

SUNSET ADVISORY COMMISSION

STAFF REPORT

*State Commission on
Judicial Conduct*

MARCH 2012



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Cover photo: The Texas Capitol is a marvel of craftsmanship down to the smallest details. The beautifully carved wood door frames are emphasized with elaborate, custom-designed bronze hinges and hardware produced especially for the building by Sargent and Co. of New Haven, Connecticut, in the late 1880s. The eight inch by eight inch hinges are inscribed with the words "Texas Capitol", decorated with incised designs of geometric and stylized floral motifs, and weigh over seven pounds each.

STATE COMMISSION ON JUDICIAL CONDUCT

SUNSET STAFF REPORT
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SUMMARY

SUMMARY

In many ways, the State Commission on Judicial Conduct is unique. As a judicial branch agency, the Commission's structure, enabling laws, rules, confidentiality, and oversight differ considerably from that of other state agencies. These differences impeded Sunset's ability to evaluate and make recommendations to improve this agency, and pose ongoing obstacles to implementing changes or reforms to Texas' approach to overseeing the conduct of judges.

A major impediment to change stems from how the Commission's structure and operations are prescribed in great detail in the Texas Constitution — everything from the make-up of the Commission to its investigatory and disciplinary processes. Other constitutionally-created state agencies have broad authorization in the constitution and rely on statute to provide more detailed direction. The Commission's detailed constitutional provisions make it challenging for the Legislature to enact statutory changes, as such laws must stay within the constitution's bounds or require voter approval to amend the constitution, not something easily done.

The Commission's structure poses ongoing obstacles to implementing changes to the oversight of judges in Texas.

For example, a 2005 change to the Commission's composition and residency requirements necessitated a voter-approved constitutional amendment, whereas the Legislature makes such changes through state law for most other agencies. As Sunset often recommends improving an agency's operations through changes to state law, the constitutional constriction impacts Sunset's ability to effect changes to the Commission.

Another challenge involves the shared oversight of the Commission by the Texas Supreme Court and the Legislature. The Supreme Court promulgates the Code of Judicial Conduct the Commission enforces and the procedural rules that guide the Commission's operations. Unlike rules an agency adopts, the procedural rules possess the same authority and effect as statute, as explained in Issue 2. Because statute and procedural rules have the same authority, if the Legislature were to adopt a change in statute that differs from the procedural rules, the change would bring into question which takes precedence. The potential for conflicts between the two leaves the Commission open to legal challenges. The arrangement between statute and the procedural rules also limited Sunset's ability to recommend changes to state law, for concern over creating further confusion for the Commission between directives from the Legislature and Supreme Court.

Lastly, unlike most state agencies that must operate openly and transparently, the Commission operates largely behind closed doors to protect the confidentiality of the judges it oversees, most of whom are elected officials. As a judicial branch agency, the Commission is not subject to the Open

Meetings, Administrative Procedure, or Public Information acts. While Sunset recognizes the need to protect judges from public disclosure of unfair or unwarranted complaints stemming from individuals unhappy with the outcome of a case or from political opponents, this must be balanced against the public's right to know that the process is working fairly and effectively when judges misuse or abuse the substantial authority they have been granted.

The major differences between the Commission and other state agencies — its law largely fixed in the constitution, potential conflicts between statute and the procedural rules, and the high level of confidentiality — all worked to make this review especially challenging. Sunset staff concluded that recommendations to change the overall structure of this judicial branch agency exceeded the scope of this review. Instead, Sunset staff focused on assessing the Commission's primary function — the investigation of complaints against judges and the disciplining of judges guilty of judicial misconduct.

Unfortunately, even this more limited approach also hit a major roadblock. The Commission, based on its interpretation of confidentiality requirements tied to the oversight of judges, refused to give Sunset staff full access to its meetings and key documents used in its enforcement process. This decision impeded Sunset staff's ability to conduct a complete and thorough review, and thus, staff could not reach an overall conclusion regarding the efficiency, effectiveness, or impartiality of the Commission's oversight of judges.

As a judicial branch agency, any significant changes to the Commission's structure, laws, canons, and rules would require action by the Legislature and Supreme Court and, most likely, voter approval to modify the constitution. In the meantime, the Commission's current structure makes the need for an objective outside evaluation even more critical to overseeing the Commission. Sunset staff can conduct such a review, if given full access. This review would provide a check on the Commission's work, ensuring to the public the process's integrity while maintaining the necessary confidentiality of judges subject to disciplinary action.

The following material summarizes Sunset staff's recommendations regarding the State Commission on Judicial Conduct.

Issues and Recommendations

Issue 1

The Texas Constitution Limits the Commission's Options to Hear Major Cases in Open Proceedings.

