m.**

SUBCOMMITTEE MEMBERS PRESENT: **Reps. Mock (Chair), Keans (Chair), Rowe, Lasky, Craig, Soltani, Woods, Picconi, Wall, and L. Jean.**

OTHERS PRESENT: **Rep. Dyer, Rep. Solow, Rep. J. Pratt, Sen. Roberge, Kevin Moquin (Committee Researcher), Judge Morrill, (for Judge Nadeau), Eileen Fox (Counsel to the Supreme Court), Howard J. Zibel (Clerk of Supreme Court), Donna Craig (Howard Zibel Assistant)**

Howard J. Zibel, Clerk of Supreme Court and Executive Secretary of the JCC, has no direct involvement in the evaluation of judges. (See written testimony attached.) Major rules change: (a) is an "after the fact" change, i.e. when complaint is concluded will be made public, and (b) even if dismissed, judge will see and offered opportunity to put a response in file. The purpose is not to embarrass or besmirch the judge, but rather to make them better judges. For example: (1) Judge with DWI after denying continuing drinking and (2) judge called police officer who arrested his brother.

Between 1960 and 1980, all 50 states had formed Judicial Conduct Committees. He recognizes there is a perception of potential intimidation and therefore not a lot of complaints come from lawyers. JCC does not necessarily wait for a pattern of behavior before acting. A great many complaints arise out of marital matters with words like "biased" included. Obviously, the JCC does not deal with facts of case, but judges' behavior. The JCC can not be used as a separate appeal process. Seven votes are needed to bring action.

It would be very rare, but there may be a situation where a judge does not follow the law intentionally in an order and could therefore be actionable before JCC, e.g., sentence to ten years when RSAs call for six years maximum. It is obviously very provable.

Judges orders and findings are exempt from the committee's jurisdiction. There is no where for a judge to be reeducated if he disregards the law. Not looked at by JCC because can be thought of as "findings and rulings." The public perception is wrong as to how many judges are reprimanded. There were 31 cases of reprimand last year and the public knew nothing about it. The Supreme Court will be the final decision-maker if complaints are to be made public. Mr. Zibel thinks this will happen as have proposed new rules.

Rep. Merton S. Dyer, E. D. & A. Committee, (see handout) spoke of the judges retirements and the new judge retirement system. Presently, retirement is eight years for full-time judges with a non-contributory by justices and state provides all funds. You must retire at age 70, will receive ¾ of his last salary, and has to have served seven years. To retire at age 65, you have to have served 10 years. If declared permanently disabled, judges get benefits as well.

The proposed retirement plan would only include judges appointed after the bill goes into effect. The defined contribution plan by state and judges. Judge could say where money is invested and would be vested at a rate of 20 percent per year for five years. Could leave bench and get retirement money. The bill would do nothing for judges in position now. Not looked at retirement system for part-time ECS.

Eileen Fox, Counsel to the Supreme Court, said has been working on judicial retirement system for new judges and has concerns about the judicial branch having a plan that would attract people to judicial service and keep them there, i.e., a little older, experienced and will stay. The judicial branch thinks there would be a defined benefit plan and tells at the end what benefit would be and would this be more appropriate. In addition, wants to make sure tax implications won't be against present judges in system. A six percent contribution by individuals and four percent by state is what is being proposed now. This will work with legislative committee as far as a defined benefit plan versus a defined contribution plan.

The committee recessed at 12:00 Noon and reconvened at 1:00 p.m.

Judge Edwin Kelley, Administrative Judge of District and Municipal Courts, used the form for four to five years. (Seventy-nine judges in his district.) Twenty-five go out – not signed. Judge gets compilation. Also gets on regular basis, letters of complaint to supplement the process. Everyone gets a response within 30 days. Actually listens to tapes from court. (All cases are taped.) Sometimes, he will sit down with judge to listen to tapes.

In cases of pure misconduct has obligation to pass to JCC. Always work in conjunction with the Supreme Court for removal or reassignment. Notified by JCC in severe cases, especially discipline that required monitoring. Fifty to sixty individual letters of complaint per year. The response back to complainant always carries the notation that they may file with JCC.

Rep. J. Pratt asked, do you have authority to order continuing education in an area. Judge Kelley said would, but also would get concurrence of Supreme Court, by an informal call to Judge Brock who quickly meets with associate – quick turn around.

Judge Morrill, for Judge Nadeau, read a handout of Judge Nadeau's statement. The evaluation process takes place every 2 to 2-1/2 years. Speaking for himself, he feels evaluations are helpful and honest. The incentive is to him, this evaluation is "his grade" for his work in his profession. Judge Nadeau get about 25 evaluation (unsolicited) per year, both positive and negative. There is approximately 12 hours of continuing education required each year for judges (which is determined by the Supreme Court). Take the oath, office, etc. seriously and discussions (reprimands) with Chief Justice taken seriously. He feels burnout can be a concern to him personally and feels a retirement system could change that. He is required on the Judicial Code of Ethics to report any infraction see to JCC, with some self-policing involved.

Judge Mahar, Probate Court, feels settling the retirement issue would help burnout and issues of having to stay put for perhaps 40 years. (He used the example of a spouse who gets job offer out of state.) They send out 70-80 evaluation forms on each judge and get back approximately 50 forms. Then goes to see judge in each court and goes over the evaluations. He also does self-assessment. When going over evaluation form, he tells you where judge is strong or weak. Would not hesitate to go to Supreme Court if judge would not respond to his comments. Judge Mahar keeps a copy and the judge being evaluated keeps a copy. Overall, he feels evaluations are positive and productive. He has been trying to make the courts more uniform.

Chairman Mock went over the bills (CACR 2, CACR 22, HB 53, HB 568) wanted to know how the committee wants to proceed. On CACR 2, a discussion ensued to eliminate the last sentence of 73-a. Also, there was a discussion on the wording of CACR 1.

The subcommittee adjourned at 4:10 p.m. The next meeting is scheduled for September 15 to vote on the bills.

RECOMMENDATION TO THE FULL COMMITTEE:

❒ See Below
❒ No Recommendation Yet

RESPECTFULLY SUBMITTED,

Rep. Sandra B. Keans, Clerk
For the Subcommittee

SUBCOMMITTEE WORK SESSION

COMMITTEE: **Judicial – Subcommittee on Judicial Reform**

BILL NUMBER: **CACR 2, relating to supreme court rules.**

CACR 22, relating to 7-year terms for state judges.

HB 53, establishing a process for reviewing judges.

✓**HB 568, establishing a review panel to review judicial officers.**

DATE: **Wednesday, September 15, 1999** LOB ROOM: **208**

TIME CALLED TO ORDER: **10:05 a.m.** TIME ADJOURNED: **12:40 p.m.**

SUBCOMMITTEE MEMBERS PRESENT: **Reps. Mock (Chair), Keans (Clerk), Rowe, Lasky, Craig, Picconi, Wall, and L. Jean.**

OTHERS PRESENT: **Rep. J. Pratt**

Rep. Rowe presented a proposal for a five-year term for Chief Justice of Supreme, Superior Court. This does not mean removal from the court. Reps. Picconi, Keans, Lasky, Wall and Craig spoke against this proposal. Looking for a statute not constitutional evaluation. Rep. Jean spoke in favor of this proposal.

Chairman Mock presented a proposal for statutes to deal with performance evaluations of judges adding to RSA 490:32. There was a thorough work session on the proposal. Chairman Mock will redraft with agreed upon changes.

The next meeting is scheduled for September 22, 1999 at 9:30 a.m. At that time, the subcommittee will vote on all these re-referred bills.

RECOMMENDATION TO THE FULL COMMITTEE:

❒ See Below
❒ No Recommendation Yet

RESPECTFULLY SUBMITTED,

Rep. Sandra B. Keans, Clerk
For the Subcommittee

Judiciary and Family Law Committee
Judicial Reform Subcommittee Meeting

September 29, 1999
9:30 a.m. – Room 208 LOB

CACR 2	Relating to supreme court rules. Providing that supreme court rules shall be subject to review and approval by a special legislative committee.
HB 568	Establishing a review panel to review judicial officers.
CACR 22	Relating to 7-year terms for state judges. Providing that all state judges appointed on or after January 1, 2001 be commissioned for 7-year terms, which may be renewed.
HB 53	Establishing a process for reviewing judges.

Subcommittee Members Present: Subcommittee Members Rep. Mock, Chairman; Rep. Keans, Rep. Laskey, Rep. Craig, Rep. Picconi, Rep. Woods, Rep. Soltani, Rep. Wall, Rep. Jean.

The meeting was called to order at 9:40 a.m.

The subcommittee started by discussing the proposed amendments to RSA 490:32 and then agreed to go forward with its proposal and approved drafting of an amendment to RSA 490:30. Rep. Soltani offered an amendment to CACR 2, stating that rules cannot be inconsistent to the RSAs.

Subcommittee Executive Session:

CACR 2 Rep. Jean moved OTP/A (#1999-2015h), seconded by Rep. Rep. Woods.
Vote: 7 yeas and 2 nays.

HB 568 Rep. Soltani moved, seconded by Rep. Jean, that the bill be struck and amendments be proposed to RSA 490:32 and RSA 490:30. (Two amendments are being drafted into legal format dealing with RSA 490:32 and RSA 490:30.)
The motion was OTP/A.
Vote: 9 yeas and 0 nays.

CACR 22 The subcommittee felt that 7-year terms were an inappropriate move to make with the courts in N.H.
Rep. Craig moved ITL, seconded by Rep. Laskey.
Vote: 7 yeas and 2 nays.

HB 53 The subcommittee believes the evaluation process should be allowed to work. The minority wants a periodic review.
Rep. Keans moved ITL, seconded by Rep. Craig.
Vote: 5 yeas and 3 nays.

Respectfully submitted,

Representative Sandra B. Keans

9:30
208

9/22/98

Judicial Reform Study Comm.

called to order 9:40

I Committee started by discussing the proposed amendments to R.S.A. 490:32
Subcommittee has agreed to go forward w proposal

II SUBCOMMITTEE APPROVED FOR DRAFTING OF AMEND. TO RSA 490:3

III SOLTANI OFFERED AMENDMENT CACR 2 STATING THAT RULES CAN NOT BE INCONSISTENT W THE RSA's

EXECUTIVE SESSION OF SUBCOMMITTEE

CACR 2
LOREN JEAN MOVED CACR 2 OTP/Am 2ND BY WOODS → 7-2
7 YEAS 2 NAYS

HB 568 OTP/Am 2ND JEAN (9-0)
SOLTANI MOVED BILL BE STRUCK AND ADD PROPOSED AMENDMENTS TO RSA 490:32 AND RSA 490:30
UNANIMOUS 9 YEAS 0 NAYS

CACR 22: CRAIG ITL 2ND LASKEY (7-2)
ROLL CALL: ACONNI, CRAIG, WOODS, LASKEY,
7 YEAS - 2 NAYS

HB53 - KEANE ITL CRAIG 2ND (5-3)

Testimony

FILE

RULE 39. COMMITTEE ON JUDICIAL CONDUCT

(1) Pursuant to RSA 490:4 (Supp. 1977) and to provide for the orderly and efficient administration of the Code of Judicial Conduct, Rule 38 of the Rules of the Supreme Court, there is hereby established a committee on judicial conduct.

(2) *Appointment of Committee*

(a) The committee on judicial conduct shall consist of eleven members appointed by the supreme court. One member shall be an active or retired justice of the supreme court; one an active or retired justice of the superior court; one a district court judge; one a probate court judge; two New Hampshire Bar Association members; and five citizens not of the bar or bench.

(b) The committee address shall be:

Executive Secretary
Committee on Judicial Conduct
Supreme Court Building
Concord, New Hampshire 03301

(3) *Terms of Office*

The term of each member shall be four (4) years, and members may be reappointed to successive terms without limitation.

(4) *Vacancy*

(a) A vacancy in the office of the committee shall occur

(1) When a member ceases to be a member of the committee; or

(2) When a judge who is a member of the committee ceases to hold the office which he or she held at the time of selection; or

(3) When a lawyer ceases to be admitted to practice in the courts of this State or is appointed to a judicial office; or

(4) When a citizen appointee becomes a lawyer or a judge; or

(5) When a member ceases to be domiciled in New Hampshire.

(b) A vacancy shall be filled by selection of a successor with the same qualifications as those required for the selection of his predecessor in office. A member selected to fill a

vacancy shall hold office for the unexpired term of his or her predecessor.

Each vacancy in the office of the committee shall be filled within thirty days after the vacancy occurs.

(c) Members may retire by submitting their resignations to the committee, which shall certify each vacancy to the supreme court.

(d) No member may participate in any proceedings before the committee involving his or her own conduct.

(e) Whenever a member is disqualified from participating in a particular proceeding, or is unable to participate by reason of prolonged absence or physical or mental incapacity, the court, upon written request of the chairperson, may appoint an alternate to participate in any such proceeding or for the period of any such disability, any such alternate to have the same qualifications as those required for the selection of the member who is being replaced.

(5) *Expenses of the Committee and Staff*

(a) The expenses shall be paid from appropriations of funds, if any are available, to the committee on judicial conduct through the supreme court budget.

(b) Members shall serve without compensation for their services, but shall be reimbursed for necessary expenses incurred in the performance of their duties, subject to the availability of funds.

(c) The committee may employ or appoint an executive secretary and other employees, including counsel, to perform such duties as it shall direct, subject to the availability of funds. The attorney general may, if requested by the committee, act as its counsel generally or in any particular investigation or proceeding.

(d) The executive secretary of the committee shall be the clerk of the supreme court or any other person designated by the supreme court.

(6) *Quorum and Chairperson*

(a) A quorum for the transaction of business by the committee shall be seven members. No act of the committee shall be valid unless concurred in by seven of its members.

Members of the committee may participate in a meeting of the committee by means of a conference telephone or similar

communications equipment by means of which all persons participating in the meeting can hear each other at the same time. Participation by these means shall constitute presence in person at a meeting.

(b) The committee shall elect from its members a chairperson and a vice-chairperson, each of whom shall serve a term of two years. The vice-chairperson shall act as chairperson in the absence of the chairperson. In the absence of both the chairperson and the vice-chairperson, the members present may select one among them to act as temporary chairperson.

(7) *Meetings of the Committee*

Meetings of the committee shall be held at the call of the chairperson, the vice-chairperson, or the executive secretary or at the written request of three members of the committee.

(8) *Annual Report*

On or before December 31 of each year, the committee shall prepare a report summarizing its activities during the preceding year. One copy of this report shall be filed with the chief justice of the supreme court and other copies may be made available to the public by a majority vote of the full committee with the approval of the supreme court.

(9) *Complaints and Investigations*

(a) Who May File Complaints: Complaints may be filed only by any person who is directly affected by the conduct complained of or was present when the conduct complained of occurred.

(b) Complaints: The committee shall consider all complaints, submitted in writing and signed by a complainant having standing and not obviously unfounded or without merit, alleging conduct on the part of a judge complained against that may be contrary to the Code of Judicial Conduct, or alleging conduct on the part of a master or referee complained against that may be contrary to canons 1, 2, and 3 of the Code of Judicial Conduct. The committee shall not consider complaints against a judge or master or referee relating to his rulings. Such matters should be left to the appellate process. The committee shall also consider written complaints by a complainant having standing and not obviously unfounded or without merit against court stenographers or reporters and any clerk of court or deputy clerk, including registers of probate and any persons performing the duties of a clerk or register, alleging conduct that may be contrary to canons 1, 2, 3 A(1)-(3) and (5)-(7) and 3 B of the Code of Judicial Conduct. Following evaluation of a complaint by the committee, the executive secretary shall provide the person complained against with a copy of the complaint,

except that such person shall not be notified of a complaint that the committee is without jurisdiction to consider unless otherwise determined. The person complained against shall respond in writing to the merits of the complaint within twenty days after receipt from the committee of a copy thereof and the committee's request for a response. Whenever the executive secretary provides a clerk of court or deputy clerk or register of probate, or other person performing the duties of a clerk or register, or court stenographer or court reporter, with a copy of a complaint against such person, the executive secretary shall at the same time give notice of the complaint to the chief justice or administrative judge of the court system in which such person serves. In such instances, the chief justice or administrative judge shall send a copy of the complaint to the presiding justice of the particular court in which such person serves.

(c) Investigation: An investigation of the complaint shall be conducted by the chairperson or the committee's designee.

(d) Hearings or Trials in Process: The committee shall not ordinarily investigate any complaint while a hearing or trial giving rise to the complaint is in process. The committee may waive this rule by vote of six members of the committee in an appropriate case.

(e) If the matter is not informally resolved or adjusted and if the investigation does not disclose probable cause to warrant further proceedings, the person submitting the statement, criticism or complaint shall be so notified but nevertheless a hearing may be requested by the person complained against. The person complained against shall be notified of the committee's findings and action.

(f) Inquiries Initiated by Committee: An inquiry relating to the conduct of a judge, master, referee, stenographer or reporter, or clerk of court or deputy clerk, including a register of probate or any person performing the duties of a clerk or register, may be initiated by the committee on its own motion, without a signed written complaint, upon any reasonable basis. If by virtue thereof the committee determines that sufficient cause exists for further inquiry, it may proceed to an investigation which shall be conducted by the chairperson or the committee's designee. Notice of the initiation of an inquiry by the committee on its own motion and of any resulting investigation shall be given to the person whose conduct is the subject of the inquiry or investigation at such time or times as the committee deems appropriate.

(10) *Hearings*

The person whose conduct is being investigated shall be given an opportunity to explain and be heard before the committee in

advance of any unfavorable action.

(a) Notice of Hearing: Notice of the hearing shall be given to the person and the complainant by mail prepaid at least thirty days prior to any hearing. Such notice to the judge, master, or referee whose conduct is being investigated shall include the following:

(1) A general factual summary of the complaint, or if the committee has proceeded on its own motion, a general factual summary of the charges generated by the committee's inquiry,

(2) those standards of the Code of Judicial Conduct which are alleged to have been violated,

(3) the time, date and place of the meeting or hearing,

(4) the fact that all further notices concerning the hearing, including any adjournments thereof, shall be given by the chairperson,

(5) the fact that the committee and the judge, master, or referee whose conduct is being investigated may be represented by counsel at the hearing, and may have witnesses present.

(b) The hearing shall be held before the committee with a record thereof by a stenographer to be paid for by the committee. The hearing shall be open to the public.

(c) If, after the hearing, the committee determines that there has been a violation of the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the supreme court, it shall dispose of the matter by informal resolution or adjustment. Such disposition may take the form of admonishing the judge, issuing a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, or other similar remedial action, or any combination of the foregoing.

(d) If, after the hearing, the committee determines that the person complained against has violated the Code of Judicial Conduct and that the violation is of a serious nature so as to warrant formal disciplinary action, censure or suspension, the committee shall file a report of its findings with the supreme court together with a record of the proceedings. Said report and record and all further proceedings before the court shall be public.

(e) The committee shall have subpoena powers. Every witness in any hearing before the committee shall be sworn to tell the truth.

(f) Evidence necessary to establish a violation of the Code of Judicial Conduct shall be clear and convincing but no judge shall be compelled to testify.

(g) The committee may respond publicly to any unjustified criticism of a judge.

(h) Committee action shall require a vote of at least seven members concurring in any action under (c) and (d) above.

(11) *Review by Supreme Court*

Upon receipt of a report of its findings from the committee under 10(d), the supreme court shall set the matter down for hearing which shall be open to the public. At such hearing the judge or master or referee complained against shall have the opportunity to appear in person and/or by counsel and be heard on the facts and the law. The supreme court shall file a written opinion and judgment directing such disciplinary action as it finds just and proper, or exonerating the judge or master or referee complained against.

(12) *Counsel Fees*

Any judge or master complained against shall be entitled to counsel. Upon application, the committee may, in its discretion and subject to the availability of funds, pay such portion as it deems equitable of the fee and expenses of the judge's or master's counsel.

(13) *Immunity*

Each person shall be immune from civil liability for all of his statements made in good faith to the committee or to the supreme court or given in any investigation or proceedings pertaining to a complaint against a judge, master, or referee. The protection of this immunity does not exist as to statements made to others. The committee, its staff, counsel, and investigators shall be immune from civil liability for any conduct arising out of the performance of their duties.

(14) *Duty of Participants*

All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by Supreme Court Rule 40. Violation of this duty shall constitute an act of contempt of the supreme court.

FILE

RULE 40. PROCEDURAL RULES OF COMMITTEE ON JUDICIAL CONDUCT

(1) Applicability and Definitions.

(a) All proceedings of the committee on judicial conduct, created by Supreme Court Rule 39, shall be governed by these rules.

(b) As used herein, the following terms shall have the following meanings:

(1) "Judge" includes a full-time marital master for all purposes of the Code of Judicial Conduct, and includes a referee or other master insofar as complaints arise under canons 1, 2, and 3 of the Code of Judicial Conduct. "Judge" shall also include court stenographers or reporters and clerks of any court or deputy clerks, including registers of probate and any persons performing the duties of a clerk or register, with respect to canons 1, 2, 3 A(1)-(3) and (5)-(7), and 3 B of the Code of Judicial Conduct.

(2) "Proceeding" includes each step taken or which may be taken under these rules with respect to a complaint filed with the committee alleging misconduct of a judge, or with respect to an inquiry concerning the conduct of a judge which the committee has initiated on its own motion.

(3) For the purposes of these rules, a "hearing" is that procedure which follows a statement of formal charges.

(2) Meetings, Conduct of Business, Staff, Quorum and Disqualification.

(a) The committee may, by vote, establish regular or stated meeting dates. In addition, special meetings of the committee may be called by the chairperson, the vice-chairperson, or the executive secretary, or at the written request of three members of the committee.

(b) The business of the committee may be transacted by telephone, exchange of correspondence, or other informal poll of members, unless one or more members object; provided, however, that no formal charges shall be instituted or regular investigation ordered or unfavorable action taken against a judge except upon deliberation and the affirmative vote of at least seven members at a meeting of the committee.

Members of the committee may participate in a meeting of the committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time. Participation by these means shall constitute presence in person at a meeting.

(c) The executive secretary shall perform the duties and responsibilities prescribed by these rules and such other duties and responsibilities as the committee may determine from time to time. He shall receive all complaints, information, and inquiries, and process the same under the direction and supervision of the committee. He shall maintain the committee's records, maintain statistics concerning the operation of the committee, and prepare an annual report of the committee's activities for presentation to the committee. He shall coordinate investigations ordered by the committee, and ensure that they are conducted discreetly and with dispatch. Subject to the direction and control of the committee, he shall have charge of the disbursement of expense funds available to the committee through the supreme court's budget. Generally, he shall supervise the work of other personnel employed by the committee, direct the activities of the committee's office, and endeavor to keep members of the committee properly informed about its business.

(d) The committee may employ such private investigators, special counsel, experts and other personnel as the committee in its discretion deems necessary for the efficient discharge of its duties, subject to the availability of funds. The function of special counsel shall be to gather and present evidence in support of formal charges filed by the committee against a judge at a hearing held to consider such charges, and, in the case of supreme court review, to support before the supreme court the committee's report of its findings.

(e) A quorum for the transaction of business by the committee shall be seven members. No action of the committee shall be valid unless concurred in by seven of its members, except as otherwise provided in these rules.

(f) No member of the committee shall participate in any proceeding in which his or her impartiality might reasonably be questioned. If a member personally appears before a judge against whom a complaint is pending, or has reason to believe that he or she will appear before a judge against whom a complaint is pending, such member shall not take part in the proceeding.

(g) If a quorum of the committee cannot be obtained by reason of the disqualification or absence of members thereof, the chairperson or the executive secretary shall request the supreme court to designate a temporary replacement or replacements. Any such temporary replacement shall have the same qualifications as the member replaced.

(3) Confidentiality of Proceedings.

(a) Except as provided in this section, all proceedings before the committee, and all information, communications, materials, papers, files and transcripts, written or oral, received or developed by the committee in the course of its work, shall be confidential. No member of the committee or its staff and no employee of the committee shall disclose such proceedings, information, communications, materials, papers, files and transcripts, except in the course of official duty or as otherwise authorized in this section.

(b) A complainant shall keep confidential the fact that a complaint has been filed with the committee until either the complaint is dismissed, a statement of formal charges is prepared and filed as described in section 7(a) of this rule, or the complainant is notified that the committee has disposed of the complaint by taking appropriate remedial action as described in subsection (h) of this section.

(c) Upon preparation and filing of a statement of formal charges, the complaint or notice of inquiry, the judge's response, the statement of formal charges, all pleadings filed thereafter, the hearing, and the committee's disposition shall be public. The committee's deliberations shall be confidential.

(d) If a matter against a judge is disposed of by informal resolution or adjustment, and if the judge shall thereby have received three or more informal dispositions during the preceding five years, the following shall be, after notice to the judge, available to the public: the complaints or notices of inquiry, the judge's responses, and the committee's findings and dispositions in all of the proceedings.

(e) If a judge is publicly charged, through independent sources, with involvement in a proceeding before the committee, or publicly charged with conduct likely to become the subject of such a proceeding, the committee may, at the request or with the consent of the judge involved, issue brief public statements as it deems appropriate in order to confirm or deny the pendency of the proceeding, to clarify the procedural aspects thereof, to explain the right of the judge to a fair hearing without prejudgment, and to state that the judge denies the allegations.

(f) If the pendency of a proceeding before the committee is generally known to the public, through independent sources, and the subject matter thereof is of broad public interest or speculation, and public confidence in the administration of justice may be threatened because of lack of information concerning the status of the proceeding and the requirements of due process, the committee may, on its own motion, issue brief statements as it may deem appropriate in order to confirm the

existence of the investigation, to clarify the procedural aspects of the proceeding, to explain that the judge is entitled to due process, and to state that the judge denies the allegations.

(g) If the committee, at any stage of a proceeding, dismisses a complaint or formal charges, whether from insufficiency of the complaint or because there is insufficient cause to proceed further with the matter or for other reason, the committee shall inform the complainant of such disposition. In addition, the committee may, at the request or with the consent of the judge concerned, issue a short explanatory statement to the public.

(h) If the committee disposes of a proceeding by informal resolution or adjustment prior to the filing of formal charges, it shall inform the complainant of the form of informal resolution or adjustment. However, if the committee provides for monitoring or review of remedial action that it may require or conditions it may impose in connection with any informal resolution, it may make such disclosure of the terms of such informal resolution to the administrative judge or other person to whom such monitoring or review is delegated by the committee as necessary to enable such judge or person properly to perform such function.

(i) This section shall not be construed to prohibit the committee from preparing and releasing to the public materials which are not related to any particular proceeding or situation. Such materials may include explanations of:

(1) The jurisdiction of the committee and the limitations upon its powers and authority;

(2) The procedure for filing complaints; and

(3) The internal procedures of the committee.

In addition, the committee may release periodic statistical reports of its work which do not identify or permit the identification of any person involved in any proceeding before the committee other than persons involved in proceedings governed by subsections (c) and (d) of this section.

(j) Nothing herein shall prevent the committee from responding to unjustified public criticism of a judge which is not the subject of a proceeding, and the committee may so respond in appropriate cases.

(k) Any violation of these provisions relating to confidentiality shall constitute contempt of the supreme court. The committee may enforce these provisions by appropriate proceedings for contempt before any justice of the supreme court.

Notwithstanding the provisions of this rule, the committee may disclose to an appropriate law enforcement authority any matter that comes before it.

Comment

One of the protections of the confidentiality provision is that a complainant is not liable for good faith statements contained in a complaint or made in the course of its proceedings.

Nothing in the rule of confidentiality prevents a complainant from disclosing publicly the conduct of a judge which he or she believes violates the code of conduct or is otherwise inappropriate. The immunity from civil liability does not apply to such disclosures. The rule does prohibit a complainant, however, from disclosing publicly the fact that a complaint against the judge about the conduct has been filed with the committee until a statement of formal charges is prepared and filed as described in section 7(a) of this rule or until the complaint is finally disposed of by the committee.

Once a complaint has been disposed of by the committee, a complainant may make a public disclosure concerning the filing of a complaint including the conduct complained of and the action of the committee. The duty of confidentiality upon the committee remains, however, unless one of the specified exceptions provided by the rules applies.

(4) Initial Review of Complaints.

(a) Each complaint shall be submitted in writing and signed by the complainant, and shall be directed to the Executive Secretary, Committee on Judicial Conduct, Frank Rowe Kenison Supreme Court Building, Concord, New Hampshire 03301. The executive secretary shall acknowledge the receipt of all complaints as quickly as possible. A copy of the complaint shall be sent to each member of the committee for review. Following evaluation by the committee, the executive secretary shall send a copy of the complaint to the judge, except that the judge shall not be notified of a complaint dismissed pursuant to subsections (b), (c) or (d) of this section unless otherwise determined. In the case of such dismissals, the complainant shall be notified that as a result of the committee's finding, the judge complained against has not and will not receive notice of the complaint or the action of the committee.

(b) The committee shall evaluate each complaint promptly after receipt to ascertain whether the committee has jurisdiction to consider the same under Rule 38 of the Supreme Court. If it clearly appears on the face of the complaint or from preliminary inquiries by the committee that--,

(1) the complainant lacks standing (*i.e.* is not a person directly affected by the conduct complained of, or is not a person who was present when the conduct complained of occurred), or

(2) the complaint relates to a judge's findings and rulings or is a substitute for an appeal, or

(3) the complaint does not allege conduct on the part of the judge which, if established, would be contrary to the Code of Judicial Conduct, the committee shall dismiss the complaint, and shall notify the complainant in writing that the matter raised is outside the committee's jurisdiction, assigning the reason therefor.

(c) If the committee determines, upon preliminary review, that a complaint is obviously without merit or is obviously unfounded, it shall dismiss the complaint and advise the complainant in writing of such action.

(d) The committee shall dismiss any complaint arising out of acts or omissions occurring more than one year prior to the receipt of the complaint, and the complainant shall be so advised in writing. However, when the last episode of an alleged pattern of recurring judicial conduct arises within the one-year period, the committee may consider all prior acts or omissions alleged to be a part of such pattern.

(e) Receipt by the committee of a complaint which is repetitive of a prior complaint, whether from the same or a different source, following disposition of the initial complaint, shall be acknowledged, but the committee shall take no further action thereon.

(f) Any complaint which appears to have merit, but which is defective in some respect so that the committee cannot act thereon, or requires clarification, may be returned to the complainant for curative action or clarification and resubmission.

