



# What Gets Judges in Trouble

Michael Crowell

Until 1973 the only way to discipline a wayward judge in North Carolina was impeachment by the General Assembly.<sup>1</sup> A state constitutional amendment effective at the beginning of 1973 empowered the General Assembly to adopt additional procedures for censure and removal of judges for misconduct or disability.<sup>2</sup> The resulting legislation authorized the North Carolina Supreme Court to censure or remove judges and established the Judicial Standards Commission to receive and investigate complaints and to recommend action to the supreme court.<sup>3</sup> Starting in 2007 the legislature gave the supreme court the option of suspending a judge and authorized the Judicial Standards Commission to issue public reprimands on its own.<sup>4</sup> The act also confirmed the commission's already existing practice of private letters of caution. In 2013 the General Assembly removed the commission's authority to issue public reprimands, though the supreme court still has that option.<sup>5</sup> As it now stands, only the supreme court may publicly discipline a judge.

Forty plus years of experience with the current disciplinary framework have resulted in fifty-three published opinions of the supreme court on recommendations from the Judicial Standards Commission plus seventeen public reprimands by the commission while it had that authority from 2007 to 2013. This record constitutes sufficient history to explore the kinds of behavior that get judges into trouble and to tell what causes a judge to be removed from office instead of being scolded.

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1. For a history of judicial discipline before 1973, see Edward P. Clark, *The Discipline and Removal of Judges in North Carolina*, 4 CAMPBELL L. REV. 1 (1981). Judge Clark chaired the Judicial Standards Commission at the time.

2. 1971 N.C. Sess. Laws ch. 560. The amendment added Section 17 to Article IV of the North Carolina constitution. Voters approved the amendment in November 1972.

3. Article 30 of Chapter 7A of the North Carolina General Statutes (hereinafter G.S.), G.S. 7A-374.1 through -378.

4. S.L. 2006-187, § 11.

5. S.L. 2013-404.

## Role of the Code of Judicial Conduct

The state constitution allows the legislature to prescribe a method for the censure or removal of a judge “for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”<sup>6</sup> The statute which authorizes the Judicial Standards Commission to recommend discipline for a judge, and the supreme court to reprimand, censure, suspend, or remove a judge, uses the same language.<sup>7</sup>

In 1973 the General Assembly also enacted Section 7A-10.1 of the North Carolina General Statutes (hereinafter G.S.) authorizing the supreme court to prescribe standards of judicial conduct. The result is the Code of Judicial Conduct. The legislature intended the code to be the guide as to the meaning of “willful misconduct” and “conduct prejudicial to the administration of justice.”<sup>8</sup>

In 1994 the supreme court said that a violation of the Code of Judicial Conduct was not enough by itself to establish conduct prejudicial to the administration of justice or willful misconduct. It was necessary to show also that that conduct would be seen by a neutral observer as bringing the office into disrepute.<sup>9</sup> Several years later, however, the supreme court revised the preamble to the code so that it now reads: “A violation of this Code . . . may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings.” It would appear that violation of the code is now by itself sufficient to warrant discipline.

As discussed below, the supreme court has said that censure is warranted for any conduct prejudicial to the administration of justice;<sup>10</sup> that conduct prejudicial to the administration of justice is not as serious as willful misconduct;<sup>11</sup> that a judge may be removed only for willful misconduct;<sup>12</sup> and that willful misconduct requires more than censure.<sup>13</sup>

## Other Means of Removal

This bulletin is about sanctions publicly imposed by the supreme court or the Judicial Standards Commission. It does not discuss private letters of caution issued by the commission because they are, well, private. The commission issues, on average, about ten or so such letters each year. Nor does the bulletin discuss situations in which a judge has been removed from office other than by the supreme court. It might be useful to list those other possibilities for removal, however.

Impeachment by the legislature is still available to remove a judge,<sup>14</sup> though it was rarely considered in the past and is never used now.

6. N.C. CONST. art IV, § 17(2).

7. G.S. 7A-376(b). The statute uses the spelling “willful” rather than “wilful,” as in the constitution.

8. *In re Nowell*, 293 N.C. 235 (1977).

9. *In re Bullock*, 336 N.C. 586 (1994).

10. *In re Martin*, 295 N.C. 291 (1978).

11. *In re Peoples*, 296 N.C. 109 (1978).

12. *Id.*

13. *In re Badgett*, 362 N.C. 482 (2008).

14. N.C. CONST. art IV, § 17(1). A two-thirds vote of all members of each house of the General Assembly is required for impeachment.