The Commission investigates complaints against judges and conducts either informal or formal proceedings to decide whether or not to take action against a judge. Once the Commission institutes a formal proceeding, it can only dismiss the complaint, issue a censure, or make a recommendation on removal or retirement. The Commission may not issue any of the lesser, more remedial sanctions it has available following an informal proceeding.

Sunset staff found the Commission's limited range of penalties available following a formal proceeding could deter it from pursuing cases of public import in open proceedings. Allowing the Commission to issue any of its lesser sanctions — in addition to a public censure or recommendation for removal or retirement — would equip the Commission with all the necessary tools it needs and remove any disincentive to taking a case to an open, formal proceeding when warranted.

Key Recommendations

- Constitutionally authorize the Commission to use its full range of sanctions following formal proceedings.
- Statutorily authorize a Court of Review to hear appeals of sanctions following formal proceedings, in the same manner as it hears appeals of censures.

Issue 2

Inconsistencies Between Its Statute and Rules Create the Potential for Litigation and Inefficiencies in the Commission's Operation.

The Texas Constitution directs the Supreme Court to promulgate rules for proceedings before the Commission and before an appellate body hearing an appeal of a Commission decision. The constitution also authorizes the Legislature to provide additional direction to the Commission on its operations in statute. Sunset found the Commission's procedural rules being on an equal legal footing with state law creates the potential for conflicts and legal challenges. Further, since the Supreme Court has not updated the Commission's procedural rules in many years, the Commission now has several discrepancies between its statute and its rules.

Requiring the Commission to study its procedural rules for needed updates and to report these findings to the Supreme Court would help to enable the Supreme Court to more regularly update the rules to stay current and prevent conflicts that muddle the Commission's process and provide potential fodder for legal challenges.

Key Recommendation

- Require the Commission on Judicial Conduct to report to the Supreme Court as needed on suggested changes to update its procedural rules.

Issue 3

Lack of Access to Key Meetings and Records Limits Sunset's Ability to Fully Assess the Commission's Oversight of Judges.

The Sunset Act requires state agencies to assist the Sunset Commission and authorizes Sunset staff to inspect the records, documents, and files of an agency. The Sunset Act also protects an agency's confidential records by providing that Sunset staff must maintain the confidentiality of any such information obtained during the course of a review. However, the Commission would not allow Sunset staff to attend its largely closed meetings to observe its enforcement process and barred staff from viewing the memoranda the Commission's legal counsel provides to Commission members for formulating rulings on cases. As a result, staff could not assess the Commission's primary duty.

Requiring the Commission to provide Sunset staff with access to observe its closed meetings and review its confidential records would ensure a complete and thorough evaluation of the Commission's activities. Sunset would continue to maintain confidentiality of the information. In addition, reviewing the Commission in six years, rather than the standard 12-year period, would allow the Commission time to implement changes recommended as a result of this review and enable Sunset to more fully evaluate the Commission's disciplinary process.

Key Recommendations

- Require the Commission to provide Sunset staff with access to observe its closed meetings and review its confidential records to ensure a complete and thorough evaluation of the Commission's activities.
- Review the Commission in six years, rather than the standard 12-year period.

Fiscal Implication Summary

These recommendations should have no fiscal impact to the State, except for the State's one-time publication costs of \$104,813 for placing a constitutional amendment on the ballot.

AGENCY AT A GLANCE

AGENCY AT A GLANCE

The State Commission on Judicial Conduct's mission is to protect the public from judicial misconduct or incapacity by ensuring judges comply with standards of conduct established in the Texas Constitution and by the Supreme Court. Originally created in 1965, the Commission operates as a judicial branch agency, and the constitution spells out all of the Commission's key duties and responsibilities, as follows.

- Investigating complaints against Texas judges.
- Issuing private and public sanctions to judges found to have committed judicial misconduct.
- Making recommendations for the removal or retirement of a judge based on misconduct or incapacity.

The Supreme Court promulgates the Code of Judicial Conduct that the Commission enforces, and the procedural rules that guide the Commission's actions. The constitution also authorizes the Legislature to promulgate laws to further the judicial oversight system established in the constitution.

The Commission oversees over 3,900 judges and the table, *Texas Judiciary*, details the type and number of judges under the Commission's jurisdiction. Appendix A provides a flow chart detailing the jurisdictions of the various courts in Texas.