(g) A complaint relating to a trial or judicial proceeding in progress shall be held in abeyance until the termination of the trial or proceeding, unless the

committee for good cause votes to proceed immediately with such complaint.

(5) Response by Judge.

(a) Except where the complaint has been dismissed pursuant to subsections (b), (c), or (d) of section 4 of this rule, the judge complained against shall respond in writing to the merits of the complaint within twenty days after receipt from the committee of a copy thereof. Such response shall be filed with the executive secretary, who shall, after receipt of a written request from the complainant, provide to the complainant a copy of the judge's response or the substance thereof in the discretion of the committee.

(b) In addition to such required response, the judge may submit to the committee such other matters as he may choose.

(5-a) Inquiries Initiated by Committee.

The committee may initiate an inquiry concerning the conduct of any judge on its own motion, without a signed written complaint, upon any reasonable basis, including conduct that is a matter of public record, reports in the news media and information provided by sources considered reliable by the committee. No such inquiry shall be initiated by the committee except upon the affirmative vote of six or more members of the committee taken at a meeting thereof. Notice of the initiation of an inquiry by the committee on its own motion shall be given to the judge by the committee at such time as it deems appropriate. The committee may delay giving such notice to the judge to avoid possible compromise of the inquiry and any resulting investigation or for other good reason.

(6) Preliminary Investigation.

(a) The committee may order an investigation of any complaint properly before it, or of any proceeding initiated by the committee on its own motion, upon the affirmative vote of seven or more members of the committee taken at a meeting thereof. Such investigation shall be conducted under the direction of the chairperson and in such manner as he may determine.

(b) The judge shall be notified of the investigation and whether it is upon a complaint or on the committee's own motion, and afforded a reasonable opportunity to present such relevant matters as he may choose. In any proceeding where the committee is acting on its own motion,

notice of the investigation may be deferred and given to the judge at such time as the committee deems appropriate.

(c) In conducting an investigation, the chairperson may require that any statement or written information furnished to the committee or its employees be given under oath or affirmation subject to the penalties for perjury or false swearing in official proceedings pursuant to RSA ch. 641. It may also require a complainant to verify his complaint under oath or affirmation, subject to such penalties for perjury or false swearing in official proceedings.

(d) Persons contacted for information shall be informed of their obligation to maintain confidentiality.

(e) Judges, clerks of court, court attaches, members of the bar and other officers of the court shall comply with the reasonable requests of the committee for assistance and cooperation in the conduct of any investigation by the committee.

(f) During the course of its investigation, the committee may informally resolve the matter with the consent of the judge. Such informal resolution may take the form of written advice or admonishment, the requirement of remedial action, or the imposition of conditions, or any combination thereof. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. The consent of the judge to informal resolution of the matter shall constitute a waiver of his right to a hearing. If a complaint is disposed of by way of informal resolution or adjustment, disclosure to the complainant shall be limited as provided in subsection (h) of section (3) of this rule.

(g) Upon completion of the investigation, if the matter has not been informally resolved pursuant to subsection (f) of this section, the committee shall determine whether the investigation has disclosed probable cause to warrant formal proceedings. If the committee does not determine that the investigation has disclosed probable cause to warrant formal proceedings, the committee shall dismiss the complaint or terminate the inquiry commenced on its own motion, as the case may be, and shall promptly notify the judge and the complainant (if any) in writing of such dismissal or termination.

(7) Statement of Formal Charges, Notice of Hearing, and Answer.

(a) If, after investigation the committee concludes, by the affirmative vote of seven or more members taken at a meeting, that probable cause to warrant formal proceedings exists, it shall prepare and file a formal statement of charges and shall set a time and place of hearing before itself. The committee shall promptly serve the judge, by registered or certified mail, postage prepaid, with a copy of the formal statement of charges together with a notice of hearing.

(b) The formal statement of charges shall (i) state whether the committee is proceeding on the basis of a written complaint or on its own motion, (ii) contain a clear summary of the allegations against the judge and of the alleged facts forming the basis of such allegations (including facts developed by the investigation), (iii) identify and cite those standards of the Code of Judicial Conduct alleged to have been violated, and (iv) advise the judge of his duty to answer as provided in subsection (f) of this section.

(c) The formal statement of charges together with the notice of hearing shall be served on the judge at least thirty days prior to the hearing date assigned.

(d) The notice of hearing shall include the following:

(1) the date, time and place of the hearing;

(2) the fact that both the committee and the judge may be represented by counsel at the hearing, may secure the attendance of witnesses and the production of documents by subpoena, and may examine and cross-examine witnesses;

(3) the identity of any special counsel for the committee; and

(4) the fact that all further notices concerning the hearing, including any adjournments thereof, shall be given by the chairperson or pursuant to his direction.

(e) The committee shall give notice to the complainant of the date, time and place of the hearing. He shall be entitled to attend the hearing as an observer, and may be required to attend and participate therein as a witness, but shall have no other function or right with respect to the hearing.

(f) Within twenty days after receipt of the formal statement of charges, the judge shall file an answer with the executive secretary, setting forth all denials, affirmative defenses, mitigating circumstances and other matters which the judge intends to raise at the hearing.

(g) At any time prior to final decision, the committee may allow or require an amendment of the formal statement of charges, and may allow an amendment of the answer. When an amendment is made to the formal statement of charges, whether before or after commencement of the hearing, the judge shall be afforded a reasonable opportunity to answer the matters newly charged, as determined by the chairperson, and shall answer such matters within the time allowed. In any such case, the judge shall also be afforded a reasonable time, as determined by the chairperson, in which to prepare his defense to the matters newly alleged.

(h) For good cause shown, the chairperson may extend the time within which the judge is required to file his answer, and may grant a continuance of the scheduled hearing, but no such extension or continuance shall be for a period longer than thirty days without the concurrence of the committee.

(i) The committee may terminate the proceeding and dismiss the complaint and formal statement of charges following the answer by the judge, or at any time thereafter, and shall in that event give notice to the judge and the complainant that it has found insufficient cause to proceed.

(8) Discovery and Subpoena Powers.

(a) At any time after the filing of a formal statement of charges, the judge or his counsel shall, upon written request, be entitled, as a matter of course:

(1) to obtain the names and addresses of all persons known to the committee to have relevant information;

(2) to examine and copy any of the following:

(A) statements of the complainant;

(B) statements of persons claiming to have knowledge of the acts, omissions or events underlying the formal proceeding;

(C) investigative reports made by or for the committee in connection with the proceeding; and

(D) any other writing or item which is relevant to the proceeding, or which appears likely to lead to relevant information.

(3) to discovery to the extent permitted in civil proceedings.

Anything in this section to the contrary notwithstanding, the committee shall not be required to disclose to the judge the identity of any informant who will not be called as a witness in support of the charges, and who has declined to sign a written complaint, unless the alleged misconduct was directed at the informant.

(b) The judge shall make available to the committee, as a matter of course, upon the written request of the chairperson, executive secretary, or special counsel, any specified material which would be discoverable in civil proceedings in this State. The committee shall be entitled to discovery to the extent permitted in civil proceedings.

(c) Nothing in this section shall authorize access to any information, writing or other item which is privileged by law, or which is protected as an attorney's work product.

(d) If disclosure is not forthcoming as provided in subsection (a) or (b) of this section, the judge or the committee may move to compel discovery before a justice of the supreme court.

(e) The committee shall have the power to subpoena witnesses, compel their attendance and testimony, and require the production of books, records, documents or other evidence or material deemed relevant to the investigation or hearing. Such subpoena powers may be exercised for the committee by the chairperson, the executive secretary or special counsel to the committee.

(f) The subpoena powers of the committee shall be exercised in behalf of the judge, upon his written request or the written request of his counsel.

(g) If any witness disobeys a subpoena of the committee, either as to his appearance or as to the production of things specified in the subpoena, or refuses to testify or answer questions, the committee may apply to a justice of the supreme court for an order compelling compliance with the subpoena or compelling him to testify.

(h) Witnesses summoned to appear shall be entitled to the same fees and mileage expenses provided by law for witnesses in regular judicial proceedings. The expenses of witnesses shall be borne by the party calling them.

(9) Conduct of Hearing.

(a) The hearing shall be open to the public.

(b) The committee may proceed with the hearing at the time and place fixed, whether or not the judge has filed an answer or appears for the hearing. The committee may draw an unfavorable inference from the failure of the judge to answer or appear; but no such failure, standing alone, shall be sufficient to meet the standard of proof.

(c) The committee shall have the burden of establishing by clear and convincing evidence a violation of the Code of Judicial Conduct. The judge shall not be required to testify or present affirmative evidence in his own behalf.

(d) The judge shall be entitled to counsel of his choice, and shall have the right to adduce evidence, produce and cross-examine witnesses, and present all relevant arguments.

(e) The committee shall not be bound by the technical rules of evidence, and may admit evidence which it considers to be reliable, material, and relevant. The chairperson shall rule on objections to the receipt of evidence, subject to being overruled by a majority of the committee present at the hearing. The chairperson may defer ruling on an objection to the receipt of evidence, and admit evidence subject to later ruling thereon.

(f) The hearing shall be recorded verbatim by stenographic, electronic or other means approved by the committee. A transcript of the hearing shall be provided to the judge without cost. The judge may tape record the hearing with the permission of the committee.

(g) The decision of the committee shall be based solely on the record evidence presented to the committee at the hearing, but shall not be based solely on hearsay evidence. The committee shall exclude from its consideration any information reviewed in earlier stages of the proceeding, unless such information is received in evidence at the hearing so as to become a part of the record.

(h) At any time after the hearing is closed but prior to final decision, the committee may reopen the hearing for the taking of additional evidence. The judge and the complainant shall be given such notice of any such supplemental session as the circumstances may reasonably require.

(10) Dispositions Following Hearing.

(a) The committee shall render its decision promptly after the hearing.

(b) If the committee decides that a violation of the Code of Judicial Conduct has not been established, the proceeding shall be dismissed, and the judge and the complainant shall be so notified.

(c) If the committee determines, by the affirmative vote of at least seven of its members, that there has been a violation of the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the supreme court, it shall dispose of the matter by informal resolution or adjustment. Such disposition may take the form of admonishing the judge, issuing a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, or other similar remedial action, or any combination of the foregoing. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. If a proceeding is disposed of by informal resolution or adjustment pursuant to this subsection (c), disclosure to the complainant shall be limited as provided in subsection (h) of section (3) of this rule.

All admonishments, reprimands and other informal adjustments shall be reduced to writing.

(d) If the committee determines, by the affirmative vote of at least seven of its members, that the judge complained against has violated the Code of Judicial Conduct and that the violation is of a serious nature so as to warrant formal disciplinary action by the supreme court, the committee shall prepare a summary report of the proceeding and of its findings. Such report shall include the recommendations of the committee (if any) concerning the sanctions to be imposed. Any member who dissents from the determination of the committee may prepare a minority opinion which shall be appended to the report of the

committee. The committee shall also prepare a record of the proceeding, which shall include the committee's formal statement of charges, the judge's answer, any other pleadings, and a transcript of the hearing. The committee's report and the record of the proceeding, certified by the chairperson or the executive secretary, shall be filed with the supreme court. Contemporaneously with such filing, copies shall be served on the judge, and proof of such service shall be filed with the court.

(11) Use of Closed Files.

(a) A closed file may be referred to by the committee in subsequent proceedings in the following circumstances:

(1) Where a complaint or formal charges have been dismissed for any reason or there has been a finding of insufficient cause to proceed, and the subsequent proceeding raises similar allegations against the judge or is based upon a similar occurrence or factual situation, the closed file may be used to exonerate the judge or may be made a part of the investigation of the new complaint; or

(2) Where, after the disposition of a prior proceeding by informal resolution or adjustment, the judge fails to refrain from acting in the manner that caused the prior complaint to be filed and a subsequent complaint is filed alleging similar conduct which is established or proven, the closed file may be used as evidence tending to show that the problem is a continuing one; or

(3) Where, following the hearing of subsequent related or unrelated charges, the committee determines that a violation of the Code of Judicial Conduct has occurred, the closed file may be referred to in connection with the decision as to the nature of the informal resolution to be imposed by the committee or as to the sanction to be recommended to the supreme court for imposition by the court.

(12) Amendment of Rules.

The committee may from time to time submit amendments of these rules to the supreme court for approval.

FILE

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT
JOSEPH P. NADEAU, CHIEF JUSTICE
NEW HAMPSHIRE SUPERIOR COURT

I regret I cannot meet with you personally to discuss superior court judicial evaluations. I hope this statement addresses issues of concern to the committee.

First, I would like to emphasize that the purpose of judicial performance evaluations is to provide trial judges with insight into their conduct on the bench as perceived by lawyers, litigants, clerks, staff, bailiffs and myself.

The process begins by the judge filling out a self assessment form (**Attachment A**) which provides the opportunity to reflect on his or her work as a judge. The judge can also comment on how his or her job is affected by such things as scheduling, education and resources. The judges ends the completed form to me for review and use in our final interview..

Next, I ask each clerk to make a list of the attorneys and law firms who regularly practice in the court where the judge sits. I then send a form (**Attachment B**)to those firms and any other firms which I feel should be included.

An evaluation form is also sent to all court personnel who work in the courthouse where the judge presides. These forms provide clerks and bailiffs,(**Attachment C**) office staff, law clerks, and court reporters (**Attachment D**) a chance to rate the judge in many categories. The categories are those which are used by most jurisdictions which conduct such evaluations. The forms also provide space for additional comments and observations.

The forms are confidential and anonymous. Confidentiality and anonymity are important because they permit people to provide an honest view of the judge's performance. Employees, attorneys and litigants know they will suffer no disadvantage because of the information provided. They also know the information will be used only for evaluation and improvement not for personal attack. Since the forms are not public, there is no concern that one isolated event will gain disproportionate attention.

Not surprisingly, most comments for most judges are highly favorable. But, even if a judge receives only one unfavorable survey, I do not disregard it. Rather, unfavorable surveys are use as a learning tools. Even if observations may be uncommon, they deserve attention. I ask the judge to recognizes that these observations or perceptions come from someone who feels strongly about the conduct described.

We also discuss how judges can avoid even a single instance of bad temper or uncharacteristic conduct. We discuss how judges can respond to contentious litigants or troublesome attorneys in positive ways, and how judges can avoid times of impatience and work hard to make certain that even unhappy litigants perceive the judge as a fair and tolerant person.

Finally, the forms also reinforce positive conduct and inform judges when they are on the right track. Judges know when the conduct described, whether positive or negative, is typical and make genuine efforts to work on areas that need improvement.

Occasionally someone asks whether these evaluations can be made public so that anyone can see the surveys and comments. Of course they can. But I have two thoughts about that suggestion. The first is that it is unnecessary. Any individual or group can solicit information about judges by conducting their own inquiries or surveys. They can gather information and make whatever use of it they desire. Also, most judicial activity takes place in a public courtroom open to all and frequently covered by the media.

My second thought is that making the surveys public will change the process. Such a public airing of administrative evaluations risks the prospect that the focus will be directed away from performance review and toward personal vilification. There is a serious risk that a small unrepresentative group would use information selectively to create the unwarranted impression that there is a serious problem with judicial performance.

For these reasons if surveys were to be made public, it seems to me those who fill out the surveys should be required to identify themselves. How else can a judge defend against what he or she believes to be unfair or untrue comments? With the cover of anonymity, it would take very little effort to create the false impression that the performance of a particular judge is questionable.

It is very frustrating to me to hear someone repeat an anonymous and usually unfounded allegation involving a judge without identifying the court, the judge or the circumstances. Judges must make difficult decisions. They must control the courtroom and everyone who comes before them. Judges are human beings and no matter how hard every judge tries to exercise their responsibilities in the most judicious manner they will occasionally make mistakes.

Finally, I ask the legislature to reflect on the harm to government of providing an additional opportunity to make unwarranted attacks on its institutions by a small vocal minority. I believe the process we have in place allows us to deal with human frailties without creating the unfounded and unwarranted impression of disarray that a handful of disgruntled litigants might like to convince the public exists. I believe our 28 superior court judges and 11 marital masters earn and deserve public confidence for their daily handling of thousands of cases throughout the state.

2/1/99 **(Attachment A)**

PERSONAL EVALUATION FORM - JUSTICE

Personal Information:

Types of cases you have heard in each category in the last year. (Estimate percentages)

Civil, Equity _____
Criminal _____
Marital _____
Other _____

1. How often have you been able to review case files prior to hearings or trials?
Never_ Rarely_ Sometimes____ Most of the time____ Always

2. How often would you like to be able to review case files prior to hearings or trials?
Never___Rarely___Sometimes____ Most of the time____ Always

3. How often have you had to stay late, or arrive early, to accommodate emergency of special scheduling problems?
Never_ Rarely___Sometimes____ Most of the time____ Always

4. Do you generally involve attorneys, litigants, and court staff when making scheduling decisions about special situations, such as working late or through the lunch hour?
Never___Rarely___Sometimes____ Most of the time____ Always

5. Do you think you take a fair share of the difficult work on the docket?
Never____Rarely__Sometimes____ Most of the time____ Always

6. Do you feel pushed by the caseload to the point where "moving cases" takes precedence over quality of justice concerns?
Never___Rarely___Sometimes____ Most of the time____ Always

7. How often do you feel you are sufficiently familiar with the law and the facts that apply to the cases you are hearing?
Never___Rarely___Sometimes____ Most of the time____ Always

8. Do you think you give attorneys a fair opportunity to make their argument to the court?
Never___Rarely___Sometimes____ Most of the time____ Always

9. Do you think that litigants and attorneys leave the courtroom when you are presiding having understood what has happened and what is to happen next?
Never___Rarely___Sometimes____ Most of the time____ Always

10. How often have you found it necessary to intervene in cases being presented in the courtroom, in order to ensure justice is done, above and beyond exact procedural and legal requirements?
Never___Rarely___Sometimes____ Most of the time____ Always

11. How would you describe your style of courtroom control?
Easy going____ Somewhat controlling____ Very controlling

12. How would you describe your settlement style? (i.e. do you actively participate?)
Never___Rarely___Sometimes____ Most of the time__ Always

13. How would you rate the amount of continuing education you have received since being appointed to the Superior Court?
Less than sufficient_____ Sufficient_____ More than sufficient

14. How would you rate the amount of continuing education you have received during the past two years?
Less than sufficient____Sufficient____More than sufficient

15. Are there any areas in which you would like more education?

16. Are there any innovations which you would like to try?

19. Are you satisfied with your overall performance?
YES ____ YES, but room for improvement____ NO

OTHER COMMENTS:

(Attachment B)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - ATTORNEY**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high)** **RANK**

1. Accessibility to staff	
2. Conscientiousness and diligence	
3. Patience and tolerance	
4. Effectiveness of communication	
5. Shows respect for staff	
6. Has earned your respect	
7. Allows me to perform my job	
8. Attentiveness to court business	
9. Promptness in rendering decisions	
10. Efficiency in use of court time	
11. Familiarity with and use of court forms	
12. Familiarity with office procedures	
13. Accessibility to counsel	
14. Handling of complex cases and issues	
15. Control in courtroom	
16. Decisiveness of decisions and rulings	
17. Attentiveness to witnesses and counsel	
18. Knowledge of law	
19. Knowledge of evidence	
20. Knowledge of procedure	
21. Understanding & compassion	
22. Fairness and equality of treatment	
23. Freedom from racial, religious or gender bias	
24. Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS **A-(top third), B-(middle), C-(lower third)**	

Number of years in practice._____

Number of hearings before this judge or master._____

Number of appearances before other judges or masters.___

Civil____, #Criminal____, #Marital____.

(Please make any additional comments on the back of this page

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

(Attachment C)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION CLERK/BAILIFF**

JUSTICE\MASTER_____

Please rank performance: 1 (low) -> 10 (high) RANK

Accessibility to counsel	
Conscientiousness and diligence	
Patience and tolerance	
Effectiveness of communication	
Handling of complex cases and issues	
Control in courtroom	
Decisiveness of decisions and rulings	
Attentiveness to witnesses and counsel	
Promptness in rendering decisions	
Efficiency in use of court time	
Knowledge of law	
Knowledge of evidence	
Knowledge of procedure	
Understanding & compassion	
Fairness and equality of treatment	
Freedom from racial, religious or gender bias	
Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years employee in judicial branch._____
Number of other judges\masters with whom you have worked_____

ADDITIONAL COMMENTS

It is not necessary to sign this form but you may do so if you wish.

(Attachment D)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - STAFF**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high)** **RANK**

1. Accessibility to staff	
2. Conscientiousness and diligence	
3. Patience and tolerance	
4. Effectiveness of communication	
5. Shows respect for staff	
6. Has earned your respect	
7. Allows me to perform my job	
8. Attentiveness to court business	
9. Promptness in rendering decisions	
10. Efficiency in use of court time	
11. Familiarity with and use of court forms	
12. Familiarity with office procedures	
13. Accessibility to counsel	
14. Handling of complex cases and issues	
15. Control in courtroom	
16. Decisiveness of decisions and rulings	
17. Attentiveness to witnesses and counsel	
18. Knowledge of law	
19. Knowledge of evidence	
20. Knowledge of procedure	
21. Understanding & compassion	
22. Fairness and equality of treatment	
23. Freedom from racial, religious or gender bias	
24. Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years you have worked in judicial branch._____
Number of other judges or masters with whom you have worked.____

(Please make any additional comments on the back of this page.)

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

FILE

PRESENTATION ON JUDICIAL CONDUCT COMMITTEE BEFORE SUBCOMMITTEE STUDYING CACR 2, CACR 22, HB 53 AND HB 568

September 8, 1999

by Howard J. Zibel, Executive Secretary
Judicial Conduct Committee

Last week, I understand this committee had some questions about the scope and operation of the Judicial Conduct Committee. Before I answer your specific questions, I would like to explain the organization of the Judicial Conduct Committee (JCC or committee) and discuss how the JCC processes and reviews complaints. My desire is to give you a better understanding of the workings of the committee.

I. ORGANIZATION OF JCC

The JCC was established on June 23, 1977, to receive and review complaints against judges for violations of the Code of Judicial Conduct. The word "judges" is used very broadly in this context. It includes masters, referees, clerks, deputy clerks, registers and deputy registers of probate, and court stenographers and reporters. It is so used in this presentation.

Originally, the JCC had seven members - three judges, two lawyers, and two lay people. In 1991, the membership was increased to nine by adding one judge and one lay person, Then, just last year, the size of the JCC was increased again by two to eleven members, this time adding two lay members. Thus, the current composition of the committee is four judges, two lawyers,

and five lay members.

Over the twenty-two year history of the JCC, lay representation has gone from the smallest segment of the committee to the largest. Judges have always comprised less than half of the membership. All of the members are appointed by the supreme court. Members serve four year terms and are eligible for reappointment. The current members are as follows:

Name	Member Type	Member Since
Robert L. Chiesa	Lawyer	1983
Raymond A. Cloutier	Probate Court	1991
Anne Coughlin	Public	1998
Douglas S. Hatfield, Jr.	District Court	1983
David A. Hodges, Sr.	Public	1990
William R. Johnson	Supreme Court	1989
Donna K. Lencki	Public	1998
Joseph M. McDonough, III	Lawyer	1997
Walter L. Murphy	Superior Court	1993
John R. Newsom	Public	1994
Terrence R. Pfaff	Public	1999

Justice Johnson of the supreme court is the chair, and public member David Hodges is the vice-chair. All members serve as volunteers and receive no compensation for their services.

II. METHOD OF PROCESSING AND REVIEWING COMPLAINTS

All complaints must be in writing. When a complaint is filed with the committee, it is assigned a docket number such that, for example, the first complaint filed this year is JC-99-001. Subsequent complaints are numbered consecutively throughout the year. Last year, the JCC received fifty-three complaints.

The first action taken on a complaint is an initial review by me and the assistant executive secretary for two purposes.

First, we determine if the complaint contains a sufficient statement of the allegations such that the committee will be able to understand it. Second, we are looking to see if the complaint contains any allegation of criminal conduct by a judge. RSA 490:30, III, which the legislature passed in 1988, requires that if a complaint contains an allegation of criminal conduct, the chair of the committee will send it to the attorney general for investigation. While the attorney general investigates a complaint alleging criminal misconduct, the JCC must suspend its work on the complaint. The forwarding of complaints to the attorney general is rare, but it does happen.

If the complaint contains a sufficient statement of the allegations and contains no alleged criminal conduct, the JCC sends a letter to the complainant acknowledging the complaint. The complaint will be on the committee's next agenda for discussion, and copies of the complaint are sent to all committee members prior to the meeting. If criminal conduct is alleged not only is the complaint sent to the attorney general, but the complainant is also sent a letter informing him or her of that action. Finally, if the complaint contains an insufficient statement of the allegations against the judge, we send the complainant a long letter explaining the work of the committee and enclosing copies of the Code of Judicial Conduct, the procedural rules of the committee, and a cover sheet which tries to get the complainant to focus the complaint. Two facts are worthy of note at this stage. The first is that all people

filing complaints with the JCC will get a letter acknowledging it. These letters usually go out within a week of the filing of the complaint. Second, at this initial stage, before committee consideration of the complaint, no notification of the complaint is sent to the judge against whom the complaint was filed.

When a complaint is ready for action by the committee, copies of the complaint are distributed to all committee members, and the complaint is placed on the committee's next agenda. Usually seven committee meetings are scheduled each year; however, some special meetings are often added so that in recent years the committee has generally met an average of eight times per year. At each meeting, the full committee, except for members who are recused from a matter, will discuss each complaint on the agenda. Many are dismissed for lack of jurisdiction. The most common reasons for such a dismissal are that the complaint relates to the judge's findings or rulings and is, therefore, merely a substitute for an appeal or that the complaint does not allege conduct that would be a violation of the Code of Judicial Conduct. If a complaint is so dismissed, the complainant gets a letter informing him or her of the dismissal and the reasons for it. Under the current rules, if the complaint is dismissed by the committee at the time of its initial consideration, the judge complained against is not notified of the complaint or the committee's action.

If a complaint is not dismissed for lack of jurisdiction when initially discussed by the committee, the judge complained

against is asked for a response. A judge asked to respond has twenty days to do so. When a judge is asked to respond, a letter is written to the complainant informing him or her of the action taken by the committee. The judge's response will then be placed on the next agenda after the JCC receives it, and it will be distributed to the committee members. After the JCC considers the judge's response, it may dismiss the complaint, begin an investigation, or offer the judge informal resolution. If the JCC dismisses the complaint, the complainant, as mentioned above, gets a letter informing him or her of the dismissal and the reasons for it.

One of the choices mentioned above that the committee has at this point is informal resolution. An informal resolution is used where the judge has committed a minor violation of the Code of Judicial Conduct. The judge must agree to the informal resolution because an informal resolution means no hearing will be held and the judge must waive his or her right to a hearing. An example of the kind of case in which an informal resolution has been used is the failure of a judge to render a prompt decision. Informal resolutions are confidential; however, if a judge has three of them in a five year period, they all become public. Despite this confidentiality, if a complaint results in an informal resolution, the complainant is informed by letter of the informal resolution and the reasons for it. One of the conditions of an informal resolution may involve monitoring or review of the judge by the administrative judge of the judge's

court or some other suitable person.

If the committee votes to conduct an investigation, the investigation usually consists of inviting those with knowledge of the matter to appear before the full committee. Sometimes the committee hires a private investigator to conduct the investigation. At the end of the investigation, the committee can dismiss the complaint, reach an informal resolution with the judge, or commence formal charges. The former two results have already been discussed, and the complainant will be informed of these resolutions by letter. If formal charges are brought, the complaint will at that point become public and a hearing will be held before the full committee. Again, after formal hearing, the committee can dismiss the complaint or reach an informal resolution, both of which will be communicated to the complainant by letter. At this point, the third option is to bring a petition to the supreme court requesting the imposition of discipline. That petition is public. In both cases where public petitions have been brought before the supreme court, the discipline requested has been suspension. Neither the JCC nor the supreme court has the power to remove a judge from office. Only the legislature through impeachment or the legislature and Governor and council through address have that power.

In sum, the judicial conduct system in New Hampshire is a system that works. Complaints are carefully processed and considered by the committee. Complainants are kept informed of the progress of their complaints. Misconduct is appropriately

treated. The backbone of this system is a very hard-working and dedicated committee. The amount of material that committee member must go through to prepare for a meeting is daunting. Nevertheless, all committee members come prepared to discuss each and every matter. The JCC members, who serve as volunteers, deserve substantial thanks for their dedication.

FILE

Supreme Court of New Hampshire

Committee on Judicial Conduct

Role and Operations of the Committee and Report for 1997

Frank Rowe Kenison
Supreme Court Building
Concord, New Hampshire 03301-1476

Supreme Court of New Hampshire

Committee on Judicial Conduct

Role and Operations of the Committee and Report for 1997

Honorable William R. Johnson, Chair
David A. Hodges, Sr., Vice-Chair
Robert L. Chiesa, Esquire
Honorable Raymond A. Cloutier
Anne Coughlin
Honorable Douglas S. Hatfield, Jr.
Donna K. Lencki
Joseph M. McDonough, III, Esquire
Honorable Walter L. Murphy
John R. Newsom
Donna P. Sytek

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
COMMITTEE ON JUDICIAL CONDUCT

FRANK ROWE KENISON
SUPREME COURT BUILDING
CONCORD, N.H. 03301-1476
P.O. Box 1476

Howard J. Zibel, Esquire
Executive Secretary
Donna R. Craig
Assistant Executive Secretary
(603) 271-2646

TDD Access: Relay NH 1-800-735-2964
(nonconfidential calls only)

November 1998

To the Supreme Court of New Hampshire:

Pursuant to Supreme Rule 39(8), *Annual Report*, the Committee on Judicial Conduct respectfully submits this annual report of its activities during the period from January 1, 1997, through December 31, 1997.

In the interest of increasing public awareness of the committee and its work, the report also provides some background on the committee's role in providing New Hampshire's citizens with a means for filing formal complaints about violations of New Hampshire's Code of Judicial Conduct.

Honorable William R. Johnson, Chair

David A. Hodges, Sr., Vice-Chair

Robert L. Chiesa, Esquire

Honorable Raymond A. Cloutier

Anne Coughlin

Honorable Douglas S. Hatfield, Jr.