Disbarment is more likely. Judges are required to be licensed to practice law, and as lawyers they are subject to discipline, including disbarment, by the State Bar for violation of the Rules of Professional Conduct. By statute a judge's office becomes vacant upon disbarment.<sup>15</sup>

Judges also may be prosecuted for criminal offenses. Under the state constitution, conviction of a felony disqualifies a person from holding any public office,<sup>16</sup> and by statute conviction of any criminal offense showing professional unfitness is grounds for disbarment by the State Bar.<sup>17</sup> As seen in the summaries of supreme court discipline cases presented below, sometimes the court will remove or otherwise sanction a judge after a criminal conviction, but there are other times when as part of a plea the judge resigns and pledges never to seek judicial office again. When that happens the supreme court may see no need to take further action.

There also are times when a judge will resign before a formal complaint has been filed with the Judicial Standards Commission or while the commission's investigation is still pending. Sometimes the commission and supreme court will proceed with discipline; at other times the resignation will end the matter. And even if the court proceeds with discipline, the resignation may prompt a lesser sanction than otherwise would be imposed.

Today all public discipline of judges is by the supreme court. For a few years the Judicial Standards Commission also could publicly reprimand judges. These public actions by the court and commission, which are the focus of this bulletin, provide a representative sample of what gets judges in trouble, even if removal sometimes occurs by different means.

## Statistics

In 1973, its first year of operation, the Judicial Standards Commission received twenty-three complaints.<sup>18</sup> By 1980 the number was up to eighty-seven,<sup>19</sup> and in the most recent year reported, 2013, there were 235 complaints initiated.<sup>20</sup> From the beginning the great majority of complaints have been dismissed after initial review by the commission, mainly because so many complaints are more about judges' legal decisions than about their behavior. In its first nine years the commission dismissed 84 percent of the complaints after initial review;<sup>21</sup> in the five most recent years about 90 percent were disposed of that way.<sup>22</sup>

Not surprisingly, domestic litigants and criminal defendants generate the most complaints, with civil litigants other than those in domestic cases next in line.<sup>23</sup> In the early 1980s about three-fourths of the complaints were about district judges, another quarter about superior court judges, and just a handful about appellate judges.<sup>24</sup> The number of complaints against the two

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15. G.S. 7A-410.

16. N.C. CONST. art. VI, § 8.

17. G.S. 84-28.

18. Clark, *supra* note 1, at 26.

19. *Id.*

20. N.C. JUDICIAL STANDARDS COMM'N, 2013 ANNUAL REPORT 3 (2014) (hereinafter 2013 ANNUAL REPORT).

21. Clark, *supra* note 1, at 27.

22. 2013 ANNUAL REPORT at 6.

23. This has been true from the beginning of the commission. Compare Clark, *supra* note 1, at 26–27 and the 2013 ANNUAL REPORT at 4.

24. Clark, *supra* note 1, at 26.

**Table 1. Supreme Court Disciplinary Decisions by Decade**

	1973–1979	1980–1989	1990–1999	2000–2009	2010–present
Removed	1	3*	1	3**	1
Suspended				1***	1
Censured	6	3	13	9	1
Reprimanded					1
Remanded			1	1	
No Discipline		1	4	2	

\* 2 of these judges were also censured

\*\* 2 judges were removed for misbehavior (1 was also censured), 1 was removed for disability

\*\*\* This judge was also censured

kinds of trial judges tends to be roughly proportionate to the number of judges. About 70 percent of trial judges are in district court, 30 percent in superior court, and typically just over twice as many complaints are about district judges. In 2013 the 270 district judges generated 184 complaints and the 112 superior court judges accounted for eighty-four, both numbers somewhat lower than other recent years.<sup>25</sup> Appellate judges generally account for just a fraction of all the grievances.

Few complaints make it all the way to the supreme court. In the five years from 2009 through 2013, for example, the Judicial Standards Commission received 1,349 new complaints and ordered formal investigation in only 121. After the formal investigation, seventy-seven more complaints were dismissed. During those five years the commission issued forty-nine private letters of caution and eleven public reprimands and sent three cases to the supreme court with a recommendation for disciplinary action.<sup>26</sup>

Since the current disciplinary structure was put in place fifty-three cases have reached the supreme court.<sup>27</sup> Of those, forty-four involved district court judges and nine involved superior court judges. The supreme court has removed eight judges for misbehavior (and additionally censured three of them) and one for disability; one judge was suspended for seventy-five days and one was suspended for sixty days and censured; thirty-two other judges were censured without being removed or suspended; and one judge was reprimanded. Two cases were remanded to the Judicial Standards Commission for further proceedings, and in seven instances the supreme court decided not to impose any discipline despite the commission's recommendation. Twice when the commission has recommended only censure the court has decided instead to remove or suspend the judge—both decisions came in 2008 and involved the same judge. (See Table 1, "Supreme Court Disciplinary Decisions by Decade," above.)