Texas Judiciary

Type of Judge	Number in 2012
Supreme Court Justice	9
Judge of the Court of Criminal Appeals	9
Appellate Court Justice	80
District Court Judge	456
Associate Judge	177
County Judge	254
Statutory County Judge	236
Statutory Probate Judge	18
Justice of the Peace	815
Municipal Judge	1,553
Retired/Senior Judge	303
Total	3,910

Key Facts

- **Commission Members.** The 13-member Commission is a judicial body that hears and decides cases of judicial misconduct. Members serve staggered six-year terms and meet six times a year. The constitution sets out the requirements for appointment. The Supreme Court appoints six judges, including one justice of a court of appeals, one district judge, one justice of the peace, one municipal court judge, one judge of a county court at law, and one judge of a constitutional county court. In addition, the Governor appoints five citizen members, and the State Bar of Texas appoints two attorneys. All appointees must be confirmed by the Senate.
- **Funding and Staffing.** Funded entirely from General Revenue, the Commission operated on \$996,626 in fiscal year 2011, with more than 80 percent covering staff. The Commission employs 14 full-time staff — an executive director, five attorneys, three investigators, a legal assistant, a staff services officer, and three administrative assistants.
- **Complaint Investigations.** The Commission relies on complaints from the public, attorneys, and members of the judiciary to start an investigation of a judge for alleged misconduct. Many complaints are dismissed as they relate to a judge's rulings in a case, which is not within the jurisdiction of the

Commission. In fiscal year 2011, the Commission received 1,119 complaints and dismissed 607 complaints for failing to allege misconduct. Appendix B illustrates the Commission's complaint process and Appendix C provides details on the complaints made and sanctions issued against each type of judge.

- **Sanctions.** If the Commission finds a violation, the Commission can issue an order of additional education or a private or public sanction, refer a judge for drug or alcohol dependency counseling, or accept a judge's resignation in lieu of discipline. In addition, the Commission can issue orders of suspension, pending either a criminal conviction or a Commission determination of a violation of the Code. Appendix D details the Commission's enforcement process.

In fiscal year 2011, the Commission issued 34 sanctions and three orders of suspension, and accepted five resignations in lieu of sanction. The Commission keeps private sanctions entirely confidential but provides summaries of these cases on its website. For public sanctions, the Commission publishes the sanction and can make the entire record available upon request. Whether the sanction is private or public, the Commission always informs the complainant of the action taken. Appendix E provides additional information on the sanctions issued in fiscal year 2011.

- **Public Censure, Removal or Involuntary Retirement of a Judge.** After a formal hearing, the Commission can issue a public censure or recommend the removal or involuntary retirement of a judge to a seven-judge Review Tribunal, comprised of appellate judges the Chief Justice of the Supreme Court chooses by lot. In fiscal year 2011, the Commission did not issue a public censure or recommend the removal or retirement of a judge.
- **Appeals.** A judge may appeal the decision of the Commission to issue an order of education, a private or public sanction, or a censure to a Court of Review comprised of three appellate judges chosen by lot by the Chief Justice of the Supreme Court. The decision of the Court of Review is final. In fiscal year 2011, no cases were appealed to a Court of Review.

A judge may object to the Commission's recommendation for removal or involuntary retirement to the Review Tribunal reviewing the Commission's recommendation. The Tribunal can reject the Commission's recommendation, order a public censure, or order the retirement or removal of a judge. A judge can appeal the decision of the Tribunal to the Supreme Court. The decision of the Supreme Court is final.

- **Continuing Judicial Education.** The Commission works with judicial schools to provide judges with instruction on judicial ethics. Statute provides the continuing education requirements for each type of judge in Texas. By law, the schools must report judges who fail to meet their continuing education requirements, and the Commission can issue sanctions to judges for failure to comply with the law. In fiscal year 2011, schools reported 18 judges for failing to meeting their continuing education requirements.

ISSUES

ISSUE 1

The Texas Constitution Limits the Commission's Options to Hear Major Cases in Open Proceedings.

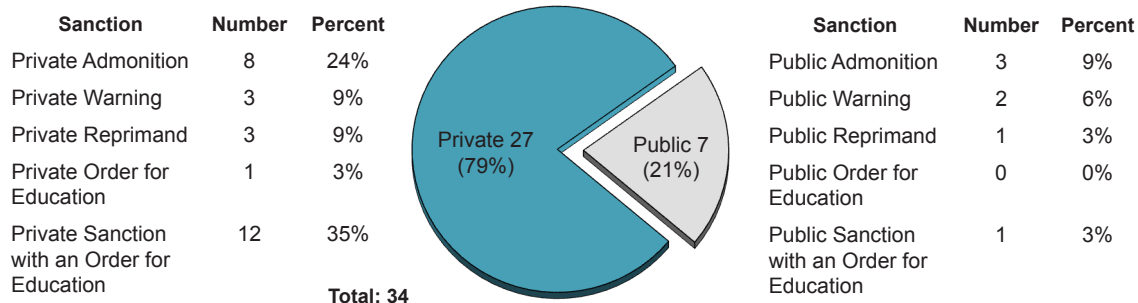
Background

The State Commission on Judicial Conduct investigates complaints filed against judges and conducts either informal or formal proceedings to decide whether or not to take action against a judge. The constitution and statute provide that informal proceedings are closed to the public and formal proceedings are open.