Donna K. Lencki

Joseph M. McDonough, III, Esquire

Honorable Walter L. Murphy

John R. Newsom

Donna P. Sytek

Howard J. Zibel, Executive Secretary

Donna R. Craig, Assistant Executive Secretary

CONTENTS

Committee membership 1

Dedication: Retirement of Frederic K. Upton 2

Background on the Committee and its Work 3

The Committee in 1997:
Changes in Members and Staff 4

How the Committee Works:
Handling the Complaint Stream 4

Disposing of the Complaints:
Committee Meetings and Discussions 5

Committee Often Mistaken
for Appeals Court 5

Investigating a Complaint's Validity 5

Resolving Cases Informally 6

Serious Misconduct Cases Become Public 6

Confidential Aspects of the Committee's Work 7

Operations for 1997 8

Breakdown of Complaints by Court System 9

Ten-year Trends 9

Appendix A—Complaint Information Letter A–1

Appendix B—Complaint Cover Sheet A–4

COMMITTEE ON JUDICIAL CONDUCT

1997 Membership

JUDICIAL MEMBERS

Honorable William R. Johnson
(Supreme Court), Vice Chair
(Elected Chair 9/26/97)

Honorable Raymond A. Cloutier
(Probate Court)

Honorable Douglas S. Hatfield, Jr.
(District Court)

Honorable Walter L. Murphy
(Superior Court)

ATTORNEY MEMBERS

Frederic K. Upton, Esquire
Chair (Retired 8/1/97)

Joseph M. McDonough, III, Esquire
(Appointment effective 8/1/97)

Robert L. Chiesa, Esquire

PUBLIC MEMBERS

David A. Hodges, Sr.

John R. Newsom

Donna P. Sytek

DEDICATION
Frederic K. Upton

Frederic K. Upton announced his retirement as a member of the Judicial Conduct Committee at the end of his term in 1997, concluding twenty years of service on the committee—eight as Chair. Fred Upton is the ultimate role model for the legal profession and, in fact, for any profession: a person of the highest integrity who donates his time, talents, and energy to the improvement of his community.

From the perspective of the Judicial Conduct Committee, Fred has been both a creator and a leader. He was one of the original members of the committee when it was established in 1977, and during his twenty years of service, he continually helped to create a new vision for the committee as he worked to interpret the original Code of Judicial Conduct and to adopt the 1990 Code.

As a leader he has demonstrated a work ethic held in awe by the members of the committee. He has exhibited a sensitivity to those who have filed complaints with the committee, as well as to the judiciary itself—and to the diverse views of the committee members as they thrash out suitable responses to complaints that are under consideration. His penetrating analysis of each complaint set a standard for the committee as it worked to carry out its responsibilities effectively and efficiently.

Fred's passion for an independent judiciary of the highest integrity made him an advocate for strict interpretation and enforcement of the Code of Judicial Conduct. Any violation of the Code brought strong words and recommendations for discipline. At the same time, he was an outspoken defender of judges and other members of the judiciary who were unable to defend themselves from often malicious and unjustified attacks. Fred Upton's tireless dedication and commitment in his role as a member and then leader of the New Hampshire Judicial Conduct Committee has been a significant factor in strengthening the New Hampshire judiciary and helping it to meet the needs of New Hampshire citizens.

The committee here formally recognizes and celebrates the extraordinary contributions of Frederic K. Upton as a member and Chair of the Judicial Conduct Committee from 1977 to 1997, and wishes him the very best of good health and happiness in his retirement from the committee. His contribution cannot be duplicated but will be warmly remembered and emulated. We are proud to have Fred Upton as our friend and colleague.

Douglas S. Hatfield, Jr.
(for the Committee)

BACKGROUND ON THE COMMITTEE AND ITS WORK

All fifty of the United States have created committees, or commissions, that are organized to receive and consider citizen complaints about judicial conduct—that is, about the behavior of judges and other court personnel, as opposed to the decisions and rulings that are a part of any judicial proceeding.

Litigants who find themselves involved in court actions may not agree with a judge's decisions, of course, and may decide to appeal those decisions to a higher court to test whether their objections are legally valid.

But they may also object to a judge's conduct—to the way a judge (or other court official or employee) *behaves* in performing his or her duties. Such objectionable behavior might include rudeness, bias, favoritism, conflict of interest, impropriety, or lack of integrity or diligence, among other possibilities.

The states' judicial conduct committees have been established to provide their citizens with a means for having such complaints considered formally, where disciplinary action can be taken or recommended when the complaints are found to be valid.

New Hampshire's Judicial Conduct Committee, established in 1977, is a committee of the New Hampshire Supreme Court. All of its members are appointed by the court, may be reappointed to successive terms without limitation, and serve without compensation.

The committee's objective is to enforce the high standards of behavior that are mandated by New Hampshire's Code of Judicial Conduct. This Code applies to virtually everyone who is a part of the state's judicial system—including judges, marital masters, referees, clerks, deputy clerks, registers of probate, persons performing the duties of clerk or register, and court stenographers and reporters.

The powers and procedures of the committee are governed by Supreme Court Rules 39 and 40, and its primary duty is to enforce Supreme Court Rule 38, which spells out quite specifically which kinds of conduct are in violation of the seven canons of the Code of Judicial Conduct.

This report, a formal accounting to the supreme court on 1997 committee operations, is designed also as a means of helping the Executive, Legislative, and Judicial branches of New Hampshire's government, as well as the general public, to a fuller understanding of what the Judicial Conduct Committee does in the public's interest. In addition to covering the committee's activities during the calendar year 1997, the report also provides a statistical analysis of complaints over the last ten years.

The Committee in 1997: Changes in Members and Staff

During 1997 there were nine members of the committee serving staggered four-year terms. By design, this total included four members who were judges, each representing one of New Hampshire's four court systems—the supreme court, the superior courts, the district courts, and the probate courts; two who were lawyers and members of the bar; and three who were citizens representing the general public.

In September 1997, the supreme court announced that the total membership of the committee would be expanded to eleven, through the addition of two more public members. Thus, at the end of the year the committee consisted of its traditional membership, with two new members to be appointed in 1998.

The committee elects one of its members to be Chair, and one to be Vice-Chair. Its staff consists of one part-time executive secretary and one part-time assistant executive secretary. On the retirement of Frederic Upton as Chair in August 1997, the committee elected Vice Chair William Johnson as Chair, with the Vice Chair remaining vacant until the new members of the committee could be appointed.

On July 2, 1997, Joseph M. McDonough, III, Esq., of Manchester, was appointed as a new attorney member to replace retiring member and Chair Frederic K. Upton. Mr. McDonough's appointment and Mr. Upton's retirement were effective August 1, 1997. On November 17, 1997, supreme court Clerk Howard J. Zibel was appointed Executive Secretary of the committee, replacing Deputy Clerk David S. Peck. Ms. Donna Craig continued as Assistant Executive Secretary.

How the Committee Works: Handling the Complaint Stream

The committee considers any complaint that is submitted in writing and that is signed by the complainant. As will be seen in the Operations section that follows, ninety-seven complaints were considered in 1997, many of them extensively detailed. In the case of a telephone inquiry by a potential complainant, the assistant executive secretary sends the caller a complaint information letter that spells out how the committee and its complaint system work for the benefit of complainants (see appendix A).

The rules also permit the committee, on its own initiative and without a written complaint, to investigate conduct that it learns about and believes may be in violation of the Code.

All complaints are docketed, and each complainant is sent an acknowledgment of his or her complaint. If the substance of the complaint is not clear, the complainant is asked to fill out a summary "cover sheet." This summary enables committee members to keep in mind, as they read, who is filing the complaint, what the complaint is all about, and what kind of supporting evidence they should be looking for. The committee feels that this summarizing and focusing of the accusation can

also be helpful to the complainant. A copy of the cover sheet is included as appendix B.

Copies of all complaints are distributed to all members of the committee, who review them in preparation for the next meeting. If the complaint alleges conduct that would constitute a crime, the Chair of the committee must refer the matter to the attorney general, and the committee suspends its consideration of the matter until any criminal proceedings are concluded.

Disposing of the Complaints: Committee Meetings and Discussions

When the committee meets, it reviews each complaint on the agenda—those that are new and those that have been carried forward—and decides whether to investigate or dismiss the complaint. If it is dismissed at this stage, the complainant is notified and given the reasons. Many complaints are dismissed because they are clearly unfounded, or prove to be after preliminary inquiry. Others are dismissed because they complain about behavior that does not violate the Code of Judicial Conduct.

Occasionally, a complaint relates to conduct that dates back more than one year, which is beyond the committee's jurisdiction. Such a complaint may be dismissed because it is "stale." If the last episode of an alleged pattern of recurring judicial behavior occurs within this one-year period, however, the committee may consider all prior behavior as an alleged part of a pattern.

Committee Often Mistaken for Appeals Court

The most common reason for dismissing a complaint is that it reflects the complainant's dissatisfaction with a judge's decision or ruling. *The Judicial Conduct Committee has no jurisdiction in such a situation, and is unable to act on any complaint that is simply a substitute for an appeal. The committee's jurisdiction relates solely to the conduct of judges and other court personnel who are found to have violated the Code of Judicial Conduct.*

Unfortunately, the committee spends much of its time dealing with such misdirected complaints: of the sixty-one complaints that were dismissed by the committee in 1997, for example, twenty-six, or forty-three percent, were based on the fact that they were substitutes for appeals from judges' rulings.

Investigating a Complaint's Validity

If the committee determines that a complaint against a judge appears to have merit, the committee requires the judge to respond in writing to the substance of the complaint within twenty days, and the complainant is notified.

When anyone else who is subject to the Code of Judicial Conduct is complained against—a clerk of court, deputy clerk, or register of probate, for example—and the complaint appears to have merit, the committee similarly asks for a response from that person within twenty days. In such a case, copies of the complaint and the response

are then provided to the chief justice or the administrative judge of the court system that is involved, who forward them, in turn, to the appropriate presiding justice.

Where a judge is involved, upon receipt of the judge's response, the committee again considers the complaint and may vote to conduct an investigation, which usually consists of inviting those with knowledge of the matter to appear before the committee. Occasionally, the committee may hire a private investigator to conduct the investigation.

After the investigation—and considering the response and perhaps interviewing the judge and/or the complainant—the committee may decide to dismiss the complaint. The judge's response, or a summary, would then be provided to the complainant, who would also be notified of the committee's decision.

Resolving Cases Informally

In some circumstances, such as when there has been a relatively minor infraction of the Code or conduct that warrants advice from the committee, the complaint may be resolved "informally." Such an informal resolution is private and may take the form of a written notice to the person who has violated the Code. In such a case, the recipient is advised that a record has been made of the infraction. He or she may then be further admonished that any Code violation, however minor, is serious; if three such violations occur in a five-year period, the full record becomes public.

Alternatively, in more serious instances, the committee might require that remedial action be taken by the judge or other offending person, or that conditions be imposed on his or her work schedule. In such a situation, the committee expresses disapproval of the conduct and requires agreement by the judge or other person to the terms of the informal action.

By agreeing to such an informal resolution, the judge or other offender waives the right to a hearing, and the complainant is notified of the informal disposition.

Serious Misconduct Cases Become Public

When more serious misconduct is found, the committee may commence formal proceedings, and at that point everything becomes public: the complaint itself, the judge's response, the statement of formal charges, all pleadings filed thereafter, the hearing, and the committee's final disposition.

If, after the hearing, the committee finds that such grave misconduct has occurred as to warrant formal disciplinary action by the supreme court, the committee files a report of its findings with the court, including its recommendations, if any, as to the sanctions that might be imposed. The court then holds a hearing that is open to the public, and at the conclusion of the hearing it produces a written opinion or order that directs such disciplinary action as it thinks just—or, alternatively, that exonerates the judge.

Confidential Aspects of the Committee's Work

Although New Hampshire's system of justice is an open system—typically, court proceedings and records are publicly accessible, on the assumption that the system will function most fairly if it is subject to public scrutiny—there are times when a degree of confidentiality is necessary to preserve the system's integrity.

Such is the case with the Supreme Court's Judicial Conduct Committee. While some of the committee's work is open to the public, and recent rules changes have enlarged that portion considerably, it is still necessary to keep a significant part of the proceedings confidential. There are several reasons for this policy. One is that it encourages the filing of serious complaints that can be considered by the committee outside the glare of publicity, while at the same time it discourages the filing of frivolous complaints that seek little more than public attention.

The policy also makes it easier for witnesses to come forward when that is appropriate. Further, it allows for the informal resolution of complaints that are not major violations of the Code but call for some action by the committee and some acknowledgment by the judge or other court official that the Code should be adhered to closely.

These rules of confidentiality also protect complainants. As long as the complaints are filed with the committee and the complainants abide by the committee's rules, judges and others who are complained against are unable to sue complainants for libel.

Committee rules prohibit any member of the committee or its staff from disclosing details of the committee's work unless such disclosure is specifically authorized. Again, a judicial conduct proceeding becomes public if the committee develops a statement of formal charges. Also, as has been noted, if a judge has received more than three "informal" dispositions of valid complaints in the preceding five years, the complaints, responses, and dispositions shall also be available to the public.

Otherwise:

- A complainant must keep confidential the fact that he or she has filed a complaint until the complaint has been dismissed, or formal charges have been filed, or the complainant has been notified that the committee has disposed of the complaint by taking remedial action.
- *This requirement does not prevent any complainant from talking publicly and critically about the behavior of a judge, however. It simply rules out disclosure of the fact that the committee has received a complaint.*
- Immunity from libel suits applies only to statements made in good faith in a complaint to the committee or in judicial conduct proceedings.

OPERATIONS FOR 1997

During calendar year 1997, the committee met five times and considered seventy-nine new complaints, in addition to seventeen that were carried forward from prior years and one that was initiated by the committee itself. Sixty-seven complaints against seventy-five individuals were disposed of (see table on next page).

As in previous years, the primary reason for disposing of a complaint—in sixty-four percent of the cases—was that it was beyond the committee's jurisdiction: either it reflected dissatisfaction with the trial judge's findings or rulings, or it alleged behavior that was not in violation of the Code of Judicial Conduct (see Table 3).

Specifically:

- *Twenty-six* of the sixty-seven complaints disposed of, or 39 percent, were dismissed because they had to do with trial judges' decisions, and did not involve misconduct.
- *Seventeen* complaints, or another 25 percent, were dismissed because they did not allege conduct that would be in violation of the Code.
- *Ten* complaints were felt by the committee to be unfounded, and were dismissed on that basis.
- *Five* complaints were dismissed because there were insufficient grounds to proceed further.
- *Two* complaints referred to conduct that occurred more than a year earlier, and thus were "stale."
- *One* was dismissed because the judge had retired, and no further action was warranted.
- *Five* cases of Code violations were found, and resulted in informal resolutions with the consent of the judges involved.
- *One* case resulted in a letter of advice to the judge to be more sensitive in dealing with difficult litigants.

As of December 31, 1997, thirty cases were pending, including four that were awaiting resolution of a related hearing or trial, and two that had been referred to the attorney general. The committee is required by rule, which it can waive, to suspend consideration of any complaint that has to do with any current hearing or trial. Also, by statute, the committee chair must refer to the attorney general any complaint that alleges criminal activity, and the committee must suspend its consideration of the complaint during that referral.

Breakdown of Complaints by Court System

Following is a breakdown of complaints disposed of in 1997, according to the court system involved and the personnel against whom the complaints were filed:

Disposition of Complaints—1997

Personnel	Supreme	Superior	District	Probate	Totals
Judges	2	17	28	5	**52**
Masters		13			**13**
Clerks		2	3		**5**
Registers					**0**
General	1	1	3		**5**
TOTAL	3	33	34	5	**75**

Ten-year Trends

The tables that follow illustrate trends over the last decade—by source, position complained against, and disposition; and by numbers of complaints filed, disposed of, and pending at the end of each year. (Discrepencies in totals are due to multiple or consolidated complaints and/or dispositions.)

Table 1 shows the sources of the complaints received by the committee from 1988 to 1997. By far the largest number of complaints—about ninety-two percent—came from private citizens. Attorneys initiated a little over three percent of the complaints, and judges about two percent. The committee itself initiated another two percent

TABLE 1: Complaint Sources

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
CITIZENS											
	48	57	55	36	67	51	69	59	70	75	**587**
ATTORNEY											
	2	1	3	2	1	3	3	2	2	1	**20**
JUDGES											
		3		2	2		1	1	3	1	**13**
COMMITTEE INITIATED											
		1	1	2	2	2		2	2	3	**13**
OTHER											
		1	1	1	1		2		1		**7**

Table 2 breaks down the complaints by judicial or court position during the 1988–1997 decade. The largest number of complaints (fifty-one percent) related to the district court system, which handles the greatest number of cases. Another forty-three percent related to the superior courts, with the probate courts accounting for another four percent, and the supreme court and the court system as a whole for the remaining two percent.

TABLE 2: Complaints by Judicial Position

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
SUPREME COURT											**11**
Judges								3	3	2	**8**
Clerks											
General		1				1				1	**3**
SUPERIOR COURT											**297**
Judges	10	16	11	16	15	21	35	17	15	17	**173**
Masters	8	4	9	3	8	9	8	15	9	13	**86**
Clerks	2				2	4	4	2	4	2	**20**
General	2	4	6	3		1	1			1	**18**
DISTRICT COURT											**332**
Judges	24	26	32	20	31	32	32	34	25	28	**284**
Clerks	4	5	1		5	2	3	4	6	3	**33**
General	2		4	3	1			1	1	3	**15**
PROBATE COURT											**24**
Judges	2	3	2	2	1	2	2	2	1	5	**22**
Registers			1								**1**
General					1						**1**
COURT SYSTEM											**5**
			1		1	2			1		**5**

Between 1988 and 1997, the committee disposed of 631 complaints. Table 3 breaks down the disposition of complaints by type.

By far the most common reason for disposing of a complaint has been that the committee lacked jurisdiction—either the complaint had to do with a judge's ruling, or it did not allege behavior that was in violation of the Code of Judicial Conduct. Almost two-thirds of the total, or 408 cases, were dismissed on these grounds, and of that total, nearly three-fourths (291, or seventy-one percent) were dismissed because they were objecting to judges' rulings.

During these ten years, thirty-one complaints were found to be valid, and twenty-seven resulted in informal resolutions, including letters of reprimand, admonishment, or advice. Four cases resulted in referrals by the committee to the supreme court. Of these, one was dismissed by the court, one was remanded to the committee for a reprimand, and two resulted in suspension of the judges.

TABLE 3: Disposition of Complaints

DISPOSTIONS	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
DISMISSALS											**600**
Lack of jurisdiction											**408**
Judges' rulings	*15*	*30*	*33*	*25*	*31*	*30*	*36*	*36*	*29*	*26*	*291*
No violation	*14*	*6*	*17*	*5*	*9*	*8*	*15*	*10*	*16*	*17*	*117*
Unfounded without merit	4	4	4	12	15	11	9	6	5	10	**80**
No violation found	6	3	1	1		1	1	2	1		**16**
Insufficient information	5	1				1			5		**12**
Insufficient cause to proceed	3	7	7	4	3	14	8	7	7	5	**65**
Beyond 1-year time limit/moot/ no standing	1		1	4	1	1		2	5	3	**18**
Complaint withdrawn	1										**1**
SUSTAINMENTS											**31**
Reprimands/ admonishments/ cautionary letters	1	5	2	2	3	3	4		1	6	**27**
Recommendation to supreme court			2				1	1			**4**

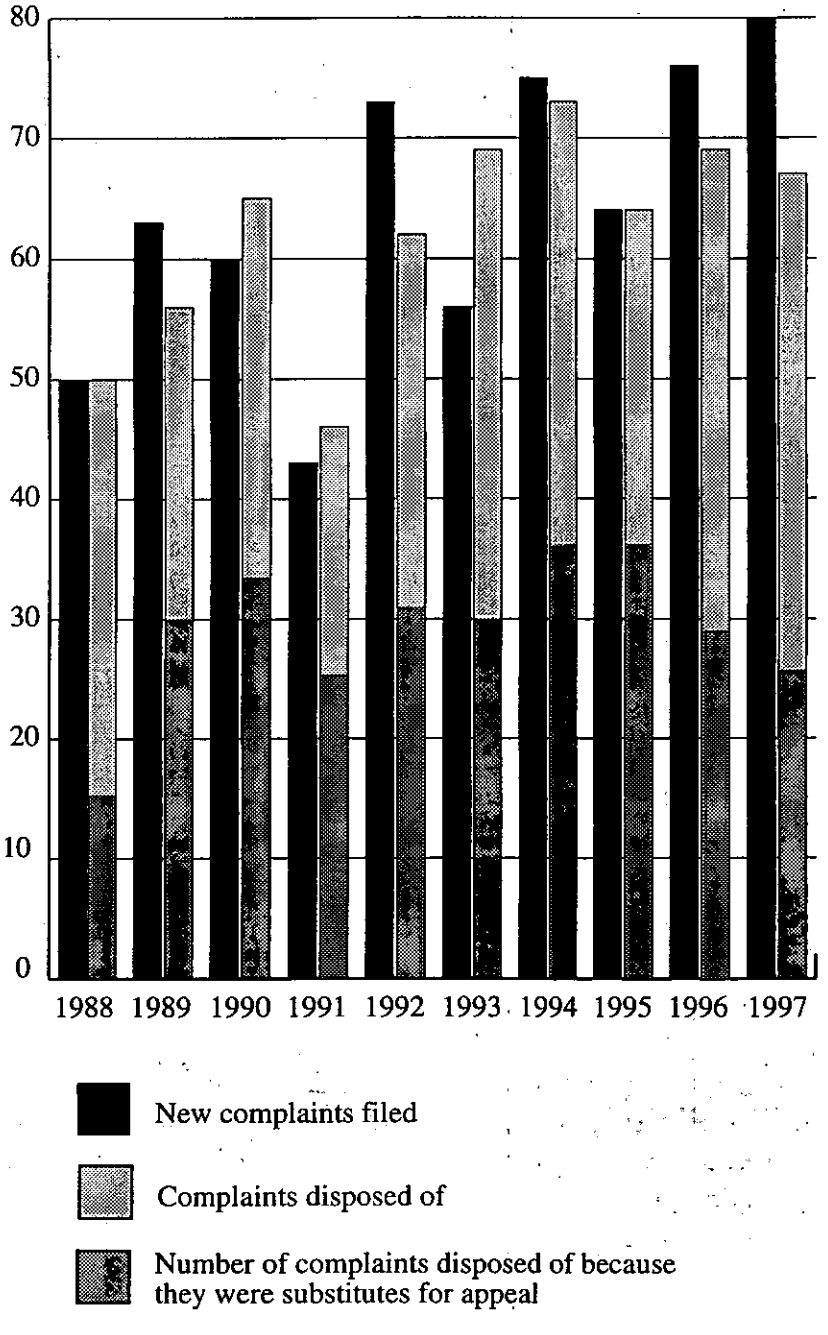
Table 4 shows the number of complaints pending on January 1 of each year from 1988 to 1997, and also, in each year, the number of complaints filed and the number disposed of (the latter reflects a consolidation of complaints).

During these ten years, 640 complaints were filed, with a trend toward increasing numbers of complaints toward the end of the decade: the average number of complaints was fifty-eight per year in the first five years, and during the last five years this rose to an average of over seventy per year, or an increase of over twenty percent.

TABLE 4: 10-Year Summary

COMPLAINTS	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Total
Complaints pending on Jan. 1	12	12	19	14	11	21	8	10	10	17	**132**
No. of new complaints filed	50	63	60	43	73	56	75	64	76	80	**640**
No. of complaints disposed of	50	56	65	46	62	69	73	64	69	67	**621**

Complaint Flow—1988–1997



APPENDICES

Appendix A:

Complaint
Information Letter

Appendix B:

Complaint
Cover Sheet

Honorable William R. Johnson, Chair
David A. Hodges, Sr., Vice-Chair
Robert L. Chiesa, Esquire
Honorable Raymond A. Cloutier
Anne Coughlin
Honorable Douglas S. Hatfield, Jr.
Donna K. Lencki
Joseph M. McDonough, III, Esquire
Honorable Walter L. Murphy
John R. Newsom
Donna P. Sytek

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
COMMITTEE ON JUDICIAL CONDUCT

FRANK ROWE KENISON
SUPREME COURT BUILDING
CONCORD, N.H. 03301-1476
P.O. Box 1476

Howard J. Zibel, Esquire
Executive Secretary
Donna R. Craig
Assistant Executive Secretary
(603) 271-2646

TDD Access: Relay NH 1-800-735-2964
(nonconfidential calls only)

Dear _____,

In response to your telephone call, I am enclosing a copy of Supreme Court Rule 38 (the Code of Judicial Conduct), Supreme Court Rule 39 (the Committee on Judicial Conduct), and Supreme Court Rule 40 (Procedural Rules of the Committee on Judicial Conduct).

As you may know, the Judicial Conduct Committee has eleven members, consisting of judges, lawyers, and public representatives, and meets six or more times a year.

All of the members read all of the complaints that are filed with the Committee. Since each meeting agenda can contain as many as fifteen or more complaints, however, and since each complaint can be lengthy and can include many pages of attachments, the Committee asks each complainant to fill out a summary "Cover Sheet." This summary enables Committee members to keep in mind, as they read, who is filing the complaint, what the complaint is all about, and what kind of supporting evidence they should be looking for. The Committee feels that this summarizing and focusing of the accusation can also be helpful to the complainant.

Attached is such a Cover Sheet, which we ask that you fill out and return to the Committee in order that it may be considered by the Committee along with your complaint. Again, this summary information will not be a substitute for your complaint, which will be read and considered in its entirety by each Committee member. The Cover Sheet is simply designed to enable the members to read each complaint, no matter how complicated and detailed, while looking for the instances of judicial misconduct (and for the supporting evidence) that are being complained about.

The Committee also urges you to be aware of what it does and does not do. It does not review the judges' findings and rulings, for example, unless it can be shown that these have been the result of persistent bad-faith disregard of the law. Unfortunately, the Committee has found that a sizeable majority of the complaints it receives must be dismissed because they essentially involve dissatisfaction with a judge's decisions, findings and rulings, rather than misconduct, and so are a substitute for an appeal. A complaint that merely

alleges that a judge made a wrong decision or ignored the facts or misapplied the law is outside the Committee's jurisdiction. In such a case you may wish to consult a lawyer about filing an appeal. The Committee has no power to change the result in a particular case; only an appellate court can do that.

Three other important rules regarding acceptance of complaints should be mentioned:

1. The complainant must be a person who either witnessed the alleged judicial misconduct or was directly affected by it.

2. The conduct complained of must be judicial misconduct - that is, conduct that is contrary to the Code of Judicial Conduct. Some examples of judicial misconduct are improper demeanor, rudeness and mistreatment of litigants; offensive remarks; gender or other bias; favoritism; receiving private communications from parties or their lawyers; conflicts of interest; excessive delay in decision-making; neglect of administrative duties; and conduct off the bench bringing the judicial office into disrepute.

3. Complaints arising out of conduct that took place over one year prior to receipt of the complaint will ordinarily be dismissed for staleness. If, however, the last episode of an alleged pattern of recurring judicial conduct occurs within the one-year period, the Committee may consider all prior acts or omissions alleged to be a part of the pattern.

The Committee investigates complaints that come within its jurisdiction in a thorough and vigorous manner. In this connection, you should be aware that the Committee has access to trial transcripts and audiotapes.

The proceedings of the Committee are generally confidential, and you are forbidden to divulge to anyone the fact you have filed a complaint until the Committee has either filed a statement of formal charges against the judge or has finally disposed of the complaint. The Committee's rules contain the following Comment, which helps to explain the confidentiality rules:

COMMENT

One of the protections of the confidentiality provision is that a complainant is not liable for good faith statements contained in a complaint or made in the course of its proceedings.

Nothing in the rule of confidentiality prevents a complainant from disclosing publicly the conduct of a judge which he or she believes violates the code of conduct or is otherwise inappropriate. The immunity from civil liability does not apply to such disclosures. The rule does prohibit a complainant, however, from disclosing publicly the fact that a complaint against the judge about the conduct has been filed with the committee until a statement of formal charges is prepared and filed as described in section 7(a) of [Supreme Court Rule 40]

or until the complaint is finally disposed of by the committee. Once a complaint has been disposed of by the committee, a complainant may make a public disclosure concerning the filing of a complaint including the conduct complained of and the action of the committee. The duty of confidentiality upon the committee remains, however, unless one of the specified exceptions provided by the rules applies.

For a more detailed explanation of the confidentiality rules, please review Supreme Court Rule 40(3).

A complainant has no right to appear before the Committee in support of his or her complaint, but may be required to attend as a witness in the course of a Committee investigation or hearing.

As you fill out the attached Cover Sheet, and as you consider your complaint as a whole, please be sure the complaint conforms to these rules governing the Committee's work. This will help you and, at the same time, it will help the Committee.

Thank you for cooperating with the Committee's requests. If I may be of any assistance, please call.

Very truly yours,

_____

Assistant Executive Secretary

New Hampshire Supreme Court
Committee on Judicial Conduct

Complaint Cover Sheet

Docket No. JC-_____

(Please Print Responses)

Complainant's (Your) Name: _____

Name of Person or Persons You Are Complaining Against (Judge, Master, Clerk or other Official):

_____

Court in Which Alleged Misconduct Occurred: _____

Names of Parties in Underlying Action or Suit: _____

Date or Dates of Alleged Misconduct: _____

Did you witness the alleged misconduct? ☐ **Yes** ☐ **No**

If not, state briefly how you are affected by it?

_____

Having read the letter which accompanies this form, please describe briefly the nature of the judicial misconduct about which you are complaining and summarize the supporting evidence.

_____

_____

_____

_____

_____

_____

_____

_____

Date: _____

_____
Signature of Complainant

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT

JUDICIAL PERFORMANCE EVALUATION IN SUPERIOR COURT
JOSEPH P. NADEAU, CHIEF JUSTICE
NEW HAMPSHIRE SUPERIOR COURT

I regret I cannot meet with you personally to discuss superior court judicial evaluations. I hope this statement addresses issues of concern to the committee.

First, I would like to emphasize that the purpose of judicial performance evaluations is to provide trial judges with insight into their conduct on the bench as perceived by lawyers, litigants, clerks, staff, bailiffs and myself.