25. 2013 ANNUAL REPORT at 4. In the report the number of complaints against different categories of judges, when added together, may be greater than the total number of complaints because a single complaint sometimes names more than one kind of judge.

26. 2013 ANNUAL REPORT at 6.

27. A list of all the supreme court decisions may be found on the Judicial Standards Commission's webpage on the Administrative Office of the Courts website. Choose the "Supreme Court Disciplinary Opinions" option on the webpage, which is found at [www.nccourts.org/Courts/CRS/Councils/Judicial-Standards/Default.asp](http://www.nccourts.org/Courts/CRS/Councils/Judicial-Standards/Default.asp).

## The Supreme Court's Approach to Discipline

In several of the individual decisions discussed later in this bulletin the supreme court has explained its approach to discipline. It will help to keep those “rules” in mind when reading about the results in particular cases. Here are brief summaries paraphrasing what the court has said about discipline, in chronological order of the cases:

- The standard of proof in judicial discipline cases is clear and convincing evidence.<sup>28</sup>
- The supreme court is not limited to the sanction recommended by the Judicial Standards Commission; it may impose any sanction.<sup>29</sup>
- A judge should be removed when the judge engages in willful misconduct for financial gain and when the judge persists in willful misconduct.<sup>30</sup>
- Censure is warranted for any conduct that is prejudicial to the administration of justice.<sup>31</sup>
- Suborning perjury would require removal.<sup>32</sup>
- A judge's failure to testify in the disciplinary hearing can be held against the judge.<sup>33</sup>
- A judge does not have to benefit financially for the behavior to be considered conduct prejudicial to the administration of justice.<sup>34</sup>
- Conduct prejudicial to the administration of justice is not as serious or as reprehensible as willful misconduct.<sup>35</sup>
- A judge should be removed from office only for willful misconduct.<sup>36</sup>
- Purposeful and repeated willful misconduct requires removal.<sup>37</sup>
- Willful misconduct can occur outside the courthouse; it does not have to take place in the judge's courtroom, chambers, or surroundings. For purposes of discipline it does not matter whether the conduct is public or private in nature.<sup>38</sup>
- Reelection of the judge subsequent to the misconduct does not insulate the judge from discipline; the commission and court may consider misconduct that occurred before the judge's last election.<sup>39</sup>
- Not every intemperate remark, especially when made in chambers, is conduct prejudicial to the administration of justice.<sup>40</sup>
- The judge being disciplined is not entitled to open file discovery of the investigator's file.<sup>41</sup>
- At one time the supreme court said that violation of the Code of Judicial Conduct does not by itself establish conduct prejudicial to the administration of justice or willful misconduct, but that the conduct also must appear to the objective observer to be prejudicial to public

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28. *In re Nowell*, 293 N.C. 235, 247 (1977).

29. *In re Hardy*, 294 N.C. 90, 97–98 (1978).

30. *In re Martin*, 295 N.C. 291, 305 (1978).

31. *Id.* at 305–06.

32. *Id.* at 306.

33. *In re Peoples*, 296 N.C. 109, 151–52 (1978).

34. *Id.* at 154 (citing *In re Crutchfield*, 289 N.C. 597, 603 (1975)).

35. *Id.* at 157–58.

36. *Id.* at 158.

37. *Id.* at 157–58.

38. *In re Martin*, 302 N.C. 299, 315–16 (1981).

39. *Id.* at 318–20.

40. *In re Bullock*, 324 N.C. 320, 322 (1989).

41. *In re Greene*, 328 N.C. 639, 648–49 (1991).

esteem for the courts.<sup>42</sup> As discussed at the beginning of this bulletin, though, later amendment to the code indicates that violation is now by itself sufficient for discipline.

- The supreme court will not punish judges for honest errors of law.<sup>43</sup>
- When questions arise about the possible bias of Judicial Standards Commission members the judge should be allowed individual voir dire of those members.<sup>44</sup>
- Even if Judicial Standards Commission procedures are imperfect, they are not fatal to the disciplinary action because the commission is only recommending action to the supreme court; the court still makes the final decision.<sup>45</sup>
- In considering whether the judge has engaged in conduct prejudicial to the administration of justice, the judge's motive does not matter so much as the conduct itself.<sup>46</sup>
- Willful misconduct requires more than censure.<sup>47</sup>
- The admonitions of the Code of Judicial Conduct are not just suggestions; they are mandatory.<sup>48</sup>

### Removal Cases

In the forty plus years of the present scheme of judicial discipline the state supreme court has removed nine judges from office, eight for misconduct and one for disability.