- Closed, Informal Proceedings.** Most commonly, the Commission conducts closed, informal proceedings. Based on the findings of these informal proceedings, the Texas Constitution authorizes the Commission to issue private or public admonitions, warnings, reprimands, or orders for additional training or education for judicial misconduct.¹ The Commission's procedural rules, promulgated by the Texas Supreme Court, describe these punishments as sanctions and state that they are remedial in nature and meant to deter similar misconduct by a judge or judges in the future.²

While most cases result in private sanctions, the Commission may also issue a public sanction following a closed, informal hearing. These include public admonitions and warnings for lesser violations that warrant informing the public about the violation and require putting the judiciary on notice that the actions identified in the violation are improper. The Commission can also issue public reprimands for more serious violations. A public reprimand has the additional consequence of barring constitutional county, statutory county, district and appellate judges from serving as visiting judges when they retire from the bench, a lucrative position. The pie chart, *Commission Sanctions*, details the number and type of sanctions the Commission issued in fiscal year 2011.

Commission Sanctions – FY 2011



- **Open, Formal Proceedings.** The Texas Constitution also authorizes the Commission to hold open, formal proceedings when a complaint alleges egregious misconduct. Based on the findings of an open, formal proceeding, the constitution authorizes three options: dismissal, public censure, or recommendation to a Review Tribunal for the removal or retirement of a judge.³ Censure is the formal condemnation of a judge’s actions and is the strongest penalty that the Commission itself can hand down. The Commission considers censure to be punitive while sanctions are viewed to be more remedial in nature. Over the last 10 years, the Commission has conducted 12 formal proceedings and issued two censures. The Commission has also made three recommendations for the forced retirement of a judge, all of which were accepted by the Review Tribunal.
- **Appeals.** Judges can appeal sanctions to a Court of Review, comprised of three appellate justices chosen by lot by the Chief Justice of the Supreme Court to conduct a trial de novo. Judges can also appeal a censure to a Court of Review, which performs a review of the record. The judgment of the Court of Review is final.

A Commission recommendation for removal or retirement is automatically sent to a Review Tribunal, comprised of seven justices or judges of the courts of appeals chosen by lot by the Chief Justice of the Supreme Court. The Review Tribunal can wholly adopt or reject the Commission’s recommendation or order the censure of the judge. Judges can appeal the decision of the Review Tribunal to the Supreme Court. The accompanying table, *Appeals of Commission Decisions*, shows a comparison of the different appeals processes.

Appeals of Commission Decisions

Type of Proceeding	Commission Action	Appellate Body	Type of Review	Further Review?
Informal	Private or Public Sanction	Court of Review	Trial de Novo	No
Formal	Public Censure	Court of Review	Review of the Record	No
Formal	Recommend Removal or Retirement	Review Tribunal, as part of its review of the Commission’s recommendation	Review of the Record	Appeal to the Supreme Court under the substantial evidence rule

Findings

The constitution and resulting case law unnecessarily limit the Commission’s punishment options.

A recent Court of Review decision found that the Commission does not have the authority to issue a public sanction following a formal proceeding. In 2010, the Commission, following an open, formal hearing, issued a public warning to a judge for closing the Court of Criminal Appeals when a request for a stay of execution was scheduled to arrive.⁴ On appeal to the Court of Review, the judge successfully argued that, although the Commission’s procedural rules allow for the Commission to issue a public warning following

a formal proceeding, statute and the constitution do not allow the issuance of a warning following a formal proceeding.^{5,6}

The Court of Review ruled that the rules of statutory construction require a reading of the statute and constitution that sanctions can only be issued following informal proceedings, and that once the Commission institutes a formal proceeding, it can only dismiss the complaint, issue a censure, or make a recommendation on removal or retirement. Thus, the court overturned the Commission's public warning in this case and the judge received no sanction. This decision means that, once it opts to hear a case in an open, public proceeding, the Commission cannot issue any of the lesser, more remedial sanctions it has available following an informal proceeding.

The Commission cannot issue any of its lesser sanctions following formal proceedings.

The Commission's limited range of penalties available following a formal proceeding could deter the Commission from pursuing cases of public import in open proceedings.

An agency's range of sanctions should not be based on whether a proceeding is informal or formal, open or closed. Agencies should have a full range of sanctions available, and the available sanctions should not vary based on what type of proceeding is selected. Formal proceedings are useful in that they allow the Commission to conduct a full evidentiary hearing when a case is either complex and the facts warrant an extensive investigation, or to openly hear cases that are important to the public.