The process begins by the judge filling out a self assessment form (**Attachment A**) which provides the opportunity to reflect on his or her work as a judge. The judge can also comment on how his or her job is affected by such things as scheduling, education and resources. The judges ends the completed form to me for review and use in our final interview.-

Next, I ask each clerk to make a list of the attorneys and law firms who regularly practice in the court where the judge sits. I then send a form (**Attachment B**)to those firms and any other firms which I feel should be included.

An evaluation form is also sent to all court personnel who work in the courthouse where the judge presides. These forms provide clerks and bailiffs, (**Attachment C**) office staff, law clerks, and court reporters (**Attachment D**) a chance to rate the judge in many categories. The categories are those which are used by most jurisdictions which conduct such evaluations. The forms also provide space for additional comments and observations.

The forms are confidential and anonymous. Confidentiality and anonymity are important because they permit people to provide an honest view of the judge's performance. Employees, attorneys and litigants know they will suffer no disadvantage because of the information provided. They also know the information will be used only for evaluation and improvement not for personal attack. Since the forms are not public, there is no concern that one isolated event will gain disproportionate attention.

Not surprisingly, most comments for most judges are highly favorable. But, even if a judge receives only one unfavorable survey, I do not disregard it. Rather, unfavorable surveys are use as a learning tools. Even if observations may be uncommon, they deserve attention. I ask the judge to recognizes that these observations or perceptions come from someone who feels strongly about the conduct described.

We also discuss how judges can avoid even a single instance of bad temper or uncharacteristic conduct. We discuss how judges can respond to contentious litigants or troublesome attorneys in positive ways, and how judges can avoid times of impatience and work hard to make certain that even unhappy litigants perceive the judge as a fair and tolerant person.

Finally, the forms also reinforce positive conduct and inform judges when they are on the right track. Judges know when the conduct described, whether positive or negative, is typical and make genuine efforts to work on areas that need improvement.

Occasionally someone asks whether these evaluations can be made public so that anyone can see the surveys and comments. Of course they can. But I have two thoughts about that suggestion. The first is that it is unnecessary. Any individual or group can solicit information about judges by conducting their own inquiries or surveys. They can gather information and make whatever use of it they desire. Also, most judicial activity takes place in a public courtroom open to all and frequently covered by the media.

My second thought is that making the surveys public will change the process. Such a public airing of administrative evaluations risks the prospect that the focus will be directed away from performance review and toward personal vilification. There is a serious risk that a small unrepresentative group would use information selectively to create the unwarranted impression that there is a serious problem with judicial performance.

For these reasons if surveys were to be made public, it seems to me those who fill out the surveys should be required to identify themselves. How else can a judge defend against what he or she believes to be unfair or untrue comments? With the cover of anonymity, it would take very little effort to create the false impression that the performance of a particular judge is questionable.

It is very frustrating to me to hear someone repeat an anonymous and usually unfounded allegation involving a judge without identifying the court, the judge or the circumstances. Judges must make difficult decisions. They must control the courtroom and everyone who comes before them. Judges are human beings and no matter how hard every judge tries to exercise their responsibilities in the most judicious manner they will occasionally make mistakes.

Finally, I ask the legislature to reflect on the harm to government of providing an additional opportunity to make unwarranted attacks on its institutions by a small vocal minority. I believe the process we have in place allows us to deal with human frailties without creating the unfounded and unwarranted impression of disarray that a handful of disgruntled litigants might like to convince the public exists. I believe our 28 superior court judges and 11 marital masters earn and deserve public confidence for their daily handling of thousands of cases throughout the state.

2/1/99 **(Attachment A)**

PERSONAL EVALUATION FORM - JUSTICE

Personal Information:

Types of cases you have heard in each category in the last year. (Estimate percentages)

Civil, Equity _____
Criminal _____
Marital _____
Other _____

1. How often have you been able to review case files prior to hearings or trials?
Never_ Rarely_ Sometimes____ Most of the time____ Always

2. How often would you like to be able to review case files prior to hearings or trials?
Never___Rarely___Sometimes____ Most of the time____ Always

3. How often have you had to stay late, or arrive early, to accommodate emergency of special scheduling problems?
Never_ Rarely___Sometimes____ Most of the time____ Always

4. Do you generally involve attorneys, litigants, and court staff when making scheduling decisions about special situations, such as working late or through the lunch hour?
Never___Rarely___Sometimes____ Most of the time____ Always

5. Do you think you take a fair share of the difficult work on the docket?
Never____Rarely__Sometimes____ Most of the time____ Always

6. Do you feel pushed by the caseload to the point where "moving cases" takes precedence over quality of justice concerns?
Never___Rarely___Sometimes____ Most of the time____ Always

7. How often do you feel you are sufficiently familiar with the law and the facts that apply to the cases you are hearing?
Never___Rarely___Sometimes____ Most of the time____ Always

8. Do you think you give attorneys a fair opportunity to make their argument to the court?
Never___Rarely___Sometimes____ Most of the time____ Always

9. Do you think that litigants and attorneys leave the courtroom when you are presiding having understood what has happened and what is to happen next?
Never___Rarely___Sometimes____ Most of the time____ Always

10. How often have you found it necessary to intervene in cases being presented in the courtroom, in order to ensure justice is done, above and beyond exact procedural and legal requirements?
Never___Rarely___Sometimes____ Most of the time____ Always

11. How would you describe your style of courtroom control?
Easy going____ Somewhat controlling____ Very controlling

12. How would you describe your settlement style? (i.e. do you actively participate?)
Never___Rarely___Sometimes____ Most of the time__ Always

13. How would you rate the amount of continuing education you have received since being appointed to the Superior Court?
Less than sufficient_____ Sufficient_____ More than sufficient

14. How would you rate the amount of continuing education you have received during the past two years?
Less than sufficient____Sufficient____More than sufficient

15. Are there any areas in which you would like more education?

16. Are there any innovations which you would like to try?

19. Are you satisfied with your overall performance?
YES ____ YES, but room for improvement____ NO

OTHER COMMENTS:

(Attachment B)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - ATTORNEY**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high)** **RANK**

1. Accessibility to staff	
2. Conscientiousness and diligence	
3. Patience and tolerance	
4. Effectiveness of communication	
5. Shows respect for staff	
6. Has earned your respect	
7. Allows me to perform my job	
8. Attentiveness to court business	
9. Promptness in rendering decisions	
10. Efficiency in use of court time	
11. Familiarity with and use of court forms	
12. Familiarity with office procedures	
13. Accessibility to counsel	
14. Handling of complex cases and issues	
15. Control in courtroom	
16. Decisiveness of decisions and rulings	
17. Attentiveness to witnesses and counsel	
18. Knowledge of law	
19. Knowledge of evidence	
20. Knowledge of procedure	
21. Understanding & compassion	
22. Fairness and equality of treatment	
23. Freedom from racial, religious or gender bias	
24. Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS **A-(top third), B-(middle), C-(lower third)**	

Number of years in practice._____

Number of hearings before this judge or master._____

Number of appearances before other judges or masters.___

Civil____, #Criminal____, #Marital____.

(Please make any additional comments on the back of this page

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

(Attachment C)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION CLERK/BAILIFF**

JUSTICE\MASTER_____

Please rank performance: 1 (low) -> 10 (high) RANK

Accessibility to counsel	
Conscientiousness and diligence	
Patience and tolerance	
Effectiveness of communication	
Handling of complex cases and issues	
Control in courtroom	
Decisiveness of decisions and rulings	
Attentiveness to witnesses and counsel	
Promptness in rendering decisions	
Efficiency in use of court time	
Knowledge of law	
Knowledge of evidence	
Knowledge of procedure	
Understanding & compassion	
Fairness and equality of treatment	
Freedom from racial, religious or gender bias	
Level of professionalism	
COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years employee in judicial branch._____
Number of other judges\masters with whom you have worked_____

ADDITIONAL COMMENTS

It is not necessary to sign this form but you may do so if you wish.

(Attachment D)

2\1\99 **SUPERIOR COURT PERFORMANCE EVALUATION - STAFF**

Please rank performance in the areas with which you are familiar. **1 (low)->10 (high)**

		RANK
1.	Accessibility to staff	
2.	Conscientiousness and diligence	
3.	Patience and tolerance	
4.	Effectiveness of communication	
5.	Shows respect for staff	
6.	Has earned your respect	
7.	Allows me to perform my job	
8.	Attentiveness to court business	
9.	Promptness in rendering decisions	
10.	Efficiency in use of court time	
11.	Familiarity with and use of court forms	
12.	Familiarity with office procedures	
13.	Accessibility to counsel	
14.	Handling of complex cases and issues	
15.	Control in courtroom	
16.	Decisiveness of decisions and rulings	
17.	Attentiveness to witnesses and counsel	
18.	Knowledge of law	
19.	Knowledge of evidence	
20.	Knowledge of procedure	
21.	Understanding & compassion	
22.	Fairness and equality of treatment	
23.	Freedom from racial, religious or gender bias	
24.	Level of professionalism	
	COMPARE TO OTHER SUPERIOR CT JUDGES\MASTERS A-(top third), B-(middle), C-(lower third)	

Number of years you have worked in judicial branch._____
Number of other judges or masters with whom you have worked._____

(Please make any additional comments on the back of this page.)

ADDITIONAL COMMENTS:

It is not necessary to sign this form but you may do so if you wish.
Please return to:

New Hampshire Superior Court Center
Judicial Evaluation - Confidential
99 North State Street
Concord N.H. 03301

FILE

Table 4.3
QUALIFICATIONS OF JUDGES OF STATE APPELLATE COURTS AND GENERAL TRIAL COURTS

State or other jurisdiction	U.S. citizenship (years)		Years of minimum residence: In state		Years of minimum residence: In district		Minimum age		Member of state bar (years)		Other	
	A	T	A	T	A	T	A	T	A	T	A	T
Alabama	5	5	(a)	(a)	...	1	25	25	...	...	...	...
Alaska	★	★	5 (a)	5 (a)	...	...	...	...	★ (b)	★ (b)	...	...
Arizona	...	...	10 (c)	5	(d, e)	1	30	30	10 (c)	5	(f, g)	(f, g)
Arkansas	★	★	2	2	...	...	30	28	(h, i)	(h, i)	(f)	(f)
California	...	...	...	...	...	...	...	...	10 (i)	10 (i)	...	...
Colorado	...	...	(e)	...	...	(e)	...	...	5	5	(g)	(g)
Connecticut	...	...	...	...	...	...	18	18	10	10	...	...
Delaware	...	...	(a)	(a)	...	...	...	...	(h)	(h)	...	...
Florida	...	...	(e)	(e)	★	★	...	...	10	5	(g)	(g)
Georgia	3	3	★	(a)	...	...	...	30	7	7	...	...
Hawaii	★	★	★ (a)	★ (a)	...	...	...	...	10	10	...	...
Idaho	★	★	2	1	...	(e)	30	30	10	10	...	...
Illinois	★	★	★	★	★	★	...	...	★	★	...	...
Indiana	★	★	...	...	★	★	...	...	10 (i)	★	...	...
Iowa	...	...	...	...	...	...	...	...	★	...	...	...
Kansas	...	...	...	...	...	★	30	30	★ (i)	★ (i)	...	...
Kentucky	★	★	2	2	2	2	...	...	8	8	...	...
Louisiana	...	...	2	2	2	2	...	...	5	5	...	...
Maine	...	...	...	...	...	...	...	...	(h)	(h)	(f)	(f)
Maryland	...	...	5 (a,e)	5 (a,e)	6 mos.	6 mos.	30	30	★	★	(f)	(f)
Massachusetts	...	...	...	...	...	...	...	...	...	...	...	...
Michigan	...	...	(e)	...	(e)	(e)	...	...	★	★	(g)	(g)
Minnesota	...	...	...	...	...	...	...	...	★ (h)	★ (h)	...	...
Mississippi	...	...	(a)	(a)	...	...	30	26	5	5	...	...
Missouri	15	10	(e)	(e)	★	1	30	30	★	★	...	...
Montana	★	★	2	2	...	...	...	...	5	5	...	...
Nebraska	★	★	3	...	★ (e)	★	30	30	5 (i)	5 (i)	...	...
Nevada	...	...	2 (e)	2 (e)	...	...	25	25	★	...	...	...
New Hampshire	...	...	...	...	...	...	...	...	...	...	(j)	(j)
New Jersey	...	...	...	(k)	...	(k)	...	...	10	10	...	...
New Mexico	...	...	3	3	...	★	35	35	10 (h,i)	6 (h,i)	...	...
New York	...	...	★	★	...	...	18	18	10	10	...	...
North Carolina	...	...	...	...	...	★	...	...	★	★	...	...
North Dakota	★	★	★	★	...	★	...	...	★ (h)	★ (h)	...	...
Ohio	...	...	...	★	...	★	...	...	6 (i)	6 (i)	(g)	(g)
Oklahoma	...	...	(e)	...	(e)	(e)	30	...	5 (i)	4 (i)	...	...
Oregon	★	★	3	3	(e)	1	...	...	★	★	...	...
Pennsylvania	★	★	1 (a)	1 (a)	...	★	...	...	★	★	...	...
Rhode Island	...	...	...	...	...	...	21	...	...	...	...	...
South Carolina	★	★	5 (a)	5 (a)	...	...	26	26	5	5	...	...
South Dakota	★	★	★	★	★ (e)	★ (e)	...	...	★	★	...	...
Tennessee	...	...	5 (a)	5	...	1	35 (l)	30	★ (h)	★ (h)	...	...
Texas	★	★	(a)	(a)	(d)	2	35	...	★ (i)	★ (i)	...	...
Utah	★	★	5 (m)	3	...	★	30 (n)	25	★	★	...	...
Vermont	...	...	5	5	...	...	...	...	★ (i)	★ (i)	...	...
Virginia	...	...	★	★	...	★	...	...	5	5	...	...
Washington	...	...	1	1	1	1	...	...	★ (o)	★	...	...
West Virginia	...	...	5	★	...	...	30	30	10 (i)	★ (i)	...	...
Wisconsin	...	...	10 days	10 days	10 days	10 days	...	...	5	5	...	...
Wyoming	★	★	3	2	...	...	30	28	9 (h,i)	(h)	...	...
Dist. of Columbia	★	★	...	...	90 days	90 days	...	...	5 (i)	5 (i)	...	(p)
No. Mariana Islands	...	★	...	...	...	...	...	30	...	(h)	...	...
Puerto Rico	★	★	5	...	...	...	...	25	10	★ (i)	...	...

Sources: National Center for State Courts, *State Court Organization 1993*; state constitutions and statutes.

Note: The information in this table is based on a literal reading of the state constitutions and statutes. Requirements that an individual be a member of the state bar or a qualified elector may imply additional requirements.

Key:

A — Judges of courts of last resort and intermediate appellate courts.

T — Judges of general trial courts.

★ — Provision; length of time not specified.

. . . — No specific provision.

(a) Citizen of the state. In Alabama, Mississippi and Tennessee (court of criminal appeals), five years; in Georgia, three years.

(b) Must have been engaged in active practice of law for specific number of years. Alaska: appellate eight years; trial five years.

(c) For court of appeals, five years.

(d) For court of appeals judges only.

(e) Qualified elector. For Arizona court of appeals, must be elector of county of residence. For Michigan Supreme Court, elector in state; court of appeals, elector of appellate circuit. For Missouri Supreme and appellate courts, electors for nine years; for circuit courts, electors for three years. For Oklahoma Supreme Court and Court of Criminal Appeals, elector for one year; court of appeals and district courts, elector for six months. For Oregon court of appeals, qualified elector in county.

(f) Specific personal characteristics. Arizona, Arkansas good moral character. Maine sobriety of manners. Maryland integrity, wisdom and sound legal knowledge.

(g) Nominee must be under certain age to be eligible. Arizona under 70. Colorado under 72, except when name is submitted for vacancy. Florida under 70, except upon temporary assignment or to complete a term. Michigan, Ohio under 70.

(h) Learned in law.

(i) Years as a practicing lawyer and/or service on bench of court of record in state may satisfy requirement. Arkansas appellate: eight years; trial: six years. Indiana 10 years admitted to practice or must have served as a circuit, superior or criminal court judge in the state for at least five years. Kansas appellate: 10 years; trial: five years. Texas appellate: 10 years; trial: four years. Vermont five of 10 years preceding appointment. West Virginia appellate: 10 years; trial: five years. Puerto Rico appellate: 10 years; trial: five years.

(j) Except that record of birth is required.

(k) There are 260 restricted superior court judgeships that require residence within the county at time of appointment and reappointment. There are 144 unrestricted judgeships for which assignment of county is made by the Chief Justice.

(l) Thirty years for judges of court of appeals and court of criminal appeals.

(m) Supreme Court is five; court of appeals is three.

(n) Supreme Court is 30 years; court of appeals is 25 years.

(o) For court of appeals, admitted to practice for five years.

(p) Superior court judges must also have 5 years of legal government practice or service as law school faculty.

DRAFT AMENDMENT

490:35 Marital Masters.

I. Marital masters selected to serve in the Marital Master Program pursuant to New Hampshire Superior Court rule 12 shall possess the following qualifications:

(a) Professional experience in family law matters;

(b) Legal and personal qualities including, but not limited to:

(1) Knowledge of family matters, including related matters such as tax and pension law;

(2) Personal maturity so as to understand and make decisions on matters before the court; and

(3) Personal qualities of patience and understanding of the difficult personal matters which are the subject of divorce and a willingness to deal with complex family matters in a non-adversarial manner.

II. The governor shall nominate and the council shall confirm all new marital masters. The governor and council shall approve those seeking a renewed contract term and the terms and conditions of the marital master contract.

HOUSE COMMITTEE RESEARCH OFFICE
New Hampshire House of Representatives
4th Floor, Legislative Office Building
Concord, New Hampshire 03301
TDD Access: Relay NH
1-800-735-2964

603-271-3600

FILE

To: Henry J. Mock, Committee Chair
Judiciary and Family Law Committee

From: Kevin B. Moquin, Committee Researcher
House Committee Research

Date: August 31, 1999

Re: Legislative authority in relation to the nomination and appointment of judicial officers.

You asked me to verify what power the legislature has in relation to the evaluation, nomination and appointment of judicial officers. In reviewing this issue, I have looked at the state constitution, the state statutes and state case law.

The New Hampshire Constitution, pt. I, art. 37 provides that, "In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." (Attachment 1). Pt. II, art. 46 further provides in part that "all judicial officers . . . shall be nominated and appointed by the governor and council . . ." (Attachment 2). The New Hampshire Supreme Court has stated, "The ***method of selection*** of constitutional officers is provided by the constitution and ***may not be altered by the legislature. All other officers occupy positions established by the legislature and the method of their election or appointment is determined by the legislature***." (Emphasis added.) ***Opinion of the Justices***, 115 N.H. 159, 161 (1975). (Attachment 3).

Furthermore, the court has stated that "the Governor has broad discretion to select ***the means*** he will use in executing a constitutional duty." ***Opinion of the Justices***, 117 N.H. 398, 402 (1977), ***citing Opinion of the Justices,*** 334 N.E.2d. 604, 609 (Mass. 1975). (Attachment 4). This opinion was issued in response to a bill that proposed to create a judicial selection commission to recommend at least three candidates for all judicial appointments. In spite of the fact that the commission's

powers were merely advisory and that the Governor still retained the power to nominate or appoint some other person not recommended by the commission, the supreme court found the proposed legislation to be "an unconstitutional encroachment upon powers of the Governor and the Council . . . by 'altering' or 'changing' the selection process for judges." ***Opinion of the Justices***, 117 N.H 401-3. Thus, in the past, the supreme court has interpreted the power of the legislature to be relatively narrow, while allowing the governor broad discretion in selecting the means of judicial appointment.

All of this is relevant to two questions that have been raised by the subcommittee: 1) Does the legislature have the power to require that the governor and council use certain criteria or qualifications in nominating and appointing judicial officers; and 2) Does the legislature have the power to limit the terms of the office of chief justice of the supreme and superior courts so long as such legislation does not limit a justices ability to serve on the court during good behavior?

In response to the first question, it would seem doubtful that the court would find legislative authority to require the use of such criteria or qualifications. As previously noted, the governor and council's authority in this area is broad and the legislature retains no power to alter the method of selection of judicial officers. While N.H. RSA 4:44, which requires the governor and council to hold a hearing prior to any judicial appointment, may raise some questions about the extent of legislative power over the appointment process, this law was only adopted in 1997 and has never been tested in court (Attachment 5).

In response to the second question, the answer appears less clear. We would need to know whether the chief justice of either of these courts is a constitutional or statutory officer. The New Hampshire Constitution mentions the chief justice of the supreme court in two articles. N.H. Const., pt. II, arts. 40, 73-a. (Attachments 6 & 7). However, the constitution does not specifically provide a procedure for the nomination and appointment of a chief justice. Furthermore, the constitution makes no mention of a chief justice for the superior court. RSA 490:1 (Attachment 8) and RSA 491:1 (Attachment 9) provide for a chief justice of the supreme and the superior court respectively. Thus, it may be easier to argue that the chief justice of the superior court is a legislative officer and that the legislature has some control over the length of his or her tenure. Though it is not clear, one can infer from the constitution that the chief justice of the supreme court is a constitutional officer and, therefore, that the legislature is subject to constitutional limitations with regard to the power to limit the chief justice's term.

We would further need to know whether the chief justices of the supreme and superior courts are judicial officers for purposes of their nomination and appointment. N.H. Constitution, pt. II, art. 73 states that "all judicial officers . . . shall hold their offices during good behavior." (Attachment 10) The two chief justices are, without doubt, judicial officers insofar as they have been appointed as

justices to their respective courts, and, as such, the legislature cannot interfere with their power to continue in office during good behavior. However, whether specifically the ***office of chief justice*** of either court is a judicial office subject to pt. II, art. 73 is a question which has not been addressed.

In summary, the legislature's authority to regulate the judicial appointment and nomination process appears to be extremely limited. Moreover, the office of chief justice of the supreme court appears to be a constitutional office rather than a legislative office. Thus, the legislature probably has little power to regulate the term of this office. Lastly, the office of chief justice of the superior court appears to be a legislatively created office. However, it is an open question as to whether the office is technically a judicial office, and thus subject to the constitutional requirement that any appointee to the office shall hold office during good behavior. If I may be of further assistance, please do not hesitate to contact me.

Attachment 1

FILE

Art. 37. Separation of Powers.

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Annotations

Analysis

1. Generally.
2. Purpose.
3. Overlapping of powers.
4. Encroachment.
5. Delegation of powers.
6. Legislative powers.
7. Judicial powers.
8. Executive powers.
9. Administrative agencies.
10. Immunities.
11. Compatible offices.

1. Generally.

Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of New Hampshire's citizens to remain a free and sovereign people; the doctrine is thus violated when one branch usurps an essential power of another. Petition of Mone, 143 N.H. - , 719 A.2d 626 (1998).

If the people are to remain free and retain their sovereignty, then government must be limited; the separation of powers is essential to this end. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

Separation of powers between the legislative, executive and judicial branches of government is a vital part of the state constitution. In re Gamble, 118 N.H. 771, 394 A.2d 308 (1978).

This article does not require the erection of impenetrable barriers between the branches of government. Opinion of the Justices, 113 N.H. 287, 306 A.2d 55 (1973).

The separation of powers of the legislative, executive and judicial branches of the government is an important part of its constitutional fabric. Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959).

The separation of powers effected by the constitution in the creation of the three departments of government is a vital limitation upon the powers and not merely a convenient and variable assignment of duties. Opinion of the Justices, 86 N.H. 597, 166 A. 640 (1933).

2. Purpose.

Separation of powers prevents usurpation of controlling authority by one branch of government, since each branch acts as a check on the other, protecting the sovereignty and freedom of those governed by preventing the tyranny of any one branch of the government being supreme. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

This article was adopted to protect the executive and judicial branches of the state government from legislative encroachment. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

The concept of the separation of powers, contained in virtually every American constitution, was designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

Principal purpose of separation of powers between the legislative, executive and judicial branches of the government as set forth in this article is to protect each of the three branches from encroachment by the other, and as applied to the executive, to protect it from legislative encroachment. Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).

As applied to the judiciary, the primary purpose of this article is to protect the judiciary from legislative encroachments rather than to circumscribe its functions within strict limits. Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959).

3. Overlapping of powers.

Concept of complete separation of powers could interfere with efficient operation of government; therefore, some overlapping of power of each branch of government must exist. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

This article recognizes that the separation of powers cannot be absolute in a workable government. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970).

The three branches of government cannot be completely separate; there must be some overlapping. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970); Monier v. Gallen, 120 N.H. 333, 414 A.2d 1297 (1980).

This article does not require the erection of impenetrable barriers between the branches since there are governmental powers of doubtful classification which may be held properly to belong to either of more than one department of the government. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970).

The three branches of government cannot be completely separate, without overlapping. Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959).

This article contemplates some overlapping and duality as a matter of practical and essential expediency. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942); Pomponio v. State, 106 N.H. 273, 209 A.2d 733 (1965).

The constitution contemplates no absolute fixation and rigidity of powers between the three departments of the government, and areas of concurrent authority are properly constituted when the fixing of exact boundary lines would give rise to undue interference with the reasonable exercise of valid governmental activities. Ferretti v. Jackson, 88 N.H. 296, 188 A. 474 (1936).

4. Encroachment.

Where a proposed legislative bill directly conflicts with New Hampshire Rules of Evidence 404(b), the separation of powers doctrine is violated; the legislature has no more right to break down the rules prescribed by the court to assure fundamental due process in criminal and civil trials than the court has to prescribe the mode and manner in which the legislature shall perform its legislative duties. Opinion of Justices (Prior Sexual Assault Evid.), 141 N.H. 562, 688 A.2d 1006 (1997).

Once the legislature has made appropriation for the executive branch of government, the requirement of the legislative fiscal committee approval of contracts made pursuant thereto by the executive branch is an unconstitutional intrusion into the executive branch. Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987).

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

The legislature could not, by operating budget footnotes applicable to specific appropriations, require the approval of the legislative fiscal committee for contracts entered into by the executive obligating expenditure of funds from the footnoted appropriations, since the footnotes were an unconstitutional encroachment by the legislative branch upon the executive branch. Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987).

Enactment of bill requiring supreme court to suspend salary and benefits of any judge who is suspended by supreme court for any misconduct for period of suspension would violate separation of powers provisions of part I, article 37 of the New Hampshire Constitution. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

Mandatory feature of bill, which requires that supreme court suspend the salary and benefits of every judge suspended for misconduct, intrudes unduly upon court's superintendence power under part II, article 73-a, which includes the authority to exercise discretion in determining whether to suspend a judge without pay; as such, it impermissibly encroaches upon an exclusive judicial function in violation of the separation of powers mandate of part I, article 37. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

The separation of powers doctrine set forth in this article compels limits to encroachments by one branch of government into the inherent and internal affairs of another branch. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

Improper imposition upon one branch of government of powers of another branch or an encroachment upon powers of one branch by another branch violates separation of powers requirement of this article. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

Separation of powers requirement of this article is violated by an encroachment by one branch of government upon a constitutional function of another. Opinion of the Justices, 116 N.H. 406, 360 A.2d 116 (1976).

This article is violated by an improper imposition upon one branch of constitutional duties belonging to another or an encroachment by one branch upon a constitutional function of another. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970); State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983); State v. Shackford, 127 N.H. 695, 506 A.2d 315 (1986).

The legislature acts ultra vires when it attempts to impose upon the judicial department duties and powers which are inconsistent with or antagonistic to the exercise of judicial power. Attorney General ex rel. Boulanger v. Morin, 93 N.H. 40, 35 A.2d 513 (1943).

5. Delegation of powers.

In order to pass constitutional muster, delegation of authority to State Board of Education to approve amendment procedure in cooperative school district's articles of agreement must contain a declared policy and a prescribed standard laid down by legislature; if the policy and standard are adequately and sufficiently prescribed, discretionary authority may be delegated. In re Kearsarge Regional Sch. Dist., 138 N.H. 211, 636 A.2d 1033 (1994).

Trial court did not err in finding that statute designed to guide State Board of Education in approving amendment procedure in cooperative school district's articles of agreement set forth a declared policy and a prescribed standard, and that statute did not amount to unlawful delegation of legislative authority. In re Kearsarge Regional Sch. Dist., 138 N.H. 211, 636 A.2d 1033 (1994).

A statute granting the director of motor vehicles authority to suspend or revoke drivers' licenses for any cause which he may deem sufficient is an unconstitutional delegation of legislative authority. Guillou v. Division of Motor Vehicles, 127 N.H. 579, 503 A.2d 838 (1986).

Sweeping and general delegation of legislative power with uncontrolled discretion to executive branch agency even in a narrow field exceeds constitutional limits. Smith Ins., Inc. v. Grievance Comm., 120 N.H. 856, 424 A.2d 816 (1980).

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Statute, establishing grievance committee empowered to review termination by insurance companies of agency agreements between the companies and their agents, was devoid of either a declared policy or a prescribed standard laid down by the legislature and as such represented an unconstitutional delegation of legislative power. Smith Ins., Inc. v. Grievance Comm., 120 N.H. 856, 424 A.2d 816 (1980).

6. Legislative powers.

RSA 77-A:6 did not violate part I, article 37 of the State Constitution by giving the commissioner unfettered discretion to implement the unitary method of taxation because the statute empowered the commissioner to compel a corporation, either owning more than fifty percent of the stock of another corporation or having another corporation own more than fifty percent of its stock, to provide information concerning the possible unitary nature of its business; there exists both a declared policy to effect an equitable apportionment of the business organization's gross business profits, RSA 77-A:3, II(c), and a prescribed standard - fifty percent "owned or owning" criteria - in the delegation of legislative authority at issue. Baxter Int'l, Inc. v. State, 140 N.H. 214, 665 A.2d 350 (1995).

The trial court's grant of a "builder's remedy" to plaintiff who successfully challenged zoning ordinance on the basis that it wrongfully excluded development of low and moderate income housing projects did not violate this article; the municipality retained control of zoning to the extent it exercised its power for the general welfare of the community. Britton v. Town of Chester, 134 N.H. 434, 595 A.2d 492 (1991).

The separation of powers doctrine requires that the supreme court defer to the state senate in its decisions concerning whom to seat in cases of election contests or disputes. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

House of representatives as a separate and coequal branch of government is constitutionally authorized to promulgate its own rules. Union Leader Corp. v. Chandler, 119 N.H. 442, 402 A.2d 914 (1979).