The district judge removed for disability had been complaining about a number of other judges and lawyers, asserting that they were conspiring to have her assassinated and otherwise making outrageous claims.<sup>49</sup> The judge agreed to removal on grounds that her behavior was caused by diabetes and stress and was likely to be permanent.

Six district judges and two superior court judges have been removed for misconduct. Half of the eight removals took place in the five-year period between 1978 and 1983; one, in 1991; the other three, in the three years from 2007 to 2010. Given the small number of cases it is not surprising that there is no strong pattern in the reasons for removal, though sexual misconduct did figure in three of the eight cases, while lying to investigators was an aggravating factor in a couple of them.

The misconduct in the eight removals, in chronological order, was as follows:

*In re Peoples*, 296 N.C. 109 (1978)—Over a four- to seven-year period the district judge removed, on his own, about fifty traffic cases, including drunk driving cases, from the calendar, placed the cases in his own file, then later dismissed them without notice to the district attorney (DA). Some of the defendants benefiting from the dismissals paid a “cost of court” to the judge, who sometimes passed the money on to the clerk and at other times did not.

*In re Martin*, 302 N.C. 299 (1981)—The district judge attempted to get female defendants to have sex with him in exchange for his help with their cases.

42. *In re Bullock*, 336 N.C. 586, 589–91 (1994) (citing *In re Edens*, 290 N.C. 299, 306 (1976), and *In re Nowell*, 293 N.C. 235, 248 (1977)).

43. *In re Tucker*, 348 N.C. 677, 682 (1998).

44. *In re Hayes*, 356 N.C. 389, 400 (2002).

45. *Id.* at 401, 406.

46. *In re Royster*, 361 N.C. 560, 563 (2007).

47. *In re Badgett*, 362 N.C. 482, 489–90 (2008).

48. *In re Belk*, 364 N.C. 114, 123 (2010).

49. *In re Harrison*, 359 N.C. 415 (2005).



*In re Hunt*, 308 N.C. 328 (1983)—The district judge took bribes from undercover FBI agents to dismiss traffic cases and protect a gambling business.

*In re Kivett*, 309 N.C. 635 (1983)—The superior court judge attempted to get the DA not to prosecute a rape case against someone who procured women for the judge; sought sex with defendants in exchange for helping with their cases; sexually assaulted a female probation officer; and tried to persuade another superior court judge to not convene a grand jury to indict him.

*In re Sherrill*, 328 N.C. 719 (1991)—The superior court judge was arrested for possession of marijuana, cocaine, and drug paraphernalia; entered a deferred prosecution; and resigned.

*In re Ballance*, 361 N.C. 338 (2007)—The district court judge was convicted of failing to file federal tax returns.

*In re Badgett*, 362 N.C. 482 (2008)—The district court judge, continuing a pattern of misconduct, refused to grant a defendant in a domestic violence case a continuance to hire a lawyer; ordered spousal support with no evidence and when not requested; referred disparagingly to a defendant's Hispanic ethnicity; ordered a defendant's wallet taken and searched for money; tried to influence the testimony of the court clerk on what happened; and lied to SBI agents investigating the misconduct.

*In re Belk*, 364 N.C. 114 (2010)—The district court judge failed to leave the boards of two companies when he took office despite being advised by the Judicial Standards Commission to do so; he also lied to investigators about those companies providing him with health insurance.

The small number of cases and the varied circumstances make it difficult to generalize about the kind of misconduct that will lead to removal. In *Peoples* the supreme court said that willful misconduct under the Code of Judicial Conduct is more serious than conduct prejudicial to the administration of justice and that removal should be reserved for willful misconduct. The eight removals all certainly fit that description. The court in *Peoples* also said that purposeful and repeated misconduct requires removal, and several of the removals have that characteristic. And in the *Kivett*, *Badgett*, and *Belk* cases the judge's behavior was aggravated by lying to investigators or attempting to influence others' testimony. *Belk* illustrates, too, that it is best not to ignore the Judicial Standards Commission when it advises against a particular course of conduct.