Under the limits imposed by current case law, the Commission may choose not to hear a case of clear public import in an open, formal proceeding since its options would be limited to a punitive sanction or dismissal, with no option for a more remedial sanction if warranted once the full facts of the case are in evidence. This reading of the law could seriously limit the Commission's options if faced with a situation where a high-profile incident comes to its attention that may not warrant a full public censure or removal. The Commission's only two options would be to hold a closed, informal proceeding to issue an appropriate sanction; or hold an open, formal proceeding so that the public is able to see that action is being taken, but ultimately have to dismiss the case if censure or removal is not warranted.

Confidence in the integrity of the judiciary rests on high profile cases being heard openly.

The Commission has an interest in ensuring public confidence in the judiciary through the holding of public hearings on cases of clear public import. The Commission's mission statement includes promoting public confidence in the integrity, independence, competence, and impartiality of the judiciary. The public cannot be confident in the integrity of the judiciary or the Commission if high-profile cases are not addressed in a public forum.

Recommendations

Constitutional Amendment

1.1 Authorize the Commission to use its full range of sanctions following formal proceedings.

This recommendation would allow the Commission to issue a public admonition, warning, reprimand, or order of education following a formal proceeding, in addition to issuing a public censure or recommending removal or retirement to the Review Tribunal. To enact a change to the constitution, this recommendation would require the Legislature to pass a joint resolution containing this sanction authority and Texas voters to approve an amendment to the State Constitution. If approved by voters, the Legislature should enact legislation to conform statute to the constitutional changes.

Change in Statute

1.2 Authorize a Court of Review to hear appeals of sanctions following formal proceedings, in the same manner as it hears appeals of censures.

This recommendation would allow the Court of Review to hear appeals of public sanctions issued following a formal hearing in the same manner as public censures. Under current law, the Court of Review hears the appeals of sanctions issued in informal, closed proceedings by trial de novo. However, as sanctions issued following a formal proceeding will have a full record and the judge will have been afforded full due process, there is no need for a trial de novo. The Court of Review would conduct a review of the record of the formal proceeding and would allow new evidence only with good cause shown, as is currently done for censures. The decision of the Court of Review would be final and not appealable.

Fiscal Implication

These recommendations should have no fiscal impact to the State, except for the State’s one-time \$104,813 publication cost for placing the constitutional amendment on the ballot.⁷

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¹ Section 1-a(8), Article V, Texas Constitution.

² State Commission on Judicial Conduct, Procedural Rules for the Removal or Retirement of Judges as promulgated by the Texas Supreme Court, Rule 1(e).

³ Section 1-a(8), Article V, Texas Constitution.

⁴ State Commission on Judicial Conduct, *Commission Order Inquiry Concerning Honorable Sharon Keller Judge No. 96*, accessed January 24, 2012, <http://www.sjc.state.tx.us/pdf/skeller/CommissionOrder.pdf>.

⁵ State Commission on Judicial Conduct, Procedural Rules for the Removal or Retirement of Judges as promulgated by the Texas Supreme Court, Rule 10(m).

⁶ State Commission on Judicial Conduct, *Special Court of Review Final Opinion In Re Keller*, accessed January 24, 2012, p. 31, <http://www.sjc.state.tx.us/pdf/skeller2/FinalOpinion.pdf>.

⁷ Texas Secretary of State, *Operating Budget for Fiscal Year 2012* (Austin, Texas, December 2011, accessed January 23, 2012, p. 7, <http://www.sos.state.tx.us/about/publications/operating-budget-fy2012.pdf>).

ISSUE 2

Inconsistencies Between Its Statute and Rules Create the Potential for Litigation and Inefficiencies in the Commission's Operation.

Background

The Texas Constitution directs the Supreme Court to promulgate rules for proceedings before the State Commission on Judicial Conduct and before an appellate body hearing an appeal of a Commission decision.¹ The Supreme Court first promulgated procedural rules for the Commission in 1967 and last updated them in 1994.² The rules detail the Commission's processes for preliminary investigations, informal proceedings, formal proceedings, and appeals; as well as notice and filing deadlines, procedural and evidentiary rules, and procedural rights of judges.

The Texas Constitution also authorizes the Legislature to provide additional direction to the Commission on its operations in statute.³ Over the years, the Legislature has enacted numerous changes to the Commission's enabling statute, including changes to make the process more open to the public and to provide a special court to hear judicial appeals of disciplinary actions issued by the Commission.

Findings

The Commission's unique structure places the Supreme Court's procedural rules on an equal footing with state law, creating the potential for conflicts and legal challenges.

Most state agencies are authorized by statute to promulgate their own rules. The rules set forth the procedure that the agency will operate under and have the force and effect of law so long as the rules do not exceed the authority provided by statute. If a rule conflicts with statute, then the rule is invalid and cannot be enforced.

However, the Supreme Court has held that procedural rules adopted by the Court have the same force and effect as statute.⁴ Additionally, the constitution requires the Supreme Court to promulgate the Commission's procedural rules, but the constitution merely permits the Legislature to adopt statute. Consequently, the Commission's rules are placed on equal footing with statute, as the constitution does not require that the rules conform to statute.