This article does not preclude legislature from requiring governor to make particular designation of an agency to include Office of Health Planning and Development pursuant to Federal Public Health Service Act. Opinion of the Justices, 118 N.H. 7, 381 A.2d 1204 (1978).

In appropriating or not appropriating money for a department or its subdivisions or for the carrying out of particular services, the legislature has fundamental control which must always be subject to a recognition of what funds and agencies are reasonably necessary for the exercise of powers inherent to the proper functioning of the three branches of government if they are to fulfill their constitutional duties. Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).

However desirable comprehensive legislation in area of conflict of interest may be, enactment of such legislation is the prerogative and responsibility of the legislature and not of the executive. Opinion of the Justices, 116 N.H. 406, 360 A.2d 116 (1976).

Legislature has indicated a willingness and purpose to legislate in area of conflict of interest on part of elected state officials, partial though it may be, and executive policy which would vary statutory requirements and also have practical effect of regulating legislative power and authority in contravention of state constitution may not be permitted. Opinion of the Justices, 116 N.H. 406, 360 A.2d 116 (1976).

Legislature in the exercise of its plenary control over municipalities may modify or divide towns and create village districts and such action does not violate the separation of powers provision in this article even if the matter is pending in the courts. Lisbon v. Lisbon Village District, 104 N.H. 255, 183 A.2d 250 (1962).

7. Judicial powers.

Newly enacted law mandating that county sheriff departments be responsible for providing security in all State courts except supreme court, and that all judicial branch employee positions associated with security function in those courts be abolished, violated separation of powers clause of New Hampshire Constitution; since court security officers play an integral role in the most fundamental function of any

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

court, the adjudicatory function, it was an improper encroachment on the judiciary's power for the legislature to remove control of court security from the judiciary and place ultimate responsibility for it with the executive branch. Petition of Mone, 143 N.H. - , 719 A.2d 626 (1998).

It is not the function of the judicial branch of the government to pass upon the wisdom, desirability and expediency of statutes enacted by the legislature, and the supreme court has not been invested with the power to pass upon the wisdom of the legislative branch of the government in determining the qualifications of its members. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

Where a petition was brought by the president of the senate requesting that the supreme court either declare that the present senatorial districts were unconstitutional under both the federal and state constitutions and that the 1982 senatorial elections be conducted pursuant to a redistricting plan which had been adopted by both houses of the legislature but vetoed by the governor, or authorize the elections to be conducted pursuant to the existing districts, the supreme court had original jurisdiction to resolve the controversy since it is the role of the court to interpret the constitution and to resolve disputes arising under it, the case did not fall within the bar against confiding political questions to the courts, and the action was one where the parties desired and the public needed a speedy determination of the important issues in controversy. Monier v. Gallen, 122 N.H. 474, 446 A.2d 454 (1982).

If the duty of an executive board is primarily to decide questions of legal rights between parties that are unconnected to any regulatory function, such function belongs to the judiciary; courts of justice even of restricted jurisdiction may not be set up in the executive branch of government. Smith Ins., Inc. v. Grievance Comm., 120 N.H. 856, 424 A.2d 816 (1980).

Courts of New Hampshire have the exclusive authority to determine the reasonableness of compensation for court-appointed counsel; statutes attempting to impose a fee schedule for court-appointed counsel intrude upon this judicial function in violation of the constitutional separation of powers mandate. Smith v. State, 118 N.H. 764, 394 A.2d 834 (1978).

This article did not insulate a decision of the governor and council from judicial review, where the question considered was a judicial question. Attorney General v. Nadeau, 110 N.H. 264, 266 A.2d 118 (1970).

The duty of the judiciary to instruct the jury on the law applicable to a given case does not require that the jury be instructed as to the limitations imposed by RSA 556:13 upon the amount of recovery in wrongful death actions, and hence the provision of that statute forbidding such disclosure to the jury is not violative of the separation of powers provision of this article. Gibbs v. Prior, 107 N.H. 218, 220 A.2d 151 (1966).

An unconstitutional encroachment on the powers of the courts is involved in a proposed statute which would permit the income accumulation of a particular burial lot trust fund to be used, in the discretion of the trustee, under certain conditions, for the general care of the cemetery. Opinion of the Justices, 101 N.H. 531, 133 A.2d 792 (1957).

Questions of law belong to the judiciary for final determination, and legislation cannot bar or restrict this power of the judiciary; the right to apply to the courts for relief from illegality may not be unduly abridged. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942).

The power to punish for contempt is an essential attribute of a court of general jurisdiction, and an act of the legislature which proposes to limit all punishment for indirect contempt to a specific fine of $ 100 and imprisonment not to exceed fifteen days is an unconstitutional attempt to infringe upon the powers of the court. Opinion of the Justices, 86 N.H. 597, 166 A. 640 (1933).

An act of the legislature awarding a new trial in an action which has been decided in a court of law is an exercise of judicial power contrary to the provisions of this article. Merrill v. Sherburne, 1 N.H. 199 (1818).

Legislation to give towns and cities authority to use unexpended surplus of cemetery trust funds for general cemetery care, under certain conditions, would not be within the power of the legislature to enact, as such would be an invasion of established equitable powers of the courts and hence in violation of this article. 1 N.H.Op.A.G. 185.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

8. Executive powers.

The power to make contracts for the expenditure of State's funds is characteristically an executive function under the plain language of the New Hampshire Constitution. Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987).

There was no merit to argument that tape recordings of conversations between informant and defendant suspected of arranging murder of husband violated separation of powers clause; because recordings were consensual, neither warrant nor neutrality and detachment of a judicial officer was required, and recordings were properly authorized by assistant attorney general. State v. Smart, 136 N.H. 639, 622 A.2d 1197 (1993).

Exercise by the governor of the right of his discretion to grant or refuse rendition of one serving a sentence imposed by a New Hampshire court does not violate the separation of powers provision of the state constitution. Koch v. O'Brien, 101 N.H. 11, 131 A.2d 63 (1957).

A system of pauper relief required to be administered by the probate courts, and which imposes upon the judges and registers of such courts by virtue of their official positions the duty of deciding applications, making investigations, issuing rules and regulations and making orders for payment of assistance, etc., is an unconstitutional attempt to impose upon the judicial department executive or administrative powers, duties, and functions belonging to the executive branch of the government. Opinion of the Justices, 85 N.H. 562, 154 A. 217 (1931).

9. Administrative agencies.

The growth of administrative boards with dual governmental functions had long been accepted as not inconsistent with the provisions of this article requiring separation of the legislative, executive, and judicial powers. Petition of Boston & Maine Corp., 109 N.H. 324, 251 A.2d 332 (1969).

Order of public utilities commission authorizing closing of railroad grade crossing was a judicial decision which vested certain rights in railroad of which it could not be subsequently deprived by a legislative act ordering reopening of the crossing as the act violated this article and hence was invalid. Petition of Boston & Maine Corp., 109 N.H. 324, 251 A.2d 332 (1969).

Issues of fact passed upon by an administrative body are not generally reviewable by the courts unless the legislature has provided therefor by expressly giving a right of review by appeal. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942).

The judicial quality inherent in a finding or verdict by an administrative body does not necessarily signify a justiciable inquiry. Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554 (1942).

The vesting of essentially judicial authority in an administrative board is not validated by providing for judicial review of its decisions, and the willingness of litigants to submit their disputes to an administrative tribunal cannot operate to give the decision of such tribunal force as a judgment. Opinion of the Justices, 87 N.H. 492, 179 A. 344 (1935); 110 ALR 819.

10. Immunities.

Under this article, certain actions of the executive branch of government are clearly immune from liability. Opinion of the Justices, 126 N.H. 554, 493 A.2d 1182 (1985).

Whether an action taken by the executive branch of government may be immune from liability, depends on whether the particular governmental conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning. Opinion of the Justices, 126 N.H. 554, 493 A.2d 1182 (1985).

11. Compatible offices.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

This article prohibits one department of the state government from interfering with another department or usurping its powers, but it has no reference to the exercise of legislative and judicial powers by an official, and hence does not prohibit one from holding at the same time the offices of supervisor of the check list, city councilman, and member of the legislature. Attorney General v. Meader, 80 N.H. 292, 116 A. 433 (1922).

Cited. In re School-Law Manual, 63 N.H. 574, 4 A. 878 (1885); Sherburne v. Portsmouth, 72 N.H. 539, 58 A. 38 (1904); Opinion of the Justices, 74 N.H. 606, 68 A. 873 (1908); Wyman v. De Gregory, 101 N.H. 171, 137 A.2d 512 (1957) appeal diismissed, 360 U.S. 717, 79 S.Ct. 1454, 3 L.Ed.2d 1540, rehearing denied, 361 U.S. 857, 80 S.Ct. 46, 4 L.Ed.2d 96 (1959); Opinion of the Justices, 102 N.H. 75, 150 A.2d 816 (1959); Robwood Advertising Associates, Inc. v. Nashua, 102 N.H. 215, 153 A.2d 787 (1959); Wyman v. Uphaus, 102 N.H. 461, 159 A.2d 160 (1960); Wyman v. De Gregory, 103 N.H. 214, 169 A.2d 1, aff'd, 368 U.S. 19, 82 S. Ct. 137, 7 L. Ed. 2d 86 (1961); Hampton v. Marvin, 105 N.H. 34, 193 A.2d 441 (1963); Petition of Harvey, 108 N.H. 196, 230 A.2d 757 (1967); Hartford Accident & Indemnity Co. v. Duvall, 113 N.H. 28, 300 A.2d 732 (1973); Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973); Opinion of the Justices, 113 N.H. 287, 306 A.2d 55 (1973); Clark v. New Hampshire Department of Health and Welfare, 114 N.H. 99, 315 A.2d 187 (1974); O'Neil v. Thomson, 114 N.H. 155, 316 A.2d 168 (1974); Opinion of the Justices, 117 N.H. 398, 374 A.2d 638 (1977); Melton v. Personnel Commission, 119 N.H. 272, 401 A.2d 1060 (1979); State v. Fennelly, 123 N.H. 378, 461 A.2d 1090 (1983); Soucy v. State, 127 N.H. 451, 506 A.2d 288 (1985); Opinion of the Justices, 128 N.H. 1, 509 A.2d 734 (1986); Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986); Rousseau v. Eshleman, 129 N.H. 306, 529 A.2d 862 (1987); Opinion of Justices, 129 N.H. 714, 532 A.2d 195 (1987); Newell v. New Hampshire Div. of Welfare, 131 N.H. 88, 550 A.2d 109 (1988); Petition of Strandell, 132 N.H. 110, 562 A.2d 173 (1989); Opinion of Justices (Marital Masters' Contempt Powers), 138 N.H. 425, 640 A.2d 784 (1994); Claremont Sch. Dist. v. Governor, 142 N.H. 462, 703 A.2d 1353 (1997); Opinion of Justices, 142 N.H. - , 712 A.2d 1080 (1998); Claremont Sch. Dist. v. Governor, 143 N.H. - , - A.2d - (1998).

Library References

NH Practice 1 N.H.P. Criminal Practice and Procedure § 2.

2 N.H.P. Criminal Practice and Procedure § 965.

2A N.H.P. Criminal Practice and Procedure § 2065.

Bar Journal Inherent Powers of the Courts to Effect Court Improvements, 14 N.H.B.J. 15 (Summer 1972).

Judicial review and the separation of powers under New Hampshire Constitution of 1776 and 1784, 18 N.H.B.J. 250 (June 1977).

The theory of the New Hampshire Constitution, like virtually every other American constitution, is derived from the concept of checks and balances. A Modern Constitution for New Hampshire, 6 N.H.B.J. 208 (209) (April 1964).

CJS Constitutional Law § 111 et seq.

ALR Inherent power of court to compel appropriation or expenditure of funds for judicial purposes. 59 ALR3d 569.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR3d 474.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 2

FILE

Art. 46. Nomination and Appointment of Officers.

All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto.

Amendments--1976. Deleted "coroners" following "attorney-general".

--1877. Deleted "solicitors, all sheriffs" and "registers of probate".

Annotations

Analysis

1. Procedure.
2. Approval of council.
3. Judicial officers.

3a. Board of claims.

4. Masters.
5. Magistrates.

1. Procedure.

The method of selection of constitutional officers is provided by the constitution and may not be altered by the legislature. Opinion of the Justices, 115 N.H. 159, 335 A.2d 642 (1975); Opinion of the Justices, 117 N.H. 398, 374 A.2d 638 (1977).

2. Approval of council.

An appointment will be deemed to have received the approval of the council, or of the governor and council, if at a meeting at which a quorum is present, it receives a majority of the votes cast, even though some members present abstain from voting. Opinion of the Justices, 98 N.H. 530, 98 A.2d 635 (1953).

It is inferable from this article that a majority of the council constitutes a quorum. Opinion of the Justices, 98 N.H. 530, 98 A.2d 635 (1953).

3. Judicial officers.

Judicial authority may be exercised only by an officer appointed in accordance with the state constitution and invested with the constitutional incidents of judicial office. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

A judicial officer, within the meaning of this article, must be nominated and appointed by the governor and council as provided in this article, and must be commissioned to hold office during good behavior as provided in article 73 of this part except where the constitution otherwise provides. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

Power of nomination of judges is granted exclusively to governor, and power of appointment is granted exclusively to council. Opinion of the Justices, 117 N.H. 398, 374 A.2d 638 (1977).

3a. Board of claims.

This article does not require that members of administrative board of claims hearing personal injury claims against the state be appointed by the governor and council. Newell v. New Hampshire Div. of Welfare, 131 N.H. 88, 550 A.2d 109 (1988).

4. Masters.

Proposed bill granting marital masters power to impose penalties for civil contempt, including incarceration, would violate New Hampshire Constitution, since effect would be to grant marital masters

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

authority of judicial officers, and constitution requires that all judicial officers be nominated and appointed by governor and council. Opinion of Justices (Marital Masters' Contempt Powers), 138 N.H. 425, 640 A.2d 784 (1994).

Marital masters of the superior court are not judicial officers within the meaning of this article. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

5. Magistrates.

Under proposed legislation investing the superior court with the same authority and discretion to appoint marital magistrates that the court exercises in appointing marital masters, such a marital magistrate by definition would not be a judicial officer within the meaning of this article. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

Proposed legislation ostensibly granting marital magistrates the authority of judicial officers, even though the magistrates would not be appointed or tenured as such, would clearly violate this article, and the orders and decrees of such magistrates would have no legal effect, without approval and adoption by a superior court justice. Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986).

Cited. Golding's Petition, 57 N.H. 146 (1876); Opinion of the Justices, 74 N.H. 606, 68 A. 873 (1908); Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959); Attorney General v. Nadeau, 110 N.H. 264, 266 A.2d 118 (1970); Opinion of the Justices, 114 N.H. 88, 315 A.2d 858 (1974); Brouillard v. Governor and Council, 114 N.H. 541, 323 A.2d 901 (1974); Opinion of the Justices, 117 N.H. 390, 373 A.2d 642 (1977); State v. Fennelly, 123 N.H. 378, 461 A.2d 1090 (1983); Witte v. Justices of N.H. Superior Court, 831 F.2d 362 (1st Cir. 1987); Opinion of Justices (Furlough), 135 N.H. 625, 609 A.2d 1204 (1992); Claremont Sch. Dist. v. Governor, 142 N.H. - , 712 A.2d 612 (1998).

Library References

NH Practice 3A N.H.P. Family Law § 25.01.

CJS States §§ 84-87.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 3

FILE

Opinion of the Justices

No. 7151
SUPREME COURT OF NEW HAMPSHIRE
115 N.H. 159, 335 A.2d 642
March 31, 1975

HEADNOTE

1. The legislature has the power to name a commissioner of health and welfare or to delegate the appointing power to either the Governor and Council or advisory commission or to both under part II, article 5 of the State constitution , which authorizes the legislature to name or provide by fixed laws for the naming of all civil officers in the State except those whose naming and manner of appointment are provided for by the constitution.

2. The legislature has authority under part II, article 5 of the State constitution to place a time limit on the power of the Governor and Council to appoint a commissioner of health and welfare from a list of names of nominees submitted by the advisory commission on health and welfare and to transfer the power of appointment to the advisory commission upon expiration of that time limit.

3. The Governor and Council's authority under part II, article 47 of the State constitution to sign every nomination and appointment of State officers whose nomination and appointment they are authorized to make under part II , article 46 does not restrict the legislature's authority under part II , article 5.

OPINION

The following resolution was adopted by the house of representatives on March 5, 1975, and filed with the supreme court on March 6, 1975:

*{*160}* "Whereas there is pending in the House of Representatives House Bill No. 36, "An Act relative to the length of time in which the governor and council must approve a commissioner of health and welfare'; and

"Whereas doubt has been expressed as to the constitutionality of certain provisions of said bill;

"Now, therefore, Be It Resolved by the House of Representatives;

"That the Justices of the Supreme Court be respectfully requested to give their opinion upon the following important questions of law:

"1. Would any provision of the Constitution be violated by the provision in said bill establishing a sixty day time limit within which the governor and council must make an appointment to the office of Commissioner of Health and Welfare from the list of nominees furnished by the Advisory Commission?

"2. Would any provision of the Constitution be violated by the provision in said bill empowering the Advisory Commission to make an appointment to the office of Commissioner of Health and Welfare in the event that the governor and council shall fail to make an appointment within such sixty day period?

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

"Further resolved that the clerk of the house be instructed to transmit to the clerk of the Supreme Court six copies of this resolution and six copies of House Bill No. 36."

The following answers were returned:

To the House of Representatives:

The undersigned justices of the supreme court submit the following reply to the inquiries contained in your resolution adopted March 5, 1975, and filed with this court March 6, 1975.

Your questions relate to House bill 36 which authorizes the Governor and Council to appoint a commissioner of health and welfare from a list of nominees submitted by the advisory commission on health and welfare within a period of sixty days after such nominees are submitted. Upon a failure of the Governor and Council to make an appointment within the sixty days, the advisory commission is then authorized to appoint a commissioner of health and welfare within the next sixty days.

Question No. 1 asks whether any provision of the constitution would be violated by limiting the power of the Governor and Council to appoint to sixty days after the submission of nominees.

Question No. 2 asks whether any provisions of the constitution *{*161}* would be violated by transferring the power of appointment to the advisory commission for sixty days upon failure of the Governor and Council to appoint within the first sixty-day period.

The constitution provides for certain constitutional State officers and directs the manner in which they are to be appointed or elected. Thus the secretary of state and the State treasurer are chosen by joint ballot of the senate and house of representatives. N.H. Const.pt. II, art. 67. Judges, the attorney general, coroners and military officers are appointed by the Governor and Council. N.H. Const.pt. II, art. 46. The method of selection of constitutional officers is provided by the constitution and may not be altered by the legislature.

All other officers occupy positions established by the legislature and the method of their election or appointment is determined by the legislature. The constitution authorizes the legislature "to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state." N.H. Const.pt. II, art. 5. Since the legislature has the power to name a commissioner of health and welfare, it has the power to delegate the appointing power to either the Governor and Council or the advisory commission or both. **Opinion of the Justices,** 102 N.H. 195, 197, 152 A.2d 878, 880 (1959).

In previous answers to questions arising from the impasse between the Governor and Council and the advisory commission in the appointment of a commissioner of health and welfare under the present law (RSA 126-A:4 (Supp. 1973)), we have stated that the legislature may properly prescribe how and by whom the appointment shall be made. **Opinion of the Justices ,** 113 N.H. 675, 312 A.2d 702 (1973); N.H. Const.pt. II, art. 41 ; **Opinion of the Justices,** 114 N.H. 165, 316 A.2d 174 (1974); **Brouillard v. Governor,** 114 N.H. 541, 323 A.2d 901 (1974).

The legislative power to determine the limitations upon the delegation of the power of appointment is not restricted to the present statutory provisions that the Governor and Council appoint from the nominees of the advisory commission. RSA 126-A:4 (Supp. 1973). House bill 36, placing a time limit on the power of the Governor and Council to appoint a commissioner and transferring the power of appointment to the advisory commission upon expiration of that time limit, is within the legislative authority. **See Opinion of the Justices,** 90 N.H. 568 , 8 A.2d

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

597 (1939).

Reliance is placed on part II , article 47 of the constitution for holding the present proposed legislation unconstitutional. Article *{*162}* 47 reads as follows: "The governor and council shall have a negative on each other, both in the nominations and appointments. **Every nomination and appointment shall be signed by the governor and council,** and every negative shall be also signed by the governor or council **who made the same.** " (Emphasis added.)

Article 47 does not restrict the authority of the legislature under part II , article 5 of the constitution but prescribes the procedure for appointment of officers authorized to be appointed by Governor and Council under part II , article 46 of the constitution.

We conclude that the proposed legislation is consistent with article 5 , part II of the constitution and is not in violation of other provisions of the constitution. Accordingly, the answer to both questions is "No".

Frank R. Kenison

Laurence I. Duncan

Edward J. Lampron

William A. Grimes

Robert F. Griffith

Governor Meldrim Thomson, Jr., by his legal counsel, **James J. Barry, Jr.,** filed a memorandum of law for affirmative answers to questions 1 and 2.

Miriam O. Page, by her attorneys, **McLane, Graf, Greene, Raulerson & Middleton** and **Charles A. DeGrandpre** and **Richard S. Snierson,** filed a memorandum of law in favor of negative answers to questions 1 and 2.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 4. FILE

Opinion of the Justices

No. 7778
SUPREME COURT OF NEW HAMPSHIRE
117 N.H. 398, 374 A.2d 638
May 24, 1977

HEADNOTE

1. Constitutional Law--Executive Power--Encroachments

Proposed legislation which provided for establishment of a judicial selection commission consisting of chief justice of supreme court, five members of New Hampshire Bar Association, and five members of public not members of bar, and which required Governor to inform chairman of commission when a vacancy occurred, and for commission to screen all candidates and select at least three candidates for consideration by Governor and Council, and further provided that Governor and Council might nominate and appoint one of commission's selections or might nominate and appoint some other person, but that if one of commission's selections was accepted, appointment should be made within sixty days, would be an unconstitutional encroachment upon powers of Governor and Council by altering or changing selection process for judges. N.H. Const. pt. I, art. 37 ; pt. II, art. 46.

2. Constitutional Law--Executive Power--Encroachments

Proposed legislation which provided for establishment of a judicial selection commission consisting of chief justice of the supreme court, five members of New Hampshire Bar Association, and five members of public not members of bar, and which directed commission's chairman to convene commission not only when a vacancy occurred but also when a vacancy might be anticipated or at any time, and that commission screen all candidates and select at least three candidates for consideration by Governor and Council, and further provided that Governor and Council might nominate and appoint one of commission's selections, or might nominate and appoint some other person, would be an unconstitutional encroachment upon the powers of Governor and Council by altering or changing selection process for judges. N.H. Const. pt. I, art. 37 ; pt. II, art. 46.

3. Judges--Appointment and Removal

Power of nomination of judges is granted exclusively to governor, and power of appointment is granted exclusively to council. N.H. Const. pt. II, art. 46.

4. Constitutional Law--Executive Power--Encroachments

Method of selection of constitutional officers is provided by constitution and may not be altered by legislature. N.H. Const.pt. I, art. 37 ; pt. II, art. 46.

OPINION

The following resolution was adopted by the senate on February 10, 1977, and filed with the supreme court on April 22, 1977:

*{*399}* "WHEREAS, Senate Bill 42, An Act establishing a judicial selection commission to recommend at least 3 candidates for all judicial appointments is pending before the New Hampshire Senate; and

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

"WHEREAS, said bill provides for the establishment of a commission consisting of the chief justice of the Supreme Court, 5 members of the New Hampshire Bar Association appointed by its Board of Governors and 5 members of the general public who are not members of the Bar appointed by the Governor and Council; and

"WHEREAS, said bill further provides that the Governor shall inform the chairman of the commission when a vacancy occurs in a judicial position and that the commission shall screen all candidates for a judicial office and select at least 3 candidates for consideration by the Governor and Council; and

"WHEREAS, said bill further provides that the Governor and Council may nominate and appoint one of the commission's selections to the judicial position or may nominate and appoint some other person to said position pursuant to Part II, Article 46 of the Constitution of New Hampshire, but if one of the commission's selections are [sic] accepted, the appointment shall be made within 60 days; and

"WHEREAS, an amendment to said Senate Bill 42 has been proposed which would remove the requirement that the Governor inform the chairman of the commission when a vacancy occurs and the requirement that the appointment of one of the commission's selections, if accepted, be made within 60 days; and

"WHEREAS, the Constitution of New Hampshire, Part II, Article 46 provides that all judicial officers shall be nominated and appointed by the Governor and Council; and

"WHEREAS, the constitutionality of Senate Bill 42 has been questioned, now therefore be it

"RESOLVED, that the Justices of the Supreme Court be respectfully requested to give their opinion upon the following questions of the law:

*{*400}* "1. Do the provisions of Senate Bill 42 conflict with the provisions of Part II, Article 46 of the Constitution of New Hampshire?

"2. Would the provisions of said bill, as amended by the proposed amendments, conflict with the provisions of Part II, Article 46 of the Constitution of New Hampshire?

"3. Do the provisions of said bill, as presently drafted or with the proposed amendments, conflict with any other provisions of the Constitution of New Hampshire?

"BE IT FURTHER RESOLVED, that the President of the Senate transmit 7 copies each of this resolution, Senate Bill 42, and the proposed amendment to Senate Bill 42 to the Clerk of the Supreme Court for consideration by said court."

The following answers were returned:

To The Honorable Senate:

The undersigned, justices of the supreme court, return the following reply to the questions presented in your resolution adopted February 10, 1977, but not filed in this court until April 22, 1977.

Senate bill 42 would establish an eleven-member judicial selection committee consisting of five appointees from the New Hampshire Bar Association, one person from each of the five councilor districts appointed by Governor and Council, and the chief justice of the state supreme

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

court.

Whenever a vacancy occurs in a judicial position, the Governor is required to inform the commission, which then convenes, accepts suggestions for candidates, carefully screens all candidates and, within thirty days after the vacancy occurs, selects at least three candidates for consideration by the Governor and Council. The names of candidates (but nothing else) are to be kept in strict confidentiality by the commission, but presumably the Governor or any Councilor could disclose the names, and the findings and recommendations without names could apparently be disclosed by anyone.

The Governor is free at any time to nominate whomever he chooses but would be required to do so within sixty days of the submission if the nominee is one of the persons recommended by the commission.

*{*401}* An amendment to this bill would remove the two requirements to be imposed on the Governor, namely, notice of a vacancy and appointment of a recommended person within sixty days. The proposed amendment also would direct the chairman to convene the commission not only when a vacancy occurs but also when a vacancy may be anticipated or at any other time.

The issue before this court is whether Senate bill 42 as it is or may be amended conflicts with the Constitution of the State of New Hampshire and particularly part II , article 46 and part I , article 37.

[1, 2] We hold that the judicial selection commission proposed to be established by the legislature is an unconstitutional encroachment upon the powers of the Governor and the Council.

Our state constitution provides that state government shall consist of three separate branches:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity. N.H. Const. pt. I, art. 37.

[3] When it comes to judges, the power of nomination is granted exclusively to the Governor, and the power of appointment is granted exclusively to the Council:

All judicial officers... shall be nominated and appointed by the governor and council... N.H. Const. pt. II, art. 46.

Two years ago this court had before it a bill relating to appointments to the statutorily created post of health and welfare commissioner. In upholding the legislature's power under pt. II, art. 5 to "fix laws" for the naming of nonconstitutional officers this court distinguished such a post by saying:

[4] "The constitution provides for certain constitutional State officers and directs the manner in which they are to be appointed.... The method of selection of constitutional officers is *{*402}* provided by the constitution and **may not be altered by the legislature.**" **Opinion of the Justices,** 115 N.H. 159, 161, 335 A.2d 642, 643 (1975) (emphasis added).

This decision merely reaffirmed this court's earlier decision in **Brouillard v. Governor and Council,** 114 N.H. 541, 547, 323 A.2d 901, 905 (1974), that said judicial officers "must be

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

appointed by the Governor and Council and **no change** can be made in that method of selection" (emphasis added).

In striking down an executive branch attempt to regulate conflicts of interests among executive branch appointees this court last year said that "(T)he separation of powers requirement of the constitution (N.H. Const. pt. I, art. 37) is violated by an encroachment by one branch of government upon a constitutional function of another... However desirable comprehensive legislation... may be, [such] is the prerogative and responsibility of the legislature and not of the executive." **Opinion of the Justices,** 116 N.H. 406, 413, 360 A.2d 116, 122 (1976). Should the Governor, as he has done, wish to set up a screening or selection mechanism on his own he is naturally free to do so.

By executive order the Governor of Massachusetts established a Judicial Nominating Commission in 1975. In upholding his purely voluntary action the Supreme Judicial Court of Massachusetts held "the Governor has the constitutional right to establish" such a commission because, like the legislature, "the Governor has broad discretion to select the means he will use in executing a constitutional duty." **Opinion of the Justices,** 334 N.E.2d 604, 609 (Mass. 1975). That court did not indicate such a board could have been imposed on the Governor by the legislature.

In the 1974 Constitutional Convention, Resolution 102 was offered along lines similar to the bill before us. It was not adopted by the convention and doubt has been expressed that a statute, rather than a constitutional amendment, would be constitutional. **See Report of Governor's Commission on Court System Improvement,** 16 N.H.B.J. 1, 69 (1974). Those states with such agencies have done so by constitutional amendment. **See , e.g. ,** Cal. Const. art. VI, § § 16 ; Mo. Const. art. 5 ; Alas. Const. art. IV, § § 5-9 ; Iowa Const. art. V., § § 15-18.

*{*403}* Regardless of the merits of the bill, it nevertheless encroaches on a constitutional power of the Governor by "altering" or "changing " the selection process for judges.

The first two questions are answered in the affirmative and, because of pt. I, art. 37 , so is the third.

William A. Grimes

Maurice P. Bois

Charles G. Douglas, III

To The Honorable Senate:

The undersigned justices of the supreme court return the following reply to the questions presented in your resolution adopted February 10, 1977, and filed in this court on April 22, 1977.