### Suspensions

The supreme court was not given the option of suspending a judge until 2007, and it has used that option only twice since then. In 2008 a district judge was suspended for sixty days, in addition to being censured, for a variety of misdeeds: failing to disclose and recuse based on a business relationship with a lawyer; trying to bully the DA into waiving the disqualification; lying to the DA about the status of the Judicial Standards Commission investigation; threatening retaliation against the DA; and rude and insulting courtroom behavior.<sup>50</sup> Although the Judicial

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50. *In re Badgett*, 362 N.C. 202 (2008). This is the same judge who subsequently was removed from office pursuant to *In re Badgett*, 362 N.C. 482 (2008).

Standards Commission had recommended only censure, the supreme court, not bound by the commission recommendation, concluded that a more severe punishment was appropriate, particularly considering the judge's untruthfulness to the commission.

The other suspension occurred in 2012 when a district judge was suspended for seventy-five days for adding at least eighty-two traffic tickets of friends and church members to the docket and then dismissing or continuing them without hearing evidence.<sup>51</sup> The judge previously had received a private warning for similar conduct. The judge probably avoided harsher discipline by cooperating with the investigation and admitting her errors.

### Censures

A censure of a judge is an official condemnation or denunciation of the judge's conduct. It is an admonishment, a strong disapproval. Censure is considered a more severe punishment than a reprimand.

The supreme court has censured judges thirty-six times. In thirty-two instances censure was the only discipline—twenty-five times for district judges and seven times for superior court judges. Three times, twice involving district judges and once a superior court judge, the censure was in addition to removal. And once, for a district judge, the censure accompanied a suspension.

The greater number of censure cases reveals a clearer pattern of misconduct. In a third of the cases the censure was related to improper ex parte communication or action, and in several more it was for the judge's attempt to influence the outcome of a case for a relative or friend. Five other cases involved rude, demeaning, or sexist comments or sexual harassment. There also were three instances of censure for badgering lawyers. The following is a representative sample of the censured behaviors:

- granting a limited driving privilege to a defendant who refused the breathalyzer, without a hearing;
- entering prayers for judgment continued (PJCs), dismissing traffic cases out of session without notice to the DA;
- having sex in the courthouse with a non-litigant [judge also was removed from office for other conduct];
- making campaign contributions to candidates for U.S. Senate, governor;
- attempting to exchange help in a prostitution case for sex; changing verdicts in motor vehicle cases ex parte; sexual advances toward detective; embarrassing remarks to victim in criminal case; threatening lawyers [the judge had retired by the time of the discipline];
- making inappropriate comments seeming to approve of domestic violence;
- badgering lawyer who tried to withdraw from case but could not ethically explain why;
- intervening in child abuse case on behalf of a close friend, including meeting with investigator, telling magistrate to set a low bond, telling clerk whom to appoint to represent defendant as indigent;
- reducing impaired driving cases to careless and reckless knowing it was not allowed by law;
- telling lawyer not to appear in her court after lawyer filed complaint about the judge's ex parte contacts in another case;

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51. *In re Hartsfield*, 365 N.C. 418 (2012).



- threatening court personnel about testimony in his divorce case, badgering lawyer for notarizing document for judge's wife;
- advising a department of social services (DSS) employee on discharge, telling DSS he would use influence to get employee's job back, convening grand jury to investigate DSS;
- public intoxication and indecent exposure;
- ex parte communications to police, other court officials about criminal charges against children of friends;
- assisting friend pursuing worthless check prosecution by refusing to continue case;
- finding defendant guilty of careless and reckless when charged with drunk driving when judge should have known there was no authority to do so;
- while in the courtroom asking lawyers and pro se defendants for support in reelection;
- signing orders without ascertaining their contents;
- making impatient, rude, and demeaning remarks to lawyer;
- refusing to recuse in case involving a party who had lawsuit pending against the judge;
- sexual harassment of judicial assistant, paralegal by unwanted hugging, touching;
- intervening in case for friend by entering ex parte child custody order for him, ordering magistrate to set unsecured bond, asking another judge to go easy on friend;
- failing to disclose business relationship with lawyer and to recuse; trying to bully DA into waiving disqualification; lying to DA about investigation of misconduct; threatening retaliation against DA; rude and insulting in courtroom [judge also suspended];
- referring disparagingly to a defendant's Hispanic ethnicity; ordering a defendant's wallet taken and searched for money; trying to influence the testimony of the court clerk on what happened; lying to SBI agents investigating the misconduct [judge was also removed from office].

The record of censures indicates that in the early years of the district court system there were a number of problems with district judges entering PJC's and otherwise disposing of traffic cases without notice to the prosecutor. That issue seems to have lessened considerably after several censures in the 1970s, though a recurring problem is judges inserting themselves in cases to assist friends.