This structure, unfortunately, can result in conflicts between state law and the Commission's procedural rules. Having procedural rules that conflict with statute creates the potential for litigation following Commission action. If the procedural rules and statute were to directly conflict, the Commission would have to choose between following statute and following its procedural rules. Whichever governing law it chooses to follow, a judge could potentially challenge the action for not following the process laid out in the other law.

A judge can challenge a Commission sanction if rules and statute conflict.

While such litigation has yet to occur, the Commission’s unique structure creates the possibility for future conflicts, as the Legislature continues to provide additional statutory direction to the Commission each session.

As the Supreme Court has not updated the Commission’s procedural rules in many years, the Commission now has several discrepancies between its statute and its rules.

The Supreme Court last updated the Commission’s procedural rules 18 years ago.

The Supreme Court last updated the Commission’s procedural rules 18 years ago in 1994. Since then, the Legislature has changed the Commission’s statute numerous times, making changes to almost every provision. These changes have expanded the Commission’s authority and provided additional rights to judges, but the rules have not been updated to provide the Commission procedures for implementing the statutory changes. The table, *Conflicts Between State Law and the Commission’s Procedural Rules*, highlights some of these statutory changes.

Conflicts Between State Law and the Commission’s Procedural Rules

Government Code	Rule	Conflict
33.024	5	Statute authorizes a judge of the Court of Review to issue a subpoena, but rule does not.
33.034(e)(1)	9	Statute allows for an appeal of a censure, but rule does not provide a process for such an appeal.
33.034(h)	9(c)	Statute provides for a continuance, but rule does not.
33.034	17	Statute makes proceedings public when the Commission files charges, but rule does not.

Beyond these conflicts, as an agency’s operations evolve, agency rules may often need updating to allow the agency to operate more efficiently. For example, the Commission has out-of-date or insufficient rules that require sending out certified notice when regular notice would do, do not provide clear procedures for post-suspension hearings, and do not allow the Commission to take actions that would allow judges to seek reconsideration instead of filing a formal appeal.

Other state agencies that the Supreme Court promulgates rules for provide suggested rule updates to the Court as needed.

The Supreme Court promulgates rules for the State Bar of Texas and the Texas Board of Law Examiners, much as they do for the Commission. Both of these agencies can and do inform the Supreme Court when changes are needed and provide suggested updates and revisions. This process ensures that the Court is timely made aware of needed changes and helps the Court by providing the initial research on needed changes. However, the Commission does not currently propose needed rule changes to the Court.

Recommendation

Change in Statute

2.1 Require the Commission on Judicial Conduct to report to the Supreme Court as needed on suggested changes to update its procedural rules.

This recommendation would require the Commission to study its procedural rules for needed updates to reflect changes in case law, statute and the constitution, and to report these findings to the Supreme Court on an as-needed basis. The Commission should also assess needed updates to improve Commission operations or increase Commission efficiency. While the statute should require the Commission to make its first recommendations to the Court no later than December 31, 2013, the Commission should consider assessing and reporting on needed changes sooner than this date.

Fiscal Implication

This recommendation would have no fiscal impact to the State.

¹ Section 1-a (11), Article V, Texas Constitution.

² Shuwerk and Hardwick, *Handbook of Texas Lawyer and Judicial Ethics; Judicial Ethics Standards Recusal and Disqualification of Judges* (West, 2010-2011), p. 12.

³ Section 1-a (14), Article V, Texas Constitution.

⁴ *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001).

ISSUE 3

Lack of Access to Key Meetings and Records Limits Sunset's Ability to Fully Assess the Commission's Oversight of Judges.

Background

The State Commission on Judicial Conduct, as a judicial branch agency set up in the Constitution, is not subject to automatic abolishment under the Sunset Act. However, the Commission is subject to a full Sunset review every 12 years.¹ The Sunset process creates a unique opportunity for the Legislature to assess an agency's performance and make fundamental changes to its operations if needed. To conduct a full review, Sunset staff uses criteria established by the Legislature to evaluate key components of an agency, such as an agency's success in achieving its goals and objectives, and the agency's efficiency and effectiveness in performing its functions.

The primary purpose of the Commission on Judicial Conduct is to protect the public from judicial misconduct or incapacity. Thus, Sunset staff's review of the Commission focused on evaluating the Commission's oversight of the judiciary. This involved evaluating how efficiently and effectively the Commission protects the public from judicial misconduct and whether the Commission's disciplinary processes are clearly defined, open and responsive to public complaints, and fairly and consistently applied in practice.