Senate bill 42, in both its original and amended form, proposes the creation of a judicial selection commission which would accept from various sources, including the Governor, the names of candidates recommended to fill vacant judicial offices. The commission would screen all candidates and recommend at least three individuals for each vacancy. The findings concerning each candidate would be submitted to the Governor and Council. All commission proceedings and recommendations would be kept strictly confidential. The Governor and Council would thereafter nominate and appoint to each vacant position either someone whom the commission recommended or anyone else, whether or not such person was considered by the commission.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

The bill in its original form contains three additional requirements that are deleted under the proposed amendment. First , the Governor shall inform the commission when a vacancy occurs, and the chairman shall then convene the commission. Second, the commission shall make its recommendation within thirty days after a vacancy has occurred. Third, if the Governor and Council accept one of the commission's recommended candidates, the appointment shall be made within sixty days of the receipt of the recommendations.

Questions No. 1 and 2 ask respectively whether the bill in its original and amended forms would violate part II , article 46 of the New Hampshire Constitution. This provision states that all judicial officers "shall be nominated and appointed by the Governor and *{*404}* Council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto."

In support of its conclusion that the bill is unconstitutional, the majority refers to several states that have amended their constitutions in order to effectuate changes in their judicial selection processes. For a more comprehensive list of such states, see Note, **Judicial Selection in the States: A Critical Study with Proposals for Reform,** 4 Hofstra L. Rev. 267, Table I at 284 (1976). What happened in these states is not relevant for two reasons. First, these states have adopted the so-called merit selection plan, **see id.** at 280-84; Note, **Judicial Selection and Tenure--The Merit Plan in Ohio,** 42 U. Cinn. L. Rev. 255, 262-63 (1973), which differs from the proposals before us in several significant respects. Although both the merit selection plan and the two versions of Senate bill 42 provide for a judicial selection commission which recommends candidates to the Governor, under the merit selection plan the Governor must appoint a candidate from the commission's list. Runkle, **The Judicial Nominating Commission,** 54 Jud. 114 (1970); Note, **Analysis of Methods of Judicial Selection and Tenure,** 6 U. Suffolk L. Rev. 955, 963 (1972). Furthermore, under the plan adopted in many states, if the Governor fails to appoint within a certain number of days, the Chief Justice of the Supreme Court becomes vested with the appointment authority. G. Winters, Selected Readings: Judicial Selection and Tenure 182, 188-89 (1967). In contrast to the merit selection plan, both proposals before us allow the Governor and Council to disregard entirely the commission's recommendations and nominate and appoint anyone they desire. Additionally, neither version provides for any transfer of authority from the Governor and Council to any other state official or group under any circumstances.

Second, the states that have amended their constitutions to implement the merit selection plan had previously chosen judges through constitutionally mandated popular elections--Note, **supra,** 4 Hofstra L. Rev. at 280--84--a selection method that is not only very different from our own but also fundamentally at odds with the merit selection system. Adoption of the merit selection plan in these "election states" could be achieved, of course, only through *{*405}* a constitutional amendment. **See id.** at 316; Note, **Judicial Selection in North Dakota--Is Constitutional Revision Necessary** ? 48 N.D.L. Rev. 326, 328-29 (1971-72).

If any state's situation with respect to judicial selection reform is similar to our own it is that of Massachusetts. The Constitution of Massachusetts, like the New Hampshire Constitution, provides that "[a]ll judicial officers... shall be nominated and appointed by the governor...." Mass. Const. pt. II, ch. 2, § 1 , art. 9. Recently, the Supreme Judicial Court of Massachusetts held that the creation of a judicial nomination commission to advise the Governor on judicial appointments did not violate the constitutional provision quoted above. **Opinion of the Justices to the Council,** 334 N.E.2d 604 (Mass. 1975).

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Contrary to the impression that may have been created by the majority opinion, the Massachusetts court did not sustain the plan on the ground it was voluntarily undertaken by the Governor, as opposed to being undertaken by the legislature. The court did not even mention, let alone rely upon, the fact the commission was created by executive order rather than by statute. The court's statement, quoted by the majority, concerning the Governor's "broad discretion" was made in response to a question whether the Governor had the power to create such a commission. It was only after answering that question in the affirmative that the court went on to discuss the issue relevant to our inquiry today. The court stated that the Governor could delegate to others the power to investigate the qualifications of judicial candidates "as long as he does not surrender to them his responsibility to select a candidate and to make the nomination and appointment." **Opinion of the Justices to the Council,** 334 N.E.2d at 609. The court reasoned that, because the commission's recommendations were not binding on the Governor, his right and duty to select any qualified person he wishes were not "delegated, surrendered, abandoned or unduly restricted." **Id.** at 610. Thus, it was the nonbinding aspect of the commission's recommendations--not the fact that the Governor voluntarily instituted the program--that saved the constitutionality of the scheme.

Turning now to our own cases, in **Opinion of the Justices,** 115 N.H. 159, 335 A.2d 642 (1975), we sustained the constitutionality *{*406}* of a legislative proposal that (1) required the Governor and Council to appoint a health and welfare commissioner from a list of nominees submitted by an advisory commission, (2) fixed a time limit for such appointment, and (3) transferred the power of appointment to the advisory commission upon expiration of that deadline. In the context of that proposal, which bears no resemblance to the present ones, we stated parenthetically that "[t]he method of selection of constitutional officers is provided by the constitution and may not be altered by the legislature." **Id.** at 161, 335 A.2d at 643; **see Brouillard v. Governor and Council,** 114 N.H. 541, 547 , 323 A.2d 901, 905 (1974). We affirm this principle today and inquire only whether Senate bill 42 in either form alters the method of judicial selection in a manner inconsistent with the constitution. We conclude it does not.

The essence of the power to nominate and appoint is the unfettered power to choose any person for judicial office that the Governor and Council wish. Under both versions of Senate bill 42, this authority remains intact: The fact that the Governor and Council would be free to disregard the commission's recommendations and appoint someone who was rejected or not even considered by the commission means that they will continue to exercise complete control over the nomination and appointment process. The proposed commission would have no veto power over the final selection. If Senate bill 42 attempted to give the legislature veto power over the Governor's choice, a constitutional amendment would be necessary. Me. Const. art. 5 , pt. 1, § 8. Or if the bill proposed a transfer of appointment power to another officer, or department of government, the measure would be unconstitutional. **Curtis v. Cornish ,** 109 Me. 384, 84 A. 799 (1912). Also, if the bill called for binding recommendations, we would not sustain its constitutionality. But the proposed legislation would cause no such fundamental changes.

The amended bill does nothing more than create a citizens' committee to do what any citizen may do--namely, recommend to the Governor and Council persons deemed to be qualified for judicial office. The only purpose of creating such a system is to aid the Governor and the Council in fulfilling their constitutional duties. At present, the New Hampshire Bar Association screens candidates *{*407}* for appointments to state judicial positions. 3 N.H.L. Weekly, 103 & 279 (1976-77). The creation of a judicial selection commission would simply formalize the advisory efforts presently and previously undertaken by the bar association.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

The majority more than casually mentions that the bill may not guarantee complete confidentiality. One of the memos we received suggests that the bill's confidentiality provision might conflict with RSA ch. 91-A (Supp. 1975). Whether the bill provides too much or too little confidentiality is, of course, irrelevant to the constitutionality of the scheme.

The majority's reference to the **Report of Governor's Commission on Court System Improvement,** 16 N.H.B.J. 1 (1974), is both inaccurate and misleading. Even a casual reading of the **Report** reveals that the "doubts" expressed were with respect to the constitutionality of an adoption by statute of the merit selection plan as discussed in paragraph 5 of this opinion. In reference to that plan the **Report** states: "The imposition by statute of any limitation upon [the Governor and Council's right to nominate and appoint], such as by requiring that the appointment be made from two or more nominees by a statutory panel or committee, would have dubious validity." **Id.** at 69.

More importantly, the **Report** goes on to recommend the "statutory enactment of a merit selection plan which would contain all the elements of the statutory selection plans used elsewhere except the requirement that the Governor **must** appoint from the list of nominees recommended by the selection panel or committee." **Id.** (Emphasis in original.) It is obvious that the Governor's Commission regarded the statutory creation of a judicial selection commission as constitutional as long as the commission's recommendations did not bind the Governor and Council. Thus, the **Report's** conclusions, based upon careful and thorough research and study, are directly at odds with the majority opinion.

We are unable to find in the amended bill any substantive restriction or encroachment upon the power of the Governor and Council, and the majority has articulated none. The inescapable conclusion is that the bill in its amended form is constitutional. The answer to Question No. 2 is "No."

*{*408}* The additional requirements contained in the original version of Senate bill 42 do not violate part 2, article 46 and so the answer to Question No. 1 is also "No." The Governor's task of informing the commission that a vacancy exists does not diminish or interfere with his power to nominate and appoint the candidate of his choice. The requirement is merely a means of triggering the operation of the commission. That the commission must convene and make its recommendations within thirty days, is, of course, a command addressed to the commission and does not involve the Governor in any way. The bill contains no implicit requirement that the Governor postpone his decision for thirty days to give the commission an opportunity to make its decisions. Finally, the sixty-day period (within which the appointment must be made if the Governor and Council choose one of the commission's recommended candidates) is valid, subject only to the constitutional mandate that three days lapse between nomination and appointment. N.H. Const. pt. II, art. 46.

With respect to the separation of powers issue the majority relies upon our statement in **Opinion of the Justices,** 116 N.H. 406, 413, 360 A.2d 116, 122 (1976), to the effect that the constitution is violated when one branch of government encroaches upon a constitutional function of another. Without identifying any impermissible encroachment, the majority declares the proposed legislation to be contrary to the separation of powers provision. N.H. Const. pt. I, art. 37. It is difficult for us to comprehend how the nonbinding suggestions of an eleven-member commission, none of whom are legislators or appointed by legislators, five of whom are appointed by the Governor and only one of whom comes from the judiciary can possibly amount to an unconstitutional encroachment upon the authority of the Governor and Council. The answer

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

to Question No. 3 is "No."

Frank R. Kenison

Edward J. Lampron

T. William Bigelow, legal counsel, filed memorandum in behalf of Governor Meldrim Thomson, Jr.

Charles H. Toll, Jr., and **William B. Roberts** filed memorandum.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 5 FILE

§ 4:44. Hearing Prior to Confirmation of Judicial Appointment.

Prior to making any judicial appointment with the governor under the provisions of the constitution, the executive council shall hold a public hearing to allow any member of the public who so desires to offer testimony on the prospective judicial appointee. Notice of the hearing shall be provided at least 7 days prior to the date of the hearing in at least 2 newspapers of statewide circulation. Prior to making the judicial appointment, the executive council shall consider the testimony made at the public hearing.

History

Source. 1997, 159:2, eff. Aug. 8, 1997.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 6

Art. 40. Chief Justice to Preside on Impeachment of Governor.

Whenever the governor shall be impeached, the chief justice of the supreme judicial court, shall, during the trial, preside in the senate, but have no vote therein.

Annotations

1. Nature of proceeding.

That the chief justice of the supreme court presides when a governor is impeached does not change the proceeding from a legislative to a judicial one. In re Mussman, 112 N.H. 99, 289 A.2d 403 (1972).

Cited. Opinion of the Justices, 66 N.H. 629, 33 A. 1076 (1891); Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970); Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).

Library References

CJS States § 101.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 2

Art. 73-a. Supreme Court, Administration.

The chief justice of the supreme court shall be the administrative head of all the courts. He shall, with the concurrence of a majority of the supreme court justices, make rules governing the administration of all courts in the state and the practice and procedure to be followed in all such courts. The rules so promulgated shall have the force and effect of law.

Amendments--1978. Added this article.

Annotations

Analysis

1. Construction.
2. Disciplinary proceedings.

1. Construction.

This article makes clear that the judiciary has the authority to promulgate and administer rules concerning practice and procedure in the courtroom. State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983).

2. Disciplinary proceedings.

Mandatory feature of bill, which requires that supreme court suspend the salary and benefits of every judge suspended for misconduct, intrudes unduly upon court's superintendence power under part II, article 73-a, which includes the authority to exercise discretion in determining whether to suspend a judge without pay; as such, it impermissibly encroaches upon an exclusive judicial function in violation of the separation of powers mandate of part I, article 37. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

Since New Hampshire Constitution vests discipline of legal profession in supreme court and legislative branch regulates psychologists, and there are marked differences between the substantive practice of each profession and the manner in which they deal with the public, insofar as majority of psychologist's time is spent with individuals patient in a private office, and the only records created are the notes of the psychologist, a less stringent burden of proof in proceedings involving psychologist certificates is rational when assessing the difficulty of proof in disciplinary proceedings. Petition of Grimm, 138 N.H. 42, 635 A.2d 456 (1993).

Cited. State v. Wentworth, 118 N.H. 832, 395 A.2d 858 (1978); Nelson v. Public Service Company of New Hampshire, 119 N.H. 327, 402 A.2d 623 (1979); State v. Hastings, 120 N.H. 454, 417 A.2d 7 (1980); State v. Wheeler, 120 N.H. 496, 416 A.2d 1384 (1980); State v. Elbert, 121 N.H. 43, 424 A.2d 1147 (1981); State v. Preston, 124 N.H. 118, 467 A.2d 243 (1983); State v. Brown, 125 N.H. 346, 480 A.2d 901 (1984); State v. Cere, 125 N.H. 421, 480 A.2d 195 (1984); State v. Meister, 125 N.H. 435, 480 A.2d 200 (1984); State v. Cooper, 127 N.H. 119, 498 A.2d 1209 (1985); Rousseau v. Eshleman, 128 N.H. 564, 519 A.2d 243 (1986); State v. Hughes, 135 N.H. 413, 605 A.2d 1062 (1992); In re Tocci, 137 N.H. 131, 624 A.2d 548 (1993); In re Proposed N.H. Rules of Civil Procedure, 139 N.H. 512, 659 A.2d 420 (1995).

Library References

NH Practice 1 N.H.P. Criminal Practice and Procedure § 568.

2 N.H.P. Criminal Practice and Procedure §§ 734, 905.

CJS Courts § 170 et seq.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 8

§ 490:1. Justices.

The supreme court shall consist of a chief justice and 4 associate justices, appointed and commissioned as prescribed by the constitution.

History

Source. RS 171:1. CS 181:1. 1855, 1659:1. 1859, 2211:4. 1874, 97:1. 1876, 25:1. GS 189:1. 1877, 25:1. GL 208:1. PS 204:1. 1901, 78:1. PL 315:1. RL 369:1. 1945, 174:3. RSA 490:1. 1978, 33:1, eff. June 23, 1978.

Amendments--1978. Deleted "and such justices as may be retired from regular active service because of permanent disability" following "constitution".

CROSS REFERENCES

Appointment and term of justices, see New Hampshire Constitution, Part 2, Article 73.

Annotations

Cited. Claremont Sch. Dist. v. Governor, 142 N.H. - , 712 A.2d 612 (1998).

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 9

§ 491:1. Justices.

For fiscal year 1992 and succeeding years, the superior court shall consist of a chief justice and 28 associate justices. Said justices shall be appointed and commissioned as prescribed by the constitution and shall exercise the powers of the court unless otherwise provided.

History

Source. 1901, 78:1. PL 316:1. 1927, 51:1. RL 370:1. 1945, 174:1. 1951, 221:1. 1953, 168:1. RSA 491:1. 1963, 260:1. 1969, 453:1. 1971, 456:7. 1977, 600:45. 1983, 381:1, 10; 383:20. 1991, 202:1, eff. July 1, 1991.

Amendments--1991. Deleted the former first sentence and substituted "1992" for "1986" and "28" for "24" and deleted "if affirmed by specific appropriation after January 1, 1985" following "justices" in the new first sentence.

--1983. Chapter 381:1 rewrote the first sentence.

Chapter 381:10 rewrote the first sentence.

Chapter 383 rewrote the first sentence and deleted the third sentence.

--1977. Rewrote the former first sentence as the first and second sentences.

--1971. Rewrote the first sentence.

--1969. Amended section generally.

--1963. Substituted "seven" for "six" preceding "associate justices".

Revision note. At the beginning of the section, deleted the former first sentence, which provided that "for fiscal year 1978 the superior court shall consist of a chief justice and 13 associate justices", and deleted "for fiscal year 1979 and succeeding years" at the beginning of the second sentence as no longer necessary.

CROSS REFERENCES

Appointment and term of justices, see New Hampshire Constitution, Part 2, Article 73.

Designation of retired justices as judicial referees, see RSA 493-A.

Retirement of justices for disability, see RSA 491:2.

Library References

CJS Judges §§ 8, 12.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

Attachment 10

Art. 73. Tenure of Office To Be Expressed in Commissions; Judges to Hold Office During Good Behavior, Etc.; Removal.

The tenure that all commissioned officers shall have by law in their offices shall be expressed in their respective commissions, and all judicial officers duly appointed, commissioned and sworn, shall hold their offices during good behavior except those for whom a different provision is made in this constitution. The governor with consent of the council may remove any commissioned officer for reasonable cause upon the address of both houses of the legislature, provided nevertheless that the cause for removal shall be stated fully and substantially in the address and shall not be a cause which is a sufficient ground for impeachment, and provided further that no officer shall be so removed unless he shall have had an opportunity to be heard in his defense by a joint committee of both houses of the legislature.

Amendments--1966. Amended article generally.

--1793. Substituted "governor" for "president" preceding "with consent".

Annotations

Analysis

1. Tenure.
2. Removal.
3. Disciplinary action.

1. Tenure.

Where plaintiff's commission of office failed to accurately express the tenure of office provided by statute, plaintiff was entitled to protection commensurate with the extent of his reliance on the express terms of his commission. Blake v. State, 115 N.H. 431, 343 A.2d 223 (1975).

2. Removal.

The power to remove a state officer for cause involves an executive and legislative proceeding. In re Mussman, 112 N.H. 99, 289 A.2d 403 (1972).

3. Disciplinary action.

Suspending pay of a judge does not violate those provisions of state constitution providing for tenure and permanent salaries for judges. Opinion of Justices (Judicial Salary Suspension), 140 N.H. 297, 666 A.2d 523 (1995).

The powers of impeachment and removal for reasonable cause are not the exclusive remedies for judicial abuse, and the supreme court, under its general superintendence power over the courts of the state, has authority to take disciplinary action short of removal. In re Mussman, 112 N.H. 99, 289 A.2d 403 (1972).

Cited. Piper v. Supreme Court, 723 F.2d 110 (1st Cir. 1983), aff'd, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985); Opinion of the Justices, 128 N.H. 17, 509 A.2d 746 (1986); Bastian v. Kennedy, 829 F.2d 1 (1st Cir. 1987); Witte v. Justices of N.H. Superior Court, 831 F.2d 362 (1st Cir. 1987); Opinion of Justices (Furlough), 135 N.H. 625, 609 A.2d 1204 (1992); Claremont Sch. Dist. v. Governor, 142 N.H. - , 712 A.2d 612 (1998).

Library References

Bar Journal The "people's right to reconstruct" the judiciary is provided by this article and article 4 of

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

this part of the New Hampshire Constitution. The Independence of the Judiciary, 1 N.H.B.J. 28 (July 1959).

CJS Judges § 21 et seq.

States §§ 92, 98-101.

ALR Power of court to remove or suspend judge. 53 ALR3d 882.

Sexual misconduct as ground for disciplining attorney or judge. 43 ALR4th 1062.

(c) 1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Inc. All Rights Reserved.

To: The House Judiciary Committee
Room #208 L.O.B. Concord, NH.

FILE COPY

RE: HB #568 of 1999

This is to follow-up my testimony as speaker #11 of 11 for about two minutes during this public hearing that lasted for almost two hours from just after 10 am to 11:50 o'clock a.m. (as advertised on page 361 of last Friday's (Feb.26'99) HOUSE RECORD Vol. 21, No. 22.

My suggestion came after speaker#10 Charles Rogers' history lesson on RSA Ch. 643:1 Official Oppression (after listening to speaker #9 Caroline Douglas testify that Article 8 of the NH Constitution,Part the First gives you this power, such as for to have any judge explain to such a panel as to why they abuse their discretion in applying the rules of evidence against one party but not another, resulting in such actions like 54 interlocutory appeals from Judge Nadeau's Superior court cases; myself have done an interlocutory appeal from another judge.) My idea being to put the existing paragraph for RSA Chapter 643:1 Official Oppression into a Roman numeral I paragraph and adding a paragraph II as to where to take said complaints to this review panel when the 640:2,II(a) public servant being complained against is a judge since noone of the "brothers" would dare find a fellow member guilty of a violation let alone a misdemeanor. The wording is left up to you with assistance if called for.

And since this bill was going into extra innings by about 50 minutes I said that I'd write my other comments which I do below:
1. to Soltani's remark of an oligarchy, see also "dulocracy" in BLACK's LAW DICTIONARY; and NOT a democracy BUT a Republic (#2 of my letter of 2/9/99 re; HB#53) 2. Sandra Keans' question of Judge Kathleen McGuire reversed 68 times on appeal but with George Manias learning from his mistakes,I compare the judges of today like in my NH Supreme Court case giving no reason but a declination (see copy of my letter of yesterday to the House Finance Committee) to that of Federal Judge Shane Devine, recently deceased who would rule against me, but that he'd at least give his reasons); 3. to remind you all of my paragraph #3 of HB53 letter of 1/13/99 of Fred Upton's statement of "internal self policing" by the JCC v.s. what I call the "check and balance" re: Kimon Zachos statement as speaker #5, also for what Peter Milham also said as speaker #6, both attorneys, the former Chairman of this Committee; 4. to inquire as to why the 7-years compared to 4,6,8+12 yrs. in other states (paragraph #1 of my HB53 letter of 1/13/99,) to be maybe 5 years as suggested by Sen Sheila Roberge, speaker #4; 5. for you to get sample copies of these questionnaire forms sent to SOME lawyers to evaluate judges, BUT not to Mrs. Douglas as she said, or others who had their G.A.L. certificates revoked by retaliation; note: Judge Nadeau,Joseph refused to let me see the ones in his office.

Also enclosed/attached hereto being what I said I promised to give to you: that of pages 1 + 77 from HB1338 of 1998 dealing with former Rep. Phil Cobbin's testimony about the court not correcting errors (as it relates to #2 above in paragraph #3.

With misc. from my notes being two items:a) Rep. Dick Marple's example of six foxes + 2 roosters guarding the hens,with Dick having been called the old rooster; and b.) another Mrs. Douglas note that just because some judges don't like the "adultry" charges in the divorce proceedings to not cost three extra days of trial, that RSA Ch 457:41, 458:7,11 +/or 645:3 be ignored; now I see why some judges refuse to place a plaque of The Ten Admendments in their Courtrooms, them already screwed up by sentencing thieves to jail instead of demanding restitution to the seventh degree per Proverbs 6:30-31, that would have Fairbanks paying off for the rest of his life, but that maybe only in part since who was his partner as remarked by the FBI?

In summary to amend this bill by rewording RSA Ch. 643:1 Official Oppression since as Chuck Rogers said, there having been only two cases annotated for 1902 and 1851, with more corrupt officials today!

Tuesday March 2nd, 1999

Joseph S. Haas, Jr.
P. O. Box 218
Ashland, N.H. 03217

To: The House Finance Committee

From: Joe Haas

RE: "ADMINISTRATION OF JUSTICE AND PUBLIC PROTECTION"
10:40 am - 12:00 o'clock high noontime
presentation by the Judicial Branch

Date: Monday, March 1st, 1999 @ 2:15 p.m.

This is to follow up my listening to ALL of the speakers (Brock, Goodnow, Nadeau, Kelly & (the singing) Mahr) this morning, finding Donald Goodnow's statement @ 11:27 am of interest in that the NH Supreme Court needs two (2) more staff attorneys so that more cases are NOT given the "discretionary" treatment, like as what happened to me with the Feb.23rd'99 "declin"ation of my appeal #98-253, photocopy of the order attached hereto, BUT which is considered by me as UN-Constitutional as indicated below, and that ought not to add to the court but to subtract those five (5) Supreme Court judges for their failure/refusal to do their jobs.

In Article 4, Part 2 of the New Hampshire Constitution it is written that these courts are "holden" to hear, try and determine ... all manner of...actions...whatsoever ...whether the same be criminal or civil. Emphasis is added for the word try, as in a trial by jury for real estate matters/Petitions to Quiet Title (Article 20, Part 1, NH Const.) wherein this method of procedure shall be held sacred, sacred as defined to be consuming (#5 @ page 1996 of Noah Webster's Third New International Dictionary, (c)1966) BUT with the court going by the definition of consuming #1 to destroy rather than #4 to engage or absorb fully the attention, interest or energy of: ENGROSS (when the rage and the hatred that (consume) - one are more than one can bear - Kay Boyle) __ as what happened to Carl Drega, (see SB # 47 for Monday, March 8'99 @ 9:00 a.m. Room 101 LOB).

Thus would your committee direct ALL requested monies from THEM to first be applied to this matter for one hundred percent (100%) compliance with the Constitution to avoid more discrimination (defined in BLACK'S LAW DICTIONARY, 6th edition, (c)1991 @ page 464 to be: "A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored. Baker v. California Land Title Co., D.C.Cal., 349 F.Supp. 235, 238, 239." (19___). A copy of this letter will be filed with my MOTION TO RECONSIDER within ten days, so that until they receive the money, they will continue my case, otherwise for me to sue the State of New Hampshire in the State Board of Claims for theft of both principal plus interest, meaning the land/building and rents already amounting to more than $½ million!

Yours truly,

Joseph S. Haas, Jr.
P. O. Box 218
Ashland, N.H. 03217

pc: NH Supreme Court

and Rep. Paul Mirski, re: House Address #1
set for Wed.3March99 @ 3:00 o'clock p.m.
Room #208 Legislative Office Building (LOB).

plus: Judge David A. Brock
c/o Orr & Reno, Concord, N.H. 03301

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 98-253, Brian J. Shedd v. Joseph S. Haas, Jr. & a., the court upon February 23, 1999, made the following order:

Notice of appeal is declined. See Rule 7(1).

Distribution:

Clerk, Grafton County Superior Court 94-E-035
William H. Hopkins, Esquire
Mr. Joseph S. Haas, Jr.
Honorable Edward J. Fitzgerald, III
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel,
Clerk

whether you like it or not, the perception is becoming out there that those systems in some cases fail dramatically. There's a sticktion problem, if you will, to us a hydraulics analogy, to where you have to have a lot of control surface movement attempt before you actually see an outcome. You've got to have a lot of bad conduct before a judicial officer gets pulled back.

In the guardian ad litem area, you should probably consider or I would suggest you consider looking at regulating the standards of review and to begin to put some duties on the State Supreme Court to have a duty to correct errors. Because I can assure you, they're just as arrogant as the federal judiciary that they will steadfastly claim they have no duty to correct errors. And that is one of the biggest black eyes for the government is for people injured by government action to then face a tribunal that at its whim may or may not take action. What you leave your citizens with is a lot of emotional wreakage that later is going to breed nothing but contempt and hatred for the government, and in the family law area, it's a great generator of that.

SEN. ROBERGE: But Phil, Judge Nadeau never said the guardian ad litem made an error, he always – he said that she was right. You have duty to correct errors, where do we go to –

REP. COBBIN: Ah, but I'm not talking about Judge Nadeau's conduct here. In that case, when you're looking at the appellate mode, you bring a train wreck of an appeal over guardian ad litem performance, there is no duty for the State Supreme Court to correct errors. And typically, what State Supreme Courts, just like the US Supreme Court, will take cases based on the interest of the judges. And typically they're looking at what kind of law they have interest in writing, not necessarily correcting errors.

So, my criticism of the State Supreme Court is equally in force with the US Supreme Court. They do not – they have come to view themselves as having no responsibility to correct errors in judicial proceedings. I would suggest that that is an outgrowth of their continued insulation. Now, that – let me just set that aside, and I'll go on to the issues with – which the committee was constituted for this article.

Article IV, Section 4
U.S. Constitutional Republic

For the record, Mr. Chairman, I'd like to thank you and the committee for giving me the opportunity to speak, because I would just like to sketch out an argument that's a little different related to this, which I believe puts the monkey back on the legislator or constitutional conventions responsible to address the issue.

We've all heard about the bait and switch issue. What I don't think has really been pursued or I haven't heard of it being pursued, and I could be wrong, you may have already pursued it, is that I believe that those articles raise the issue of a potential violation of the federal guarantee to the states and its inhabitants of a republican form of government. Under our constitution the states are guaranteed a republican form of government. And what a republican form of government is, is it's a government by representation. It is by the assent of the government of the sovereign, if you will, their assent to the laws.

What we're seeing here, what makes this article so dangerous, and dangerous, I believe, because it would suggest to the federal judiciary to try and maneuver in the cloakroom for the same powers is it cannot be – It is pretty clear that the intent over time of that article has been to view legislative power being granted to the judicial branch, and that it's not just me that says that that is a form of tyranny. The founders said it, and the United States Supreme Court in inherencey doctrine cases has tended to say it, that when you combine this powers in one branch or the other, that's inherently totalitarian. And I want to make the argument for history, if you will, that it's also inherently against the republican form of government, because it continues that erosion of the people's representation in the lawmaking branch.

As Rep. Weyler has made an observation about this stuff, open up your constitution and see which branch of government comes first when we look at the organization of the government. You see an interesting phenomenon in the federal constitution and in the state. It doesn't put the judicial branch first, it puts the legislative branch, because it is the most representative form of the government.

Now, under republicanism you can have a unicameral legislature, and that wouldn't offend the republican form of government, it would still be the lawmaking by representation. Nebraska has a unicameral legislature.

J-6

NEW HAMPSHIRE CONSTITUTION EXAMINATION STUDY COMMITTEE
Legislative Office Building, Room 208
Concord, New Hampshire
Thursday, October 8, 1998

HOUSE BILL 1338-FN-A, AN ACT establishing a study committee to examine the adoption of articles 41, 72-a and 73-a of the second part of the New Hampshire constitution.

Testimony of:
Mr. Joseph Haas 1
Mr. Kenneth Curran . . . 15
Mr. Hank Amsden. 33
Rep. Roland Hemon . . . 46
Ms. Rosemary Ridge . . . 63
Rep. Philip Cobbin 75

CHAIRMAN JACOBSON: Okay, we'll start the hearing. Mr. Haas.

JOSEPH HAAS: Good morning, Mr. Chairman and member of the committee, Rep. Richardson. I just talked with Kevin Moquin downstairs at the press conference for VOCALS, and I asked him if he submitted my letter to you all of September 10th, he said he has not. So, I have it right here, a photocopy.

CHAIRMAN JACOBSON: Okay, thank you.

MR. HAAS: I'll start with that if I might. I have some other papers, I'll just give them as I go along here.