In several of the examples listed above censure seems like a light punishment for egregious conduct. Sometimes it is clear from the court's opinion that the court took it easy on the judge because the judge already had resigned or retired. That was true, for example, in *In re Hair*, 324 N.C. 324 (1989), when the judge was censured for trying to arrange sex in exchange for helping the defendant with a prostitution charge and for making sexual advances at a detective; in *In re Leonard*, 339 N.C. 596 (1995), when the judge's alcohol problem led to charges of public intoxication and indecent exposure; and in *In re Renfer*, 347 N.C. 382 (1997), when the judge had been entering false guilty pleas without the knowledge of the defendants. In all three cases the judge had already left office. The lighter sanction of censure also may be imposed sometimes because of the judge's good reputation and the absence of any financial gain. That was the case in *In re Cornelius*, 335 N.C. 198 (1993), where the superior court judge was only censured for interference in a DSS employment matter, including threats to use his influence to get the employee's job back and convening a grand jury to investigate the DSS.

## Public Reprimands

From 2007 to 2013 the Judicial Standards Commission was authorized to issue public reprimands. Since 2013, however, only the supreme court may reprimand. As was true when the commission issued reprimands, the public reprimand is to be used by the supreme court when the court finds that “a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor.”<sup>52</sup>

While it had authority to do so, the Judicial Standards Commission issued seventeen public reprimands: twelve were for district court judges, four for superior court judges, and one for a court of appeals judge. That single reprimand is the only public discipline of an appellate judge by the supreme court or the Judicial Standards Commission. The bases for the reprimands by the commission, in chronological order, were:

- drunk driving;
- investigating theft from an uncle’s estate, influencing the bond set for the defendant (in another district);
- using civil contempt, putting defendant in jail rather than entering monetary judgment;
- drunk driving;
- entering an ex parte order in a domestic case based on lawyer’s representation about opposing counsel;
- four-year delay in entering judgment from bench trial;
- intervening on behalf of sister in domestic case;
- ex parte communications through Facebook, independent investigation in domestic case;
- issuing show cause order for contempt based on the publication of a derogatory political flyer about the judge (order later withdrawn);
- comments in other courtrooms, to lawyers, in case in which judge’s wife was a public defender;
- two-year delay in filing order in equitable distribution case;
- issuing directive to public defender on his behavior, ordering it sealed, without notice to defender and without due process;
- messages to other judges to try to influence traffic case of register of deeds;
- signing motions for appropriate relief based on lawyer’s representations without following proper procedure, without proper notice;
- driving while under the influence of an impairing substance (the judge had been convicted and completed substance abuse treatment);
- delay of nearly four years in entering order in equitable distribution case;
- complaining to local police about treatment of the judge’s son, lobbying the DA to initiate proceedings to remove the police chief, ordering town personnel records brought for his review and holding records even though no legal proceeding was pending, intimidating local officials and the DA, threatening local officials with removal.

The kind of conduct that warranted a public reprimand by the Judicial Standards Commission generally was the same kind of behavior that could result in censure by the supreme court. The commission, based on its experience with its recommendations to the court, was able to recognize when a public reprimand was an appropriate outcome and could conclude a matter without having to take it to the court. The one area addressed by the commission’s public reprimands

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52. G.S. 7A-374.2(7).

that was not previously the subject of court discipline was a judge's delay in completing business. Three of the public reprimands described above were based on the time judges took to enter final orders after hearing matters.

Since reprimand authority was shifted from the Judicial Standards Commission to the supreme court in 2013, the court has issued one reprimand, to a district judge in 2015. The public rebuke of the judge was for failing to adequately inquire into the rights of an overseas military serviceman, imprudently relying on the opposing lawyer, and allowing that lawyer to advise the judge without counsel being appointed for the serviceman. The court's order did not discuss how it will decide between censure and reprimand.

### Court's Rejections of Commission Recommendations

In ten instances the supreme court has rejected the sanction recommended by the Judicial Standards Commission. Seven times the court chose not to discipline the judge at all; twice the court remanded the case to the commission for further proceedings; and one time the court censured the judge but refused to remove him from office as recommended.

One remand was because the commission had refused to grant a continuance to the judge who then had not presented evidence at the hearing; the supreme court wanted a better record on which to decide on the recommended removal.<sup>53</sup> The other remand was to have testimony about assault and sexual comments videotaped because the witnesses' credibility could not be assessed from a transcript alone.<sup>54</sup> The court eventually rejected the commission's recommendation to remove the judge, and dismissed the charges, because of doubts about the principal witness's credibility.