To ensure the assistance of and access to state agencies under review, the Sunset Act requires state agencies and officers, upon request, to assist the Sunset Commission and authorizes Sunset staff to inspect the records, documents, and files of an agency.² The Sunset Act also protects an agency's confidential records by providing that, if the Sunset Commission receives a confidential record in connection with the performance of its duties, the record remains confidential and exempt from public disclosure.³ In addition, the Texas Attorney General has issued an opinion holding that Sunset working papers, including all documentary or other information, prepared or maintained by Sunset staff during the course of an agency review are confidential and not subject to disclosure.⁴

Findings

The Commission's largely closed process makes it difficult for the public to know if the Commission is appropriately responding to citizen complaints against judges.

As a "quasi-court, quasi-administrative" judicial branch agency with authority over judges, who are mostly elected officials, the Commission operates under stronger confidentiality requirements than most other state agencies. The Texas Constitution provides for the confidentiality of all papers filed with and proceedings before the Commission, unless otherwise provided by law. State law provides two primary exemptions from this confidentiality — that all formal proceedings be open and that the records of a case resulting in a public sanction be made public. In addition, as a judicial branch agency, the Commission is not subject to the Open Meetings, Administrative Procedure, or Public Information acts.^{5,6,7}

The Commission operates under stronger confidentiality requirements than most other state agencies.

In the last 10 years, the Commission has held only 12 meetings that were open to the public.

However, because formal proceedings and public sanctions constitute a small portion of the Commission's activities, very little of the Commission's process is visible to the public. For example, in fiscal year 2011, only seven of the Commission's 34 disciplinary actions involved a public sanction. That same year, the Commission met six times to hear cases of alleged judicial misconduct, but held no meetings open to the public. In fact, over the last ten years, the Commission has held a formal proceeding, which is open to the public, only 12 times. As the Open Meetings Act does not apply to the Commission, even these meetings, while open, do not have to be posted.

A survey of members of the public and judges that have gone through the Commission's complaint process indicates pronounced differences regarding the fairness and effectiveness of the process.

Unable to observe the process directly, Sunset staff designed a survey to obtain input from individuals who have been a part of the judicial discipline process. In October 2011, staff sent a survey to each of the 493 individuals who filed a complaint against a judge that warranted an official investigation in fiscal years 2008, 2009, and 2010. Staff also sent the same survey to the 382 judges against whom the complaints were filed if they were still in office. Sunset received 224 responses — 115 from complainants and 109 from judges — representing a response rate of about 26 percent. For additional information on the results of the survey, see Appendix F.

The responses indicated a clear difference of opinion between complainants and judges, with complainants expressing an overwhelmingly negative view of the Commission and judges indicating nearly the exact opposite. For example, a clear majority of complainants, 78 percent, rated the fairness of the complaint process overall as unsatisfactory. In contrast, only 14 percent of judges rated the process' fairness as unsatisfactory. While some differences are not unexpected, the sharp contrast in these participants' view of the process raised concerns and would normally necessitate staff observing the process directly and reviewing relevant documents to make an independent evaluation.

Seventy-eight percent of surveyed complainants rated the fairness of the complaint process as unsatisfactory.

The Commission's refusal to give Sunset staff full access to its meetings and records prevents Sunset from performing a thorough review of the agency and its disciplinary processes.

Based on its constitutional and statutory confidentiality provisions, the Commission argues that its meetings are closed to everyone, including the Sunset Commission and its staff. The Commission interprets its authority as civil in nature, not administrative. Commission members view themselves as exercising judicial authority in taking action to address judicial misconduct, not administrative actions as with executive branch licensing agencies that oversee other professions, such as doctors or accountants. The Commission

states that this level of confidentiality is necessary to protect the confidentiality of the judges involved and to preserve the integrity of the Commission's informal proceedings.

Consequently, the Commission would not allow Sunset staff to attend its meetings to observe its process and its interactions with judges, complainants, and witnesses. In addition, by invoking attorney-client privilege, the Commission barred staff from viewing the memoranda the Commission's legal counsel provides to Commission members for formulating rulings on cases. Thus, Sunset staff were denied access to a key document providing analysis for the Commission and were unable to observe the Commission's approach to deciding when and if a complaint of judicial misconduct is valid — and if so, what level of disciplinary action is appropriate. As a result, staff could not assess the Commission's primary duty.

Sunset staff acknowledges that the Commission was very cooperative with other requests involving aspects of the Commission not deemed confidential. Staff had access to all members of the Commission and Commission staff. The Commission provided files and recordings of portions of public and private sanction cases, though not Commission deliberations, after redacting the identities of complainants and judges. The Commission staff also supplied statistical summaries of disciplinary data. In addition, the Commission was open and responsive to several suggestions for material improvements. For example, during the course of the review, Commission staff worked to implement several significant changes to the Commission's website and IT processes.