CHAIRMAN JACOBSON: Okay.

MR. HAAS: And I won't read from the letter, I'll just summarize. I remember from a previous hearing, you asked for a case or cases where a rule has overridden a statute. What I have is evidence, in my own case, in

Grafton County, where I went through a sheriff's sale. Based upon the rule, number 161, Superior Court, there was supposed to be an injunction bond issued, which never was.

The only excuse not to issue one is for good cause shown. There was no good cause shown, there was no hearing for good cause. What happened was the statute that I tried to bring forward on a motion for discovery was overridden. That statute on a sheriff sale says that there must be, when there's a sale of corporate interest, two posting in two adjoining towns. I asked, where are these posters, in the court? The judge said he didn't know what I was talking about.

Myself as a landlord, I was changed from a landlord into a tenant in this situation, which according to their own case law cannot be done, because to change the position of the parties in a preliminary injunction would make the court a party to extortion. I use the word plunder, and I circled the extortion and plunder there, which has amounted to this day of the loss of my building, assessed at $168,000, loss of rents for 50 months or more at $2,000 a month, which is over $100,000. We're talking about a quarter of a million dollars here. And there's no guarantee that once I win in the supreme court that I will get this money back.

On pages 2 and 3, you have the photocopy of the void judicial sales, where it gives basic points that at any departure from the general laws is fraught with great danger, and is likely to result in inconsiderate action, if not unmitigated plunder. What I say is that the court system is not only inconsiderate, they're a bunch of thieves.

If you go to page 3, you'll see that the courts of equity cannot dispense with regulations proscribed by statute. So, you, as the legislature, set up the rules –

REP. BICKFORD: Good morning.

MR. HAAS: Good morning, Rep. Bickford.

REP. BICKFORD: Sorry to be late.

MR. HAAS: That's okay, I'm just getting started.

FILE COPY

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
COMMITTEE ON JUDICIAL CONDUCT

Honorable William R. Johnson, Chair
David A. Hodges, Sr., Vice-Chair
Robert L. Chiesa, Esquire
Honorable Raymond A. Cloutier
Anne Coughlin
Honorable Douglas S. Hatfield, Jr.
Donna K. Lencki
Joseph M. McDonough, III, Esquire
Honorable Walter L. Murphy
John R. Newsom
Donna P. Sytek

FRANK ROWE KENISON
SUPREME COURT BUILDING
CONCORD, N.H. 03301-1476
P.O. Box 1476

Howard J. Zibel, Esquire
Executive Secretary
Donna R. Craig
Assistant Executive Secretary
(603) 271-2646

TDD Access: Relay NH 1-800-735-2964
(nonconfidential calls only)

August 11, 1998

Caroline D. Douglas, Esq.
Two Eagle Square, Suite 402
Concord, NH 03301

Re: Judicial Conduct Committee Records

Dear Ms. Douglas:

Justice Johnson has asked that I respond to your letter to him of August 10, 1998, requesting access to records and documents generated by the Judicial Conduct Committee.

Pursuant to Supreme Court Rule 40(3)(a), "all proceedings before the [judicial conduct] committee, and all information, communications, materials, papers, files and transcripts, written or oral, received or developed by the committee in the course of its work, shall be confidential." Only upon the preparation and filing by the committee of a statement of formal charges do the pleadings and hearing before the committee become public. Rule 40(3)(c).

As a result of the above rules, I cannot honor your request for access to the committee's records and documents. In the event that a public hearing is held in the future before the committee, public notice of that hearing will be given. Only if you are a party to the proceeding would you get individual notice.

Lastly, you state that you were given pamphlets dated in 1996 and 1997. I assume these were the committee's annual reports. In addition, for the last year, the committee has prepared public summaries of each meeting. For your information, I enclose copies.

Very truly yours,

Howard J. Zibel

HJZ:slf

COMMITTEE ON JUDICIAL CONDUCT

Summary of June 12, 1998 Meeting

The Committee considered twenty-one complaints at its meeting on June 12, 1998. The results are as follows:

- In three cases, the Committee voted to obtain a response from the persons complained against.

- Three complaints were dismissed because they did not allege conduct that is in violation of the Code of Judicial Conduct.

- Seven complaints were dismissed because they related to the judges' findings or rulings and thus were not within the Committee's jurisdiction. One of these complaints was also dismissed because it did not allege conduct that is in violation of the Code of Judicial Conduct; and one was also dismissed because it arose out of acts or omissions which occurred more than one year prior to the receipt of the complaint.

- In two cases, the Committee reaffirmed its prior orders dismissing the complaint.

- Four cases were deferred until the next meeting.

- In one case, no action was taken because the complainant did not wish to proceed and the Committee concurred.

- In one case, the Committee voted to request the judge to appear at the next meeting.

The Committee also voted to submit to the supreme court for approval a proposed increase in the quorum requirements from six to seven members for all transactions except Supreme Court Rules 39(9)(d) and 40(5-a). In both, the proposed increase would be from an affirmative vote of five to six or more members of the Committee.

Having been chosen by the American Judicature Society for presentation of their new training program next year, the Committee agreed on either Saturday, February 6 or 13 as best dates.

The Committee scheduled its next meeting for September 18, 1998.

COMMITTEE ON JUDICIAL CONDUCT

Summary of April 10, 1998 Meeting

The Committee considered twenty-two complaints at its meeting on April 10, 1998. The results are as follows:

- In eight cases, the Committee voted to obtain a response from the persons complained against.

- Three complaints were dismissed after preliminary inquiries because they did not allege conduct that is in violation of the Code of Judicial Conduct.

- Four complaints were dismissed because they related to the judges' findings or rulings and thus were not within the Committee's jurisdiction. Three of these complaints were also dismissed because they did not allege conduct that is in violation of the Code of Judicial Conduct.

- In two cases, the Committee voted to resolve the matter by informal resolution or adjustment.

- One complaint was dismissed because there was insufficient cause to warrant further proceedings.

- In one closed case, the Committee voted to place the complainant's letter on file.

- One complaint was dismissed after preliminary inquiry because it was found to have arose out of acts or omissions which occurred more than one year prior to the receipt of the complaint.

- In one case, the Committee had received information that the complaint had been resolved and decided to check with the complainant to see if she wished to proceed with the complaint.

- One case was deferred until the next meeting.

The Committee scheduled its next meeting for June 12, 1998.

COMMITTEE ON JUDICIAL CONDUCT

Summary of February 13, 1998 Meeting

The Committee considered twenty-eight complaints at its meeting on February 13, 1997. The results are as follows:

- One complaint was deferred pending additional information from the complainant.

- In six cases, the Committee voted to obtain a response from the persons complained against.

- Four complaints were dismissed because it did not allege conduct that is in violation of the Code of Judicial Conduct. One of these complaint was also found to have arose out of acts or omissions which occurred more than one year prior to the receipt of the complaint,

- Seven complaints were dismissed because they related to the judges' findings or rulings and thus was not within the Committee's jurisdiction.

- In one case, the Committee voted to resolve the matter by informal resolution or adjustment.

- One complaint was dismissed after preliminary investigation because there was insufficient cause to warrant further proceedings.

- In two closed cases, the Committee voted to place letters on file.

- One case was dismissed for failure to fill out a complaint cover sheet stating the specific actions taken by the judge which the complainant felt constituted judicial misconduct.

- In three cases, the Committee reaffirmed its prior orders dismissing the complaints.

- In two cases, the Committee continued its investigation of the complaints by opening up a separate inquiry on its own motion. In each of the cases, the Committee voted to obtain a response from the persons complained against.

The Committee scheduled its next meeting for April 10, 1998.

COMMITTEE ON JUDICIAL CONDUCT

Summary of January 17, 1998 Meeting

The Committee welcomed Anne Coughlin, of Concord, as a new citizen member of the Committee.

The Committee considered eleven complaints at its meeting on January 17, 1998. The results are as follows:

- One complaint was dismissed after investigation because no probable cause was found of conduct that is in violation of the Code of Judicial Conduct.

- In one case, the committee tabled the complaint pending the decision in an appeal in the supreme court.

- In two cases, the committee continued its investigation of the complaints by having an informal discussion with a person having information pertaining to the complaints.

- Three complaints were dismissed because they related to judges' findings or rulings, or were substitutes for appeals, and thus were not within the committee's jurisdiction. One complaint was also dismissed because it did not allege conduct that is in violation of the Code of Judicial Conduct.

- One complaint was dismissed as stale. The complaint was also dismissed because it did not disclose sufficient cause to warrant further proceedings.

- One complaint was deferred pending a response from the person complained against.

- One complaint was dismissed both because it related to the judge's findings or rulings, or was a substitute for appeal and because it did not allege conduct that is in violation of the Code of Judicial Conduct. This dismissal was only a partial dismissal, the remainder of the complaint having resulted in an informal adjustment at the meeting of December 19, 1997.

- The dismissal of one complaint was reaffirmed because the Committee concluded that nothing alleged warranted a different result.

The committee scheduled its next meeting for February 13, 1998.

FILE COPY

Submitted by Bill Cushman

Memo on 73A
Court gives itself power to make law

By a Referendum In 1973 The N.H Supreme Court was set up as a Constitutional Court with the power to make its' own rules."**which shall have the force and effect of Law**"For some reason, this bit was NOT included in the ballot. so **the public never voted on it.** It was quietly added to the Constitution. as Article 73A And 816+ pages of rules now exist. Rule # 1 enables the Court to ignore its' own rules..

Among the rules were several dealing with total secrecy in The Judicial Conduct and the Professional Conduct Committees. Consequently the Judge Fairbanks scandal was suppressed for more than thirteen years.

In 1993, Mr. Richard Bosa sued challenging 73A Judge Fauver ruled "The added words were "merely rhetorical".and the suit was denied.

But by then the Fairbanks matter was open & exposed. Bills were filed to reverse 73A (they all failed) and Committees were set up to investigate the whole picture. In 1998 the Subcommittee on H.B 1338 held public hearings regarding the Courts. Testimony was given by Justices, Judges and by the public. The public was even invited to submit questions for Chief Justice Brock. .But due to the Bomb Scare in Concord, their questions were never collected and the session was never rescheduled. (Note, members of the group VOCALS which exposed the Fairbanks case were cross examined by the F.B,I.

During these hearings

- Chief Justice Brock said that 73A was vital for the protections of the rights of the Citizens Court has inherent power to make rules anyhow
- The Secretary of State said no law mandated a voter's guide

Enclosed are copies of relevant documents:

* Copy of Ballot, & copy of Constitution as amended. Also copy of debate in Con Con regarding added words. On reverse is sample letter to complainant threatening sanctions (Jail) if he talks.
* Copy of a letter from Professional Conduct Committee saying complaint closed because Fairbanks no longer practices. so no action will be taken
* List of people who testified..
* Topics covered by public testimony
* Questions for Chief Justice Brock by Committee
* His answers. (I have Video of this)
* Excerpt of Transcript Sec of State "No requirement for Voter's Guide" (p 14)
* Excerpt Ch J. Brock "73 A necessary to preserve liberty of people"(p 47)
* Jacobson says in asking for Unified Court, Voter's guide intimidating (p 48)
* Brock - Pro Se "rather spend money on other luxury than legal fees"(p 17)
* Judge Fauver rules "Force and effect of law" merely rhetorical" (p 4&5)
* Final Report Committee HB 1338 - But what has been accomplished?

I have provided this material so that you may get an idea of how the Courts think and how they influence your lives directly and indirectly. They maintain several lobbying staffs and are active visibly and invisibly.One thing is very clear, only the very well funded and *some* of the very poor can get Justice. The Middle Class has had it!!!

File - Memo73A Feb 15, 1999

Notice

Bait and Switch Tactic Used by N.H. Supreme Court!

Gives it Power to MAKE Law.

1978 Referendum changed N.H. Constitution

As Voted:

4. Are you in favor of amending the Constitution to provide that the chief justice of the supreme court shall be the administrative head of the state courts, and that he shall, with the concurrance of a majority of the supreme court justices, make rules governing procedures in the courts?

As entered to Constitution:

[Art.] 73-a. [Supreme Court, Administration.] The chief justice of the supreme court shall be the administrative head of all the courts. He shall, with the concurrence of a majority of the supreme court justices, make rules governing the administration of all courts in the state and the practice and procedure to be followed in all such courts. The rules so promulgated shall have the force and effect of law.

November 22, 1978

Law? **Law was never mentioned on Ballot!!**

In Fall 1998, Committee On 73A was told several times by representatives of Legal Community that the matter of the added sentence never came up to the Con. Con.

Never Mentioned - Never debated !

However the Journal of the Con Con quotes Delegate Gordon as saying-

JOURNAL OF CONSTITUTIONAL CONVENTIO

the 1974 Con Con. This 73-A was put through as a housekeeping measure, which would enable the Supreme Court to keep the lower courts in uniformity. That's all it was. Do you think that the people, or even we here, if it had been told to us that all rules promulgated have the full force of law, if it had been explained to Martin Gross when he asked this, do you think that we would have voted for it. No way. Let me tell you, neither would the people out there. All I'm asking is, let's give the people who voted for this thing, a chance to correct it at the ballot box, that's all I'm asking.

This leads one to concclude that the words

"force and effect of law "

were purposely left off the ballot

The State of New Hampshire Supreme Court

Professional Conduct Committee • 4 Park Street, Suite 304 • Concord, New Hampshire 03301
(603) 224-5828

April 23, 1993

Mr. James H. Morrow, III
P.O. Box 301
Epping, New Hampshire 03042

Re: Complaint against Stephen A.S. White, Esquire - #93-046

Dear Mr. Morrow:

Your letter of April 19, 1993 is hereby acknowledged.

A copy of your letter has been forwarded to Stephen A.S. White for his information and attention.

After a reply has been received from Mr. White and reviewed by the Committee, I will contact you as to whatever further action the Committee deems proper.

Enclosed for your review is a copy of the Committee's Rules and Procedures.

Please be advised that all matters relating to complaints submitted to the Committee, and any action taken by the Committee shall be kept confidential, unless otherwise provided by the Rules of the Supreme Court. Rule 37(17)(g) states: "All participants in the proceedings shall conduct themselves SO AS TO MAINTAIN THE CONFIDENTIALITY MANDATED BY THIS RULE. Violation of this duty shall constitute an act of contempt of the supreme court." (Emphasis added.)

Sincerely,

James L. DeHart
Administrator

JLD/bjl
Enclosure

The State of New Hampshire Supreme Court

Professional Conduct Committee • 18 North Main Street, Suite 209 • Concord, New Hampshire 03301
(603) 224-5828

April 26, 1990

Ms. Anne Shulins Birchenough
c/o John W. Birchenough
Senior Congress Park Apartments, #111
67 Maple Avenue
Claremont, New Hampshire 03743

Re: Complaint against John C. Fairbanks - #873803

Dear Ms. Birchenough:

The purpose of this letter is to advise you that John C. Fairbanks was disbarred by the New Hampshire Supreme Court on April 18, 1990. The disbarment was based on conduct unrelated to your complaint. But since disbarment is the most severe sanction that can be imposed on Mr. Fairbanks by virtue of filing a professional conduct complaint, the Committee has closed its file on the complaint submitted by you. This action was taken because even if the Committee were to ultimately find professional misconduct on your complaint, Mr. Fairbanks could not be disciplined because he is no longer licensed to practice in New Hampshire.

Thank you for taking the time to submit your complaint.

Sincerely,

Peter H. Fauver
Chairman

PHF/bjl

Dates and Witnesses for the Committee to Study the Adoption of Articles 41, 72-a and 73-a of the Second Part of the New Hampshire Consitution

August 11, 1998	Martin Gross Chief Justice David Brock
August 20, 1998	Diantha Schierloh Linda Wojas Stewart Lamprey Caroline Douglas
August 27, 1998	Stanley & Peter Emanuel Richard Bosa Robert Nichols Kenneth Blevens Caroline Douglas
September 17, 1998	Doris Watson & Bob Gibbs Alice True Bob Tomes William Cushman George Hast
September 29, 1998	Ralph Brewster Dick Marple William Vickers Edward Loh Interviewed by F.B.I.
October 1, 1998	Donna Lee Gangi Lee Hall Mary Bonser Lenore Bronson
October 7, 1998	Michael Brewster Gerald Stanley Timothy Robertson Edward Brown Charles Johnson Carl Scheidegg
October 8, 1998	Joseph Haas (Interviewed by F.B.I. Kenneth Curran Hank Amsden Rep. Roland Hemon Ms. Rosemary Ridge Rep. Philip Cobbin
October 29, 1998	Chief Justice David Brock

Mr. Charles Rodgers of VOCALS was also interniewed by F.B.I.
F.B.I. was working from list they got from Attorney General

Topics Covered by Testimony before Sub Committee on HB1338

Summer and Fall 1998

On Effects of Rules established under 73A

(5th Pass) 10/ 29/98

Topic:	Testimony by	Detail	Time Start
The Courts	Caroline Douglas Esq	Power grab by Courts	
	Philip Cobbin Esq.	Comprehensive assessment	0:27
	Rep Paul Mirski	Many Attys fear Bar & Court	0:52
	Alf Jacobson, Comm Chair	On Duty of Court	1:07
Fiduciary Fraud	Alice True	Charged $ 672,000 For Divorce	1:34
Probate	Diantha Schierloh(Aug 20)	Estate of 1/2 Mil used up by fee	N.A.
	Roland Hemon	Atty billed $ 100,000 of 1/2 Mil	2:04
	Robertson	High Atty fees, Atty bleeding trust	2:14
Profess C C	Lee Hall	Complaint re Fairbanks killed	2:30
Real Estate	Mary Bonser	Long costly battle to keep land	2:40
	Blevens	Court ignores rules at will	3:03
	Curren	Town ignores mineral rights	3:30
	Haas	Sherriff's Sale Rules Ignored	4:15
Divorce	Lenore Bronson	Court ignores statutes	4:54
	Mary Rindge	G.A.L. did not follow order	5:12
	W, Cushman	Assets systematically bled	5:39
	Carl Scheidegg	Divorce & Malpractice	5:55 - 6:54

Please Note: The above was gleaned from tapes made of the hearings. Hearing # 4 of August 20, 1998 was not taped but is available on Transcript.(Mrs Schierloh was Aug 20)
Some speeches are very difficult to summarise.The list of testifiers was kept short on purpose. by the Committee because of time limitations But we feel that discontent with the system is a great deal more widespread that originally believed .
Not all the testimony is included. I have skipped the Constitutional speeches and focussed on the areas where the general public has distinct grievances.

Notes

The Courts: Testimony regarding the nullification of 73a etc will be available separately.
The Supreme Court denies any problem but the public sees it otherwise.
Rep. Mirski accuses Rep Keans of Conflict of interest. She defends herself vigorously
(Jacobson and Mirski segments taken at Executive Session of full Committee)

Fraud & Probate: The attorney/Client relationship is such that there is ample room for fraud. The atty has a huge advantage over the client. Overbilling is a major problem.(Hubbel etc) Mrs. True was billed the entire value of settlement. Sup Ct told give to give it back.She has to sue to get part(Case heard in Dover with NO PUBLIC ALLOWED.). Also the atty. for Mrs True was also criticised by Sup Court for writing himself into the will of an old woman who had just had a stroke. He inherited a house worth $ 1.5 Mil. Robertson and Hemon have similar complaints.

Note the popularity of "Living Trusts". They are a defense against the Probate system

PCC & JCC Lee Hall complaint denied. With control of discipline now in the hands of the Court, The public is kept in the dark. Many believe the hearings should be completely open. As Mr. Jacobson said, if the President's behavior is open why are attorneys so protected. Douglas v Douglas hearing in Sup Ct chamber showed ability of PCC to allow or deny evidence.

Real Estate:: Unsuspecting and uninformed easily relieved of assets
Mary Bonser Has fought to retain family land against grab by Town
Blevens has no other place to take his case, Courts refuse to hear
Curren Town steals his gravel- paid up in the end.
See testimony by Joe Haas,especially the last part. Hard to follow but well worth the effort.

Divorce. About half the work done by attys involves divorce. Both men and women are bled financially, emotionally and socially. We need to take it out of the adverdsarial system..
Bronson could not get the Court to enforce statutes against ex who had left the state.
Ridge(sp?) GAL was instructed to evaluate BOTH husband and wife. Did not investigate husband at all. Note that GAL no longer does GAL work.
Scheidegg: This man is an excellent speaker. He has been battling for 13 years! Very well organsied. Knows how to present his case. Enjoy!

The Constitution guarantees us Justice promptly and without delay. But the Reality is anything but that.
Several years ago, Rep Peter Burling (?) testified on the lack or efficiency in Courts. Every morning at 9:00AM at each Superior Court in the State as many as 10 attorneys are waiting to perform. The clock is running for each of them. The clients pay. even though their atty may not get to perform at all.

Ten Counties x 10 att each = 100 x $ 150.00 per hour = $ 15,000 for what?

Questions for Chief Justice Brock
By SubCommittee HB 1338
October 29, 1998

TIME:

(1) The Voters' Guide for both Article 72-a and 73-a were incomplete, not objective, and 2-07-52 slanted in ways that were over-generalized and not documented. Furthermore, the full impact of the adoption of these articles were not presented to the voters. Example: The Voters' Guide relating to Article 72-a never delineated the impact that its adoption would have on Article 4, Part II.

Need to found

(2) Recommendations:

a) That the Voters' Guide be approved by the body adopting the proposed constitutional amendment.

b) That the actual proposed amendment be printed in the Voters' Guide, along with any explanation and that the actual amendment be printed on the ballot.

1-50-13 (3) A full review of the practices and procedures relating to the guardian ad litem. Much testimony was given, particularly on the point that there was not an investigative report on both sides of a custody issue; also, to look into "ex parte" motions; and further, the use of the concept of mental instability in GAL cases.

(4) Review the question of the removal of trustees on petition by beneficiaries.

SKIP (5) The prospect of more access to the law libraries of the Superior Court.

(6) The question of secret meetings with counsel and judge in chambers and no transcript 2-18-47 provided.

(7) The development of more user-friendly procedures within the court system and the need 1-56-23 to develop printed procedures for those who wish to enter in as pro se. Questions have been raised that suggest that there is sometimes an appearance of prejudice against pro se clients by the court.

2-03-03 (8) The possibility of having an Intermediary Court of Appeals.

(9) Questions raised on the relationship of judges to the Bar Association.

2-25-31 (10) Review and/or reaffirmation of judges.

(11) The possibility of establishing a Special Prosecutor's Office.

(12) A review a the judiciary's relationship of 91-a and Part I, Article 8 of the 2-13-52 N.H. Constitution.

(13) The question of the court making an order. For example: The reversal of the grant of a 2-22-52 new trial without sufficient explanation.

(14) The question of the failure of judges to know the law and make mistakes. The question
1-38-14 of judges recusing themselves without answering for their mistakes, or in some cases not recusing themselves, even though they have made mistakes or have a conflict of interest. One suggestion is that on the question of recusal that there be a panel to make the decision.

1-35-21 (15) A reexamination of the doctrine of "Harmless Error."

(16) The question of the denial of transcripts to court clients. A question of recording
1-28-48 fees of as high as a dollar per page were raised. At issue is the question of right to know under RSA 91-a and that these recordings should be made only at the level of cost or at a more reasonable fee. Plain Error Review

3rd Plain Error

1-25-28 (17) Penalizing clients for lawyers' or courts' personnel mistakes.

(18) The question of procedures with the PCC (Professional Conduct Committee)and the
1-20-21 JCC (Judicial Conduct Committee). Also, the question of more lay members on these committees. Should the Legislature establish committees to handle complaints about lawyers and judges?

(19) The question has been raised on what is the duty of the Supreme Court to correct errors
1-16-59 in judicial proceedings?

(20) What is the meaning of the "right of counsel" in the Constitution? Does it apply to only
1-16-00 members of the Bar? ~~1977~~ 33:1,

(21) What is the relationship between the constitutional provision that justice shall be free and
1-12-14 the charging of filing fees? 1977

0-46-02 (22) The unnecessary extension of the divorce cases with the result of very high legal fees.

1-07-16 (23) The practice of attorneys bleeding the trust accounts.

(24) Since the Constitution provides that the Legislature may establish statutory authority for
0-37-07 divorces, etc., there is the suggestion that a nonadversarial system be established which may have the positive effect of reducing the high cost.

(25) According to the Constitution, justice shall be delivered promptly and without delay.
0-26-32 What can be done to make this more of a reality?

(26) In marital cases where there is established a cause of contempt, marital masters apparently
0-16-29 have no authority to actually assign the cost to the one who is in contempt.

(27) The question of lawyers who refuse to take cases for fear of retribution was raised on
0-08-19 several occasions where persons testified that they were unable to get a lawyer to get their case.

Notes on Chief Justice Brock's Answers to Sub Committee HP 1338 October 29, 1998

First Draft 11/7/98 (A)

Time	Quest #	Response & Notes
0-00-58		Opening Remarks
0-08-19	# 27	Fear of Retaliation Unable to hire atty in State. Brock does not understand question."No possibility of retaliation by bar or court" "Everyone can appeal" (See Blevens, Curran testimony)
0-16-29	# 26	Bronson Divorce Court failed to enforce support and med insurance Master can not enforce. But Judge signed order. (She cites RSA 458-51 which makes party in default pay att. Atty bills her $ 12K) She goes Pro Se Brock says court has no obligation to advise
0-26-32	# 25	Delays by Court Brock- can get jury in 1 year (was 4-5)Improved Monthly Computer report on progress of cases. Sup gets 900 -1,000 per year. Accept 45% (Arith?) No longer does written opinions in all cases. Easy to appeal. "Attys encourage appeals to protect THEMSELVES "
0-37-07	# 24	Non Adversarial Divorce(Alf notes earlier bill killed in Finance by bar"Bread & Butter issue")(Pt 2 of 76 Constitution gives Legislature power to do divorce. Notes that in observing herings, Marital Law is not issue. Brock-Couple usually don't agree to non-adversarial, {Editor: Atty tells Get better in court} Family Court doing great job Alf(?-People run out of money-BROCK **Atty now give contracts(?)** Fear of diospute resolution. Pro Se making big Mistake- deny good representation;**"Rather spend money on some other luxury than Legal fees." "Lawyers can not be expected to work for nothing."** Rep Wall objects. Brock rebutts.Wall- pay a lot get very little---Marital Master have no secretary. write decisions on weekends in longhand. fall behind. Bickford-- Joint Physical Custody but only 1 week-end per month- leads to false statistics."JPh C = Dumping ground" **Therapeutic Justice** both parties to be part of children's lives. Social Services provided who pays? Pro Se again-35% in divorce. Brock does not like Pro Se
1-07-16	# 23	Attorneys bleeding Trusts Supreme Court does not audit accounts Only sample fraction. If anyone knows should report to PCC (Ed Note: Indorf memo) Brock **wants to control Inter Vivos Trusts to Protect beneficiaries.**(Ed Note-Will he do it for free?

1-12-14 # 21 Free Justice vs filing fees Court is supposed to support self But if unable to pay- case is free. Use form like indigent defense.

1-16-00 # 20 Right of Counsel Must be citizen of good character.(Ed Note- what about practising law w/o license?Don't charge)

1-16-59 # 19 Supreme Court Corrects Errors in Judicial Proceedings. Complaint Must follow proper procedure Appeal etc.

1-20-21 # 18 PCC & JCC Alf mentions PCC hearing & exclusion of Evidence (Material was declared Private and was not allowed.But if excluded Court could not reach proper conclusion.(Ed Note-What about pictures on wall etc photo by police used as evidence.?) Brock defends exclusion. Expert witness paid by complainant.

1-25-28 # 17 Mistakes by Atty & Court Client must appeal. But Court will not reimburse. Client pays.

1-28-41 # 16 Transcripts Brock "still $ 1.00 per page. (ED N- way out of touch) Court stenos live off typing

1-35-21 # 15 Harmless Errors no matter - would not have changed outcome

1-38-14 # 14 Judges not knowing the law Appeal, Not apply to JCC Discuss conflict of interest

1-50-13 # 3 G.A.L. Failure to investigate BOTH parties as ordered. Evasive? GAL created by Legislature. (But controlled by Superior Court)

1-56-23 # 7 Pre SE Litigants Arizona & New York systems with Kiosks to dispense forms Need Money to set up. "Case Managers" in Family Court give help.explain system. Bar has study group working on this.

5 SKIP

2-03-05 # 8 Intermediate Court of Appeal History -legislature feared another Court. has turned down request in past

2-07-52 #1&2 73a etc. Alf says word "Forever" was eliminated why? **Brock says 72a is absolutely necessary to preserve liberty of people.**

2-13-52 # 12 Openness of Judiciary Asked how they justify that some things be secret Brock "impossible to do our work if the world comes in all the time".

2-18-47	# 6	Secret meetings in Chambers no record. made available to client. Brock: In all criminal cases a recording is made. Not civil. Alf tells of case where atty. tells client "This is how it will have to be so agree." Brock That is wrong. ":Not aware of problem"
2-22-52	#13	Supreme Court reverser lower court but NO Reason given Brock, that will not happen again.
2-25-31	# 10	Reaffirmation of Judges Brock against "We in New Hamp are *blessed* with a judicial system (Ed: redo)
2-30-00	End	Alf-Recieved a lot of questions from Public. Can you come back again? Yes.

Note: I think # 4, removal of trustes by petition, was missed or dealt with obliquely.

Item 0-37-07 # 24 Brock says attys now give contracts. If so, why were they so anxious to kill HB 320 ?which would have brought New York State rules to N.H. regarding divorce?

MR. GARDNER: Yes, and that's – and that's exactly what happened. There was money, usually when the legislature appropriated a budget for the convention, they would try to save a little bit of money. Sometimes they didn't have much left, other times they did. Sometimes the legislature actually used funds to help prepare this.

CHAIRMAN JACOBSON: Now, do you know, is there any records that were kept by this group that actually organized this Voters' Guide?

MR. GARDNER: Well, no, I don't know for sure. I'm sure that the – probably what it cost to print these. A hundred thousand might be – I'm sure you'd be able to get that information. But, no, I don't know if there's any kind of a record. You know, the way this has – really, the way this took place, as I remember it, all of a sudden someone might remember in the summer, July or – Wow, we ought to do this, we forgot to do it. So, how does it usually work? Someone goes to Legislative Services and said, hey, you know, we've got to get this out in a matter of – we don't have to, but it would be nice. So, let's put something together. Sometimes it actually happened as late as the summer, other times, there was more preparation. People were aware of it and put more time earlier.