The cases in which the supreme court chose not to accept the commission's recommendation provide additional insight into the disciplinary process and the kinds of behavior the court considers deserving of discipline. The bare facts of those cases are as follows:

*In re Martin*, 295 N.C. 291 (1978)—The district judge was censured for dismissing a traffic ticket when the DA had refused to dismiss the case after the judge said the defendant needed a break; and for *ex parte* actions in ordering seizure of an automobile in another case. The commission had recommended removal, based on those incidents and on the judge asking an officer to testify falsely about a breathalyzer test, a charge for which the supreme court did not find clear and convincing evidence. On the charges it did uphold the court said it appeared that the problems were primarily due to the judge not being a lawyer (the constitutional amendment requiring judges to be lawyers was not approved until 1980) and not fully understanding the law. In addition, the court said it had not previously clarified what kind of conduct warranted removal and what justified only censure.

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53. *In re Renfer*, 345 N.C. 632 (1997). The judge eventually was censured in *In re Renfer*, 347 N.C. 382 (1997). The supreme court found that the judge's conduct was sufficient to justify removal, but by that time she had already resigned and agreed not to seek judicial office again.

54. *In re Hayes*, 353 N.C. 511 (2001).

*In re Bullock*, 324 N.C. 320 (1989)—The court rejected censure for the district judge. The judge's confrontation with a law enforcement officer in chambers about something the officer had said was inappropriate, and the judge's remarks were intemperate, but the incident occurred in chambers and was not sufficiently egregious to constitute conduct prejudicial to the administration of justice. Not every intemperate remark warrants discipline.

*In re Bullock*, 336 N.C. 586 (1994) [same Bullock as immediately above<sup>55</sup>—The court rejected the commission's recommendation that the district judge be censured for refusing to recuse himself in a case after previously disqualifying himself and saying he could not be fair; and for personal investigation in a custody case. The court said violation of the Code of Judicial Conduct does not by itself establish conduct prejudicial to the administration of justice warranting censure. The conduct must appear to the objective observer to be prejudicial to the esteem for the court; it must bring the office into disrepute. [As discussed at the beginning of this bulletin, subsequent amendment to the Code of Judicial Conduct appears to establish that violation of the code now is sufficient by itself for discipline.]

*In re Fuller*, 345 N.C. 157 (1996)—The court rejected the commission's recommendation that the district judge be censured for persuading both sides to accept a plea of speeding in a case involving failure to stop for a school bus. It was error to solicit and accept the plea—it is for the prosecutor, not the judge, to negotiate pleas—but the judge granted a motion to dismiss when he realized speeding was not a lesser-included offense. The court believed the judge had not acted knowingly and had corrected his mistake when it was brought to his attention.

*In re Martin*, 345 NC 167 (1996)—The court rejected the commission's recommendation to censure the district judge for arranging a meeting in his office to consider a new bond for the defendant charged with drunk driving. Although the charge had been raised to a felony, the judge wanted to maintain the same bond. When the prosecutor objected to the procedure the judge stopped and followed normal bond procedure. The court found that the conduct was not prejudicial to the administration of justice. All parties had been present at the meeting, and the judge withdrew his plans after the prosecutor objected.

*In re Tucker*, 348 N.C. 677 (1998)—The court rejected the commission's recommendation to censure the district judge for entering not guilty pleas in two DWI cases without the prosecutor's consent, based on representation from the defendant's lawyer that the DA had agreed; also for granting PJs in two drunk driving cases. The court found that the not guilty pleas were the result of a misunderstanding between the lawyer and the DA and that the procedure followed was consistent with the DA's previous handling of cases. On the PJs, the judge

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55. But note that Judge Bullock was censured for badgering a lawyer who wished to withdraw from a case but could not explain why without violating his ethical obligations. *In re Bullock*, 328 N.C. 712 (1991).

did not realize that the law had changed to prohibit such a disposition in drunk driving cases. The court said it would not punish a judge for honest mistakes of law.<sup>56</sup>

*In re Hayes*, 356 N.C. 389 (2002) [final resolution of case remanded to Judicial Standards Commission in *In re Hayes*, 353 N.C. 511 (2001), as discussed *supra* at note 54 and associated text]—The court rejected the commission’s recommendation to remove the district judge for sexual harassment of a clerk. The court found that the clerk’s testimony had been impeached sufficiently such that the court was unable to determine by clear and convincing evidence that the judge had engaged in the misconduct alleged. Upon dismissing the charge the court did not have to decide whether the judge was denied due process by commission members refusing to recuse themselves on remand after previously voting to recommend removal of the judge. The court said the judge should have been allowed individual voir dire of four commission members but that the commission’s admittedly imperfect procedures were not fatal because the ultimate determination was to be made by the court.