However, without access to key components of the Commission's disciplinary processes, staff could not make a determination of their efficiency, effectiveness, or fairness. By preventing a full review, the Commission on Judicial Conduct seriously limits the ability of the Sunset Commission and the Legislature to assess the oversight of judges in Texas, as required by law.

Despite the Commission's place in the judicial branch of state government, the confidentiality of these meetings and records are no different than those of other state agencies. If given access, Sunset staff would have maintained the same level of confidentiality that statute requires of the staff of the Commission on Judicial Conduct and would have been subject to the same penalties for disclosure.

For more than 30 years, Sunset staff has routinely accessed confidential meetings and documents as part of its job reviewing state agencies, and has consistently maintained the confidentiality of this information, as required by law.

Sunset has a long history of accessing sensitive confidential information. In reviewing agencies such as the Medical Board, various health and human service agencies, the Railroad Commission, the Division of Workers' Compensation, and the State Bar, to name a few, Sunset has had access

Without access to meetings, Sunset staff could not observe the Commission's interactions with judges and complainants.

Sunset staff could not assess the Commission's efficiency, effectiveness, or fairness due to lack of access.

to very sensitive information, such as detailed disciplinary case files and confidential health records. The purpose of observing such information is to gather a complete picture to assess how an agency performs its functions. Sunset uses this information to help shape its recommendations to the Legislature, but does not reveal or include in its reports any information deemed confidential.

The inability of Sunset staff to conduct a complete review of the Commission this cycle makes it inadvisable to wait a full 12 years before the agency's next Sunset review.

The Sunset Commission is a key component of the legislative check on a process whose oversight of judges takes place largely within the confines of the judicial branch and largely behind closed doors. While the constitution and state law appear to support the need for confidentiality to safeguard the judiciary, the Legislature also clearly intended that this lack of transparency be counter-balanced by allowing the Legislature, through the Sunset process, to periodically conduct an outside and objective evaluation of the Commission and its oversight of judges.

Assuming the Legislature enacts changes to address Sunset's ability to conduct a more thorough review of the Commission in the future, the limited access provided this cycle would indicate a need to review the Commission within a shorter timeframe than the standard 12-year cycle currently provided for in law.

The Commission's one reporting requirement serves a useful purpose and should be maintained.

In 2011, the Legislature directed Sunset to evaluate the reporting requirements tied to each agency under review and to recommend to the Legislature whether to keep or discontinue each requirement.⁸ The Commission on Judicial Conduct has only one reporting requirement — to annually report to the Governor and the Legislature on statistical information and examples of improper judicial conduct and changes the Commission considers necessary in its rules, law, or the constitution. Statute also requires distribution of the report to the *Texas Bar Journal*, to periodically publish information on what constitutes misconduct and sanctions resulting from misconduct.⁹

Required since 1983, the Commission uses the report to explain its narrow, and rather nuanced, authority and jurisdiction, a frequent source of misunderstanding. The Commission elaborates on what constitutes judicial misconduct, its disciplinary process, and sanctions taken in the prior year. Since 2001, the Commission has posted each annual report on its website, making the reports easily accessible to the public. In addition, publicizing this information through the *Bar Journal* reminds judges of the Commission's role, helping to deter similar behavior by other judges. At less than \$280 in expenditures for printing, the report presents no undue cost to the Commission and appears to serve a useful purpose.

Periodic review by Sunset helps to counter balance the Commission's lack of transparency.

The Commission's annual report helps publicize its sanctions.

Recommendations

Change in Statute

3.1 Require the Commission to provide Sunset staff with access to observe its closed meetings and review its confidential records to ensure a complete and thorough evaluation of the Commission's activities.

Clarify in the Commission's statute that its confidentiality and privilege provisions do not bar the Commission from being subject to a full Sunset review. Clarify in statute that Sunset staff must maintain the same level of confidentiality as the staff of the Commission and, as a result, is entitled to access whatever components of the Commission's process Sunset deems necessary. This statutory change should make clear that the sharing of confidential agency documents prepared by Commission staff attorneys to aid the Commission in reaching a decision does not constitute a violation of attorney-client privilege.

3.2 Review the Commission in six years, rather than the standard 12 year period.

While not subject to abolishment, the Commission's statute requires a Sunset review every 12 years. This recommendation would make a one-time change to provide for the next review to occur in six years, 2019. This shorter Sunset date would allow the Commission time to implement changes recommended as a result of this review and enable Sunset to more fully evaluate the Commission's disciplinary process with the broader authority envisioned above. After 2019, the Commission would revert back to a periodic Sunset review every 12th year.

3.3 Maintain in law the requirement for the Commission to distribute an annual report on its activities to protect the public from judicial misconduct.

This recommendation would simply maintain the requirement in the Commission's statute to annually report on its activities and sanctions. To comply with a recent change in law, the report and notice that the report is available should be provided to the Legislature in an electronic format only.¹⁰

Fiscal Implication