CHAIRMAN JACOBSON: Well, as everyone can well see that the critical sentence has been – the controversy is not in the question as they posed it. So, it becomes, in a sense, critical to know who made that discussion, because the resolution as adopted by the Constitutional Convention, as in document one, clearly states that these rules shall have the force of law, but it doesn't show up any place here in the Voters' Guide or in the explanation thereof.

MR. GARDNER: But as I've said, there's not even a requirement that there be a Voters' Guide.

CHAIRMAN JACOBSON: Well, I understand that, but nonetheless, there was.

MR. GARDNER: That's right.

CHAIRMAN JACOBSON: And people went in – at least some people went in and read it. Now these people are saying that, well, what we voted for is not what is in the constitution. Though, in the document

CHAIRMAN JACOBSON: Thank you. We only have a few moments left here, and I would like to jump to one and two, and not so much one, but two in terms of the recommendations that we are considering making, and I'd like to have your commentary on that.

CHIEF JUSTICE BROCK: More on two than one?

CHAIRMAN JACOBSON: You can go one, two.

CHIEF JUSTICE BROCK: Okay. Let's see.

CHAIRMAN JACOBSON: I'm particularly interested in the last sentence in one.

CHIEF JUSTICE BROCK: Remind me what that says, I don't have that actual question.

CHAIRMAN JACOBSON: This is the one that – 72-a, which made the court's constitutional, and then there was inserted in Article 4 – let's see, that's in Part II – the phrase "except as otherwise provided by 72-a of Part II," and it says "amended in 1966." But no mention at all was ever made in the Voters' Guide or in the question asked that such a significant change, for example, we had testimony about the word "forever" that that eliminated the word "forever" from the constitution.

CHIEF JUSTICE BROCK: I guess my –

CHAIRMAN JACOBSON: The adoption of 72-a.

CHIEF JUSTICE BROCK: My best answer – let me say that the adoption of 72-a was absolutely necessary to create an independent judiciary, constitutionalize the supreme and superior court. It's so fundamentally important to the preservation of people's liberties that we have constitutionally established independent judiciary.

As far as your concerns about the amendment, I'm not aware that 72-a has ever been challenged by anyone, nor has the issue you just raised, concerning Article 4 ever been raised in a legal context in there. I suppose it's possible. It's an issue that still could be raised. But it hasn't been,

Not so suit

and I probably shouldn't comment on it further. I think it's – you know, it's – well, I'll leave it right there.

CHAIRMAN JACOBSON: What about the recommendations in Number 2?

CHIEF JUSTICE BROCK: Oh, I think that's something that's entirely up to the legislature, absolutely.

CHAIRMAN JACOBSON: Because one of the questions – one of the complaints have been, with regards to both 73-a and 72-a, that the people did not vote on the precise wording of the amendment.

CHIEF JUSTICE BROCK: I would just caution that you remember Marty Gross' testimony. There are going to be constitutional amendments, if you print them verbatim, that are going to cause even greater confusion than some simple English summary of them. But no, if the legislature determines that the full text of every proposed constitutional amendment or if the Con-Con, or legislature, I guess, it would be. I hadn't thought about that, it must be the Con-Con that determines it.

CHAIRMAN JACOBSON: I read the Voters' Guide for the 1966 – which is the 72-a, and reading it, it had actual errors in it and was written in such a way that it scared you, that the entire sky was going to fall down if you didn't vote for this.

CHIEF JUSTICE BROCK: I assume the Constitutional Convention approves that, and –

CHAIRMAN JACOBSON: I don't believe they did.

CHIEF JUSTICE BROCK: Really? Well, then I don't understand the process then.

CHAIRMAN JACOBSON: I didn't see any evidence of that and neither did the constitutional – I only was in one, in 1984. We never approved the Voters' Guide. We simply appointed a committee to do it, and they did it.

CHAIRMAN JACOBSON: Further questions on Number 24? I want to skip 23 for a moment, and we'll just go on to 22, since it's related to the very same subject we've been talking about. And that is, there were a number of complaints in which people said they simply ran out of money. They have a figure of $60,000 for a divorce, $80,000 to get a divorce. I don't know that the court or the legislature can do anything about that, but maybe you do have a comment on it.

CHIEF JUSTICE BROCK: No. You know, I think that attorneys now up front enter into contracts and understandings with their clients concerning the fee arrangement. Clients, when they enter into the attorney-client relationship, should understand exactly what the arrangement is. You know, obviously, if at some point along the line, the client isn't able to live up to the fee arrangement, the attorney would become concerned and have to deal with that situation.

The area of exorbitant fees and that type of thing or, you know, surprise fees. There is a Fee Dispute Resolution Committee of the Bar Association that hears complaints about that, and they'll give persons who have those complaints a hearing. But, I think, other than that, there really isn't too much we can do about it.

CHAIRMAN JACOBSON: Well, I think that's one of the problems that actually result in the number of pro se cases within the divorce system, and in some sense would be another argument for a non-adversarial system in these particular cases.

CHIEF JUSTICE BROCK: That may be a factor. The inability to pay may be a factor, but I would also point out to you that there are many, many people who make a decision to go pro se because they would rather spend the money on some other luxury or on something else rather than legal fees.

CHAIRMAN JACOBSON: But 60 or $80,000 in fees is, you know, – I'm just a poor man from up country.

CHIEF JUSTICE BROCK: I'm just a poor New Hampshire judge, I agree with you, that's –

... and the power to make these rules and regulations, Article 73-a does not add to the powers of the judicial branch; it simply reapportions that power within the judicial branch. Consideration of the third sentence of Article 73-a -"The rules so promulgated shall have the force and effect of law."- does not change this conclusion. These rules have always had the "force and effect of law" as any attempt by the legislative branch to enact legislation governing court procedures is and always has been unconstitutional under Part 1, Article 37 of our Constitution. See id. at 179. Therefore, the Court finds that Article 73-a is consistent with the separation of powers philosophy inhering in the provisions cited by the plaintiffs -Part 1, Articles 29, 31, 35 and 37 and Part 2, Article 5. Accordingly, the Court holds that Article 73-a is not unconstitutional.

In applying the Ossipee standard to the plaintiffs' allegations that the third sentence of Article 73-a renders it invalid, the Court finds that these allegations do not state a cause of action upon which relief may be granted because the third sentence of Article 73-a is merely rhetorical. Therefore, even assuming

arguendo that the voters did not approve the sentence, the plaintiffs have suffered no injury. Thus, there is no basis upon which relief may be granted.

Accordingly, the Motion to Dismiss is GRANTED.

So ordered.

DATE: 8/23/93

Peter H. Fauver
Presiding Justice

8/24/93
pc: Bosa
Artzt
Johnson
Ciolfi

State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

FINAL REPORT
December 1, 1998

NH CONSTITUTION, Part II, Articles 41, 72-a, 73-a, ADOPTION STUDY

HB 1338, Chapter 0330:1, Laws of 1998
establishing a study committee to examine the adoption of
articles 41, 72-a and 73-a of the second part of the NH constitution.

The 1998 session of the General Court by the legislative vehicle of HB 1338 established a chaptered study committee of eight members to investigate the role of Part II, Articles 41, 72-a and 73-a. The following representatives were appointed by House Speaker Donna Sytek: Peter F. Bergin, David A. Bickford, Susan J. Clay, Alf E. Jacobson, Andrew R. Peterson, Barbara H. Richardson and Janet G. Wall. Senate President Joseph L. Delahunty appointed Senator Sheila Roberge. At its first meeting, the Committee elected Representative Jacobson as Chairman, Senator Roberge as Vice Chairman and Representative Susan Clay as Clerk. At the meeting in September, Representative Richardson took over the duties of Clerk.

The Committee held 16 meetings and heard from 39 witnesses from the public at large. In addition, the Committee invited Chief Justice David Brock of the New Hampshire Supreme Court, Secretary of State William Gardner and Attorney Martin Gross, a delegate in the 1974 Constitutional Convention, to testify. The Committee also invited Judge Peter Fauver to testify, but he refused.

The work of the Committee consisted of two parts. First, there was a study of the adoption of the aforementioned articles with respect to their development and presentation to the respective Constitutional Conventions; their subsequent adoption by the voters and the issues raised by their implementation by the Supreme Court. Secondly, the Committee heard complaints and concerns about the use of rules and procedures by the judicial system as provided by Article 73-a.

With respect to Article 41, there was very little testimony offered. There appeared to be very little concern among the public regarding Article 41. The Committee could only conclude that there is no major concern about the Article.

With respect to Article 72-a, there were serious concerns expressed. First, the language used in the 1964 Constitutional Convention seemed to highlight negative aspects in its support of the proposed amendment. For example, if the amendment is adopted, the Supreme Court and Superior Court "will no longer be able to be changed at the will or the whim of the General Court," nor "because of political reasons or other reasons that are less than desirable" (Journal of

Constitutional Convention, p. 76). These generalizations are not documented. Furthermore, the Committee did not have the time to investigate the actual circumstances cited for legislative changes in court organization under Part II, Article 4 prior to 1966.

There was also public testimony expressing concern over the constitutional loss of the phrase in Part II, Article 4 that reads: "The general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts." The particular concern was concentrated on the word, "forever."

Similarly, the wording in the 1966 Voters' Guide came under criticism where it speaks of the Supreme Court and the Superior Court in need of being "absolutely free and independent of the possibility of political interference or other tampering based upon ulterior motives." Again, there is no documentation for this generalization. Again, what is the meaning of the phrase, "absolutely free and independent?" In a republican democracy under the tripartite system, there are to be checks and balances by each branch on the other two so that the notion of "absolute" is foreign to such a democracy. Witnesses as well as Committee members felt that the exception to Part II, Article 4 as created by the adoption of Part II, Article 72-a did diminish the checks and balances for the Legislature in terms of its relationship to the judiciary, especially since no discussion of this impact was included in the 1966 Voters' Guide.

In Article 73-a, the principal concern expressed by witnesses is the omission of the last sentence of the proposed amendment as adopted by the 1974 Constitutional Convention from the Voters' Guide of 1978. That sentence read: "The rules so promulgated shall have the force and effect of law." Witnesses testified that this omission makes the affirmative on the amendment in 1978 null and void. The Court, however, in its response argued that the Court has always had that power, and that the sentence was merely an appendage to an already existing practice prior to the 1978 adoption of Article 73-a. New Hampshire along with 18 other states give this more exclusive power to the judiciary over its rules and procedures.

In the 1974 Constitutional Convention, the question of the future role of the Legislature in rulemaking was raised. In testimony before this committee, 1974 Delegate Martin Gross testified that at the convention he asked the following question: "Is my understanding correct that this amendment, if adopted, would not deprive the legislature of its right that it presently has to regulate court procedures by statute?" According to Gross, Delegate Nighswander's response was: "I would think any power that they now have, they would still have." (Testimony, August 11, 1998, p. 3.) It was Attorney Gross' view that the intention of this amendment was "to identify the chief justice as the primary authority within the court system, but not necessarily the court as the primary authority for court rules to the exclusion of the legislature." (Ibid., p. 17.)

However, as time has moved on since 1978, the role of the General Court in judicial rulemaking has increasingly come under question, and the Supreme Court has at times seemed to indicate that the Legislature has no role since the adoption of the 1978 amendment. In his testimony, Attorney Gross did raise questions about the relationship between the Court and the Legislature when he

said: "Part II, Article 73-a recognizes the court's inherent authority to make rules. I have no problem with it. If it is intended to go further and assert that Part II, Article 73-a established the primacy of the judiciary in making rules, then I would say that it is not consistent with the question that I put and the answer I got on the floor of the Constitutional Convention in 1974." (Ibid., p. 5.) In this context, questions remain as to just what role did the General Court have in judicial rulemaking, if any, prior to 1978, and does this role continue. The answer to this question requires very careful investigation of earlier practices. The defeat of a proposed amendment to Part II, Article 73-a which would have added the words, "if not inconsistent with statute," (Ibid., p. 6.) renewed the issue, and it now continues in the legislature. As Attorney Gross pointed out: "the allocation of authority between the legislature and the court about court procedural rules need to be studied, and . . . this is a perfectly legitimate thing to do." (Ibid., p. 7.)

In his testimony, Supreme Court Chief Justice David Brock carefully explained that the court has "always recognized" that the separation of powers "does not require an absolute division of powers, but a cooperative accommodation among the three branches of government." (Ibid., p. 26.) In this connection, Justice Brock differed with Attorney Gross in that he saw the relationship as more of "an area of shared responsibility" rather than a question of "primacy." In his view, through the years the court has "responded to many of the statutes adopted by the legislature by implementing them in their rules." (Ibid., p. 36.)

Justice Brock went on to draw a distinction between substance and procedure. Quoting from a court decision, Brock expressed the following view on the issue of substance and procedure:

> *Substantive laws are those laws which have for their purposes to determine the rights and duties of the individual and to regulate his conduct and relation with government and other individuals. Procedural laws are those laws which have for their purpose to prescribe machinery and methods to be employed in enforcing these positive provisions.* (Ibid., p. 26.)

The investigation of the practices of these foregoing constitutional amendments has raised the ultimate question of checks and balances. As far as now can be ascertained, the only full check that the General Court has is the judicial budget. To use the budgetary tool against what some witnesses described as an "out of control" judicial system would create a serious problem for the public who may well need the system to settle civil disputes or bring justice to criminal behavior.

Clearly, the General Court and the judicial branch together should reexamine the relationship between these two branches of government because of the many intersections that exist between them.

Because of the voter confusion created by the Voters' Guides as to the precise impact of proposed constitutional changes that affect all areas of government, the Committee makes two suggestions. First, that in the future the actual amendment language be printed in both the Voters' Guide and the actual ballot along with the summary question or statement as is the practice now. There is no

real validity to the argument that voters cannot understand the Constitution's language because its precise language is so convoluted and complex linguistically that the average voter can understand only some highly simplified statement. After all, as in Part II, Article 73-a that disputed sentence: "these rules shall have the force of law" is a very clear unambiguous statement! Secondly, that the Voters' Guides receive final approval from the Convention or Legislature that adopted the proposed amendment.

Part II. Topics and concerns brought to the Committee by witnesses concerning the rules and practices within the judicial system.

1. ***Pro Se*** defendants and/or Plaintiffs. A growing number of court clients, for various reasons, are appearing in court as ***pro se***. A number of them, especially in prolonged divorce cases that drained them financially, felt that the costs of seeking and finding a judicial remedy with the assistance of a lawyer was far too costly so their only choice was to appear ***pro se***. In that role, some claimed that they were not "treated with dignity" but more as "an imbecile or a piece of garbage."

   Because there is every indication that ***pro se*** appearances are growing because of the rapidly escalating litigation costs, the court does need to improve itself as a user-friendly environment. Other states are facing similar problems. Arizona is one such state that has already taken steps to improve the system to accommodate the growing number of these cases. The Committee recommends that the Court and the Legislature cooperatively examine this problem and propose possible solutions that serve the public interest and expand the public's knowledge of court procedures. ***Pro se*** litigants have a right to know court procedures. Some suggestions include establishing a Committee on Public Outreach and a court "case manager" to assist in ***pro se*** cases.

2. The biggest single concern of witnesses is related to domestic cases. The difficulty for the Committee was that in these cases, it heard only one side of the issue. Almost always in these cases there is at least one dissatisfied litigant. The complaints and concerns grouped around several categories:

   a. the length and cost of these cases. Some witnesses told of cases that dragged out more than a decade without a decision. Matrimonial lawyers often overcharge, under-perform and generally take care of themselves at the expense of clients.

   b. In child custody cases, witnesses told of the Guardian Ad Litem investigating only one side but still making decisions about such matters as child abuse that profoundly affects both sides in custody cases.

   The Committee recommends that a Commission for Domestic Affairs be established with joint legislative and judicial membership to look into the prospect of a non-adversarial procedure for domestic cases as permitted under the NH Constitution, Part II, Article 76 and a full

review of the present Guardian Ad Litem statutes to assure that Guardian Ad Litems carry out their responsibilities in such a way that all sides in a dispute are fairly reviewed in their presentations of evidence to the court.

3. Legal fees and other financial relationships were topics of considerable concern. Lawyers have an economic interest in cultivating and prolonging not only divorce cases but any litigation. (Testimony, September 17, 1998, p. 13.) Among these were:

   a. Attorneys draw wills which make themselves the beneficiaries or make some favorite agency in which they are active participants the beneficiaries.

   b. Under Chapter 458:51 attorney's fees in contempt cases are denied by martial masters because the masters on the one hand can declare a litigant in contempt under the aforesaid chapter, but they lack the authority to assess the actual fees. Witnesses reported that there are apparently no financial or other consequences in these cases of contempt.

   c. Lawyers charge several clients for the same hour; e.g., travel time to court representing more than one client.

   d. refusal to abide by the decision of the Fee Dispute Committee.

   e. prohibition of fee cutting by Bar Association as being unethical.

   f. the practice of lawyers bleeding trust accounts.

   g. the conflicting relationship of the constitutional provision that justice shall be free and the charging of fees.

   h. exorbitant charges by the court for photocopies of transcripts and other court documents.

   i. Clients must bear the cost of mistakes made by lawyers or court personnel during a trial or court procedure.

4. A number of witnesses' concerns related to the judges and judicial proceedings, including:

   a. the question of secret, "in camera," meetings between judge and counsel(s) without client(s) being present and either no transcript or denial of transcript.

   b. the question of the failure of judges to know the law, and as a result make faulty decisions without penalty.

   c. Comments were made both about judges who recuse themselves or declare a conflict of interest without sufficient reason and judges who refuse to recuse themselves when its clear that they should.

d. Questions were raised about the duty of the Supreme Court to correct errors in judicial proceedings. In particular, questions were raised over the doctrine of "harmless error."

e. removal of a trustee on petition of beneficiaries.

f. the question of the Supreme Court making an order, as in the case of a reversal of the grant of a new trial by a lower court without any or an insufficient explanation.

g. Some witnesses spoke of situations where lawyers told them that they would not take a case for fear of judicial retribution. One witness reported that he had to hire an out-of-state attorney because he could not find a New Hampshire attorney to take his case.

5. One of the major questions raised was the relationship of the Bar Association to the Judiciary. Recently, the President of the Bar, Randall Cooper, asserted that the Bar has an obligation "in certain circumstances to accurately, quickly and fairly respond to inaccurate or unjust criticism of judges and the courts." He went on to say that "this has traditionally been the role of our Association, and it should continue." (NH Bar News, September 2, 1998, p. 2.) This assertion obviously speaks of an intimate relationship between the Bar and the Judiciary that places the Bar in the position of being an advocate of the Court and at the same time being subject to the administrative authority of the Court.

6. Again, there were suggestions that the Judicial Conduct Committee member makeup be so constituted that a majority of committee members not be members of the Bar.

7. A number of witnesses suggested that there be a periodic review and reaffirmation of judges in their positions. Such reviews would provide a forum to enhance judicial accountability. Others suggested specific time periods for a judicial appointment instead of a life term. Others suggested the election of judges, but the recent revelations in Texas about lawyers contributing to the campaigns of judges would seem to be a worse system than our appointment system.

8. Other suggestions and recommendations were made and are included in this report.

a. Clarify by rule the meaning of the constitutional provision that speaks of the "right of counsel." RSA 311:1 does permit representation in court by a non-lawyer of good, moral reputation. Is that included under the NH Constitution?

b. There were questions, as in the Fairbanks hearings, about the Professional Conduct Committee as well as the Judicial Conduct Committee procedures and membership makeup especially as it relates to lay members. There was a suggestion that the Legislature establish independent committees with similar functions.

c. There were suggestions that there be a review of the relationship of RSA 91-a and Part I, Article 8 of the NH Constitution.

d. The possibility of establishing a Special Prosecutor's office.

e. The possibility of establishing an intermediary Court of Appeals.

f. Greater opportunity for the use of Superior Court libraries.

Respectfully submitted,

Representative Alice E. Jacobson, Chairman
Merrimack County, District 2

Senator Sheila Roberge, Vice-Chairman
District 9

Representative Barbara H. Richardson, Clerk
Cheshire County, District 12

Representative Andrew R. Peterson
Hillsborough County, District 8

Representative Peter F. Bergin
Hillsborough County, District 16

Representative Janet G. Wall
Strafford County, District 9

Representative David A. Bickford
Strafford County, District 1

Representative Susan J. Clay
Hillsborough County, District 4

MINORITY REPORT

December 16, 1998

NH CONSTITUTION, Part II, Articles 41, 72-a, 73-a, ADOPTION STUDY

HB 1338, Chapter 0330:1, Laws of 1998
establishing a study committee to examine the adoption of articles 41, 72-a and 73-a of the second part of the NH constitution

Tenure of Judges

Additional insulation was added to the judiciary branch of government by Part II, Article 72-a that created constitutional courts as opposed to courts structured by the legislature.

Therefore, lifetime tenure is no longer essential but periodic review with the right to renomination and reconfirmation is now reasonable.

Retirement of Judges

Judges need to be able to retire and take a portion of their retirement with them so they don't feel obligated to sit in court when their interest has waned.

Recusal of Judges

Judges rule on their own recusal motions (they judge themselves). A possible solution is a statute which permits a *preemptive challenge* to a judge, which means anyone can ask for and receive a different judge for stated reasons, or for any reason. The first judge may not then direct the case to a successor judge. It should be randomly assigned to another judge's docket to be heard.

The NH Constitution calls for the judges to be as fair as the lot of humanity can admit. This is perhaps the strongest standard in the country, but the court's recusal rules are among the weakest in the country. The recusal rules should be made stronger to match the constitutional standard to provide for fair judges.

Part II, Article 73-a

There is no need to leave the sentence "The rules so promulgated shall have the force and effect of law" in Part II, Article 73-a. It was not voted on by the public and the word "law" confuses the distinctive and separate roles of the judicial and legislative branches of government. It is the legislature's role to make laws. (See Part II, Article 5.)

David A. Bickford

Representative David A. Bickford
Strafford County, District 1

Sheila Roberge

Senator Sheila Roberge, Vice Chairman
District 9

Barbara H. Richardson

Representative Barbara H. Richardson, Clerk
Cheshire County, District 12

Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HB 568

BILL TITLE: **establishing a review panel to review judicial officers.**

DATE: 3/31/99

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep. Ciaio

Seconded by Rep. Solaw

Vote: 16 - 2 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Re-Refer, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: 18-0

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. [redacted], Clerk

JUDICIARY 1999 SESSION

House Bill # 568

Public Hearings _____ Executive Session ✓

COMMITTEE REPORT: Re Refer.

	YEAS	NAYS
Mock, Henry P, Chairman	✓	
Peterson, Andrew R, V Chairman	✓	
Jacobson, Alf E	✓	
Keans, Sandra B		✓
Bergin, Peter F		
Dokmo, Cynthia J		
Jean, Loren J, Clerk	✓	
Rowe, Robert H	✓	
Ford, Nancy M	✓	
Withee, Dennis J		
Dudley, Terri C	✓	
Picconi, Al J	✓	
Soltani, Tony F	✓	
Woods, Phyllis L	✓	
Wall, Janet G	✓	
DePecol, Benjamin J		✓
Pratt, John M	✓	
Craig, James W	✓	
Lasky, Bette R	✓	
Mitchell, McKim W	✓	
Solow, Martha S	✓	
Wood, Jane		
TOTAL VOTE	16	2

Appeared in Favor	Appeared in Opposition

JUDICIARY 1999 SESSION

HB-568 Bill #

Public Hearings _____ Executive Session ✓

COMMITTEE REPORT: OTPA

	YEAS	NAYS
Mock, Henry P, Chairman	✓	
Peterson, Andrew R, V Chairman	✓	
Jacobson, Alf E	✓	
Keans, Sandra B	✓	
Bergin, Peter F	✓	
Dokmo, Cynthia J		
Jean, Loren J, Clerk	✓	
Rowe, Robert H		
Ford, Nancy M		
Withee, Dennis J	✓	
Dudley, Terri C		
Picconi, Al J	✓	
Soltani, Tony F	✓	
Woods, Phyllis L	✓	
Wall, Janet G		
DePecol, Benjamin J		
Pratt, John M	✓	
Craig, James W	✓	
Lasky, Bette R	✓	
Mitchell, McKim W	✓	
Solow, Martha S	✓	
Wood, Jane	✓	
TOTAL VOTE	16	0

Appeared in Favor	Appeared in Opposition

Committee Report

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **HB 568**

TITLE: establishing a review panel to review judicial officers.

DATE: March 31, 1999 CONSENT CALENDAR YES ☒ NO ☐

☐ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☒ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

This bill establishes a review panel, consisting of legislators and members appointed by governor and council, to review judicial officers at least once every seven years following his or her appointment. There are many views on the issue of judicial review and many bills concerning the subject. The committee voted 16-2 to re-refer this bill for further study along with the many other bills on the issue of judicial reform. The committee feels that this approach will result in a more coherent picture of what, if anything, should be done.

Vote 16-1.

Rep. James W. Craig
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

CONSENT CALENDAR

Judiciary

HB 568, establishing a review panel to review judicial officers. RE-REFER

Rep. James W. Craig for **Judiciary:** This bill establishes a review panel, consisting of legislators and members appointed by governor and council, to review judicial officers at least once every seven years following his or her appointment. There are many views on the issue of judicial review and many bills concerning the subject. The committee voted 16-2 to re-refer this bill for further study along with the many other bills on the issue of judicial reform. The committee feels that this approach will result in a more coherent picture of what, if anything, should be done. Vote 16-1.

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **HB 0568**

TITLE: establishing a review panel to review judicial officers.

DATE: October 20, 1999 CONSENT CALENDAR YES ☒ NO ☐

☐ OUGHT TO PASS

☒ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

The subcommittee met several times on a series of judicial reform bills. We were very careful not to cross over the Constitution lines of authority. Through this legislation, the courts should now understand that the citizens of New Hampshire want judges to be courteous, efficient and competent. In this amendment, the committee provides in the Judicial Conduct statute that (1) performance evaluations will be done on all judges with input from attorneys, parties, witnesses, jurors, court personnel, etc. at least once every three years; (2) all complaints pertaining to judges will be passed (dismissed or not) between the Administrative Judge and the Judicial Conduct Committee; (3) the evaluations will be made available to the Governor and Executive Council upon nomination of judges to other judicial appointments; and (4) the court annually will file a report on the evaluation process.

Vote 16-0.

Rep. Sandra B. Keans
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

CONSENT CALENDAR

Judiciary

HB 0568, establishing a review panel to review judicial officers. OUGHT TO PASS WITH AMENDMENT

Rep. Sandra B. Keans for **Judiciary:** The subcommittee met several times on a series of judicial reform bills. We were very careful not to cross over the Constitution lines of authority. Through this legislation, the courts should now understand that the citizens of New Hampshire want judges to be courteous, efficient and competent. In this amendment, the committee provides in the Judicial Conduct statute that (1) performance evaluations will be done on all judges with input from attorneys, parties, witnesses, jurors, court personnel, etc. at least once every three years; (2) all complaints pertaining to judges will be passed (dismissed or not) between the Administrative Judge and the Judicial Conduct Committee; (3) the evaluations will be made available to the Governor and Executive Council upon nomination of judges to other judicial appointments; and (4) the court annually will file a report on the evaluation process. Vote 16-0.

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **HB 0568**

TITLE: establishing a review panel to review judicial officers.

DATE: October 20, 1999 CONSENT CALENDAR YES ☒ NO ☐

☐ OUGHT TO PASS

☒ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

The subcommittee met several times on a series of judicial reform bills. We were very careful not to cross over the Constitution lines of authority. Through this legislation, the courts should now understand that the citizens of New Hampshire want judges to be courteous, efficient and competent. In this amendment, the committee provides in the Judicial Conduct statute that (1) performance evaluations will be done on all judges with input from attorneys, parties, witnesses, jurors, court personnel, etc. at least once every three years; (2) all complaints pertaining to judges will be passed (dismissed or not) between the Administrative Judge and the Judicial Conduct Committee; (3) the evaluations will be made available to the Governor and Executive Council upon nomination to other judicial appointments; and (4) the court annually will file a report on the evaluation process.

Vote 16-0.

Rep. Sandra B. Keans
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: HB-568

TITLE:

DATE: 10/20/99 CONSENT CALENDAR YES ☑ NO ☐

☐ OUGHT TO PASS

☑ OUGHT TO PASS WITH AMENDMENT # 2122-H

☐ INEXPEDIENT TO LEGISLATE

☐ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

Vote 16 - 0

Rep. Kenney
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

HB 568 OTP c Am. 16-0

THE SUB-COMMITTEE MET SEVERAL TIMES ON A SERIES OF JUDICIAL REFORM BILLS. WE ~~HAD TO BE~~ were VERY CAREFUL ~~TO~~ NOT to CROSS OVER the CONSTITUTION LINES OF AUTHORITY. ~~However~~ Through this legislation, the COURTS should NOW UNDERSTAND THAT THE ~~PEOPLE~~ CITIZENS OF NEW HAMPSHIRE WANT JUDGES TO BE COURTEOUS, EFFICIENT AND COMPETENT. ~~THE COURTS WERE HELPFUL IN PROVIDING STATISTICS AND DATA TO THE SUBCOMMITTEE~~

IN THIS AMENDMENT THE COMMITTEE PROVIDES IN ~~SHA~~ THE JUDICIAL CONDUCT STATUTE THAT:

(1) PERFORMANCE EVALUATIONS WILL BE DONE ON ALL JUDGES ~~BE~~ WITH INPUT FROM a) ATTORNEYS, PARTIES, WITNESSES, JURORS, COURT PERSONNEL ETC. at least once every 3 years;

(2) ALL COMPLAINTS pertaining to judges WILL BE PASSED ~~BETWEEN~~ DISMISSED OR NOT ~~WILL BE~~ BETWEEN THE ADMINISTRATIVE JUDGE & JUDICIAL CONDUCT COMMITTEE;

(3) THE EVALUATIONS WILL BE MADE AVAILABLE TO THE GOVERNOR & EXECUTIVE COUNCIL UPON NOMINATION TO OTHER JUDICIAL APPOINTMENTS

(4) ~~THERE WILL BE AN ANNUAL REPORT PUBLISHED~~ and THE COURT ANNUALLY WILL FILE A REPORT ON THE EVALUATION PROCESS.

J. Kean

ofv
#611