*In re Brown*, 358 N.C. 711 (2004)—The court rejected the commission’s recommendation that the district judge be censured for refusing to recuse herself in a juvenile matter in which she had instructed the lawyer not to go to another judge for an order. Even though the judge ended up testifying in the matter, the court found that the lawyer had not provided sufficient facts for the judge to know in advance that her testimony would be needed. The court decided the judge had handled the matter fairly.

## Conclusion: The Patterns of Discipline

What does one make of all these disciplinary decisions, these removals, suspensions, censures, and reprimands? Too much generalization would not be appropriate; after all, considering that they cover a forty-year period, the number of such cases is relatively small. Each case has its own personal facts, and the makeup of both the Judicial Standards Commission and the supreme court has changed a great deal over those four decades. Indeed, North Carolina has had ten different chief justices since the present disciplinary scheme was established —William Bobbitt, Susie Sharp, Joe Branch, Rhoda Billings, Jim Exum, Burley Mitchell, Henry Frye, I, Beverly Lake Jr., Sarah Parker, and Mark Martin.

With those reservations in mind, following are some observations about the sanctions handed down since the supreme court acquired authority to discipline judges in 1973:

- *Removal* is reserved for serious examples of willful misconduct and is used sparingly. A judge will be taken off the bench for fixing cases, taking bribes, trading sex for help in court, drug use, and conviction of serious offenses. A pattern of willful misconduct over time can be an important factor in the supreme court’s decision. Lying to investigators

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56. But note that the same judge later was censured for entering a not guilty plea without informing the prosecutor. *In re Tucker*, 350 N.C. 649 (1999). The opinion says that the judge previously had received a private reprimand from the Judicial Standards Commission for ex parte actions.



or trying to intimidate or influence witnesses increases the likelihood that a judge will be removed.

- It is difficult to say much about *suspension* because it is such a new sanction and has been used only a couple of times. Although the conduct may not be much different, suspension seems more likely than censure when the misconduct has occurred over a period of time.
- *Censure*, and the newer *public reprimand*, appear to be roughly equivalent, though censure has been considered a more severe sanction, at least while the Judicial Standards Commission could issue public reprimands, because the censure came from the supreme court rather than the commission. It seems likely that censure will continue to be considered the more severe sanction even as the court issues both reprimands and censures. Judges have gotten in trouble and been censured or reprimanded most often for improperly acting *ex parte*, particularly in dealing with traffic cases, or for attempting to help relatives or friends in their cases. Problems with drinking, including drunk driving, have resulted in censure or reprimand, as have repeated abusive or insulting conduct toward parties or lawyers or court personnel. Sexual harassment likewise has warranted such discipline and is more likely to be recognized as a problem today than it was twenty or thirty years ago. Most recently, judges have been publicly scolded for taking excessive amounts of time to enter orders.
- The supreme court usually follows the recommendation of the Judicial Standards Commission. Occasionally the court will find that the clear and convincing evidence standard of proof has not been met, or the court will resist discipline for what it sees as a sufficiently isolated instance of misconduct by a judge who otherwise has performed well. If the court is convinced that the judge has attempted to act fairly, though mistakenly, it will not take disciplinary action.
- Politicking rarely gets a judge, or a candidate for a judgeship,<sup>57</sup> in trouble. Only twice have judges been publicly disciplined for improper political activity—once for contributing to non-judicial campaigns and once for soliciting election support from the bench. In response to United States Supreme Court decisions opening the door for more open debate of issues by judicial candidates, the North Carolina Supreme Court in recent years has revised Canon 7 of the Code of Judicial Conduct to describe more precisely the kind of politicking that is allowed. Given the revisions to Canon 7, the canon's declaration of protection for all constitutionally allowed political activity, and the prohibition on using any other code or proposed code to interpret the Code of Judicial Conduct,<sup>58</sup> disciplinary action based on political activity will likely remain a rare occurrence.

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57. Canon 7 of the Code of Judicial Conduct, the canon concerning political activity, applies to candidates for judicial office as well as to incumbent judges. The Judicial Standards Commission has jurisdiction only over sitting judges, however. A case against a non-incumbent judicial candidate would be handled by the State Bar.

58. The prohibition against using other codes is found in the Preamble to the North Carolina Code of Judicial Conduct. It was added in the late 1990s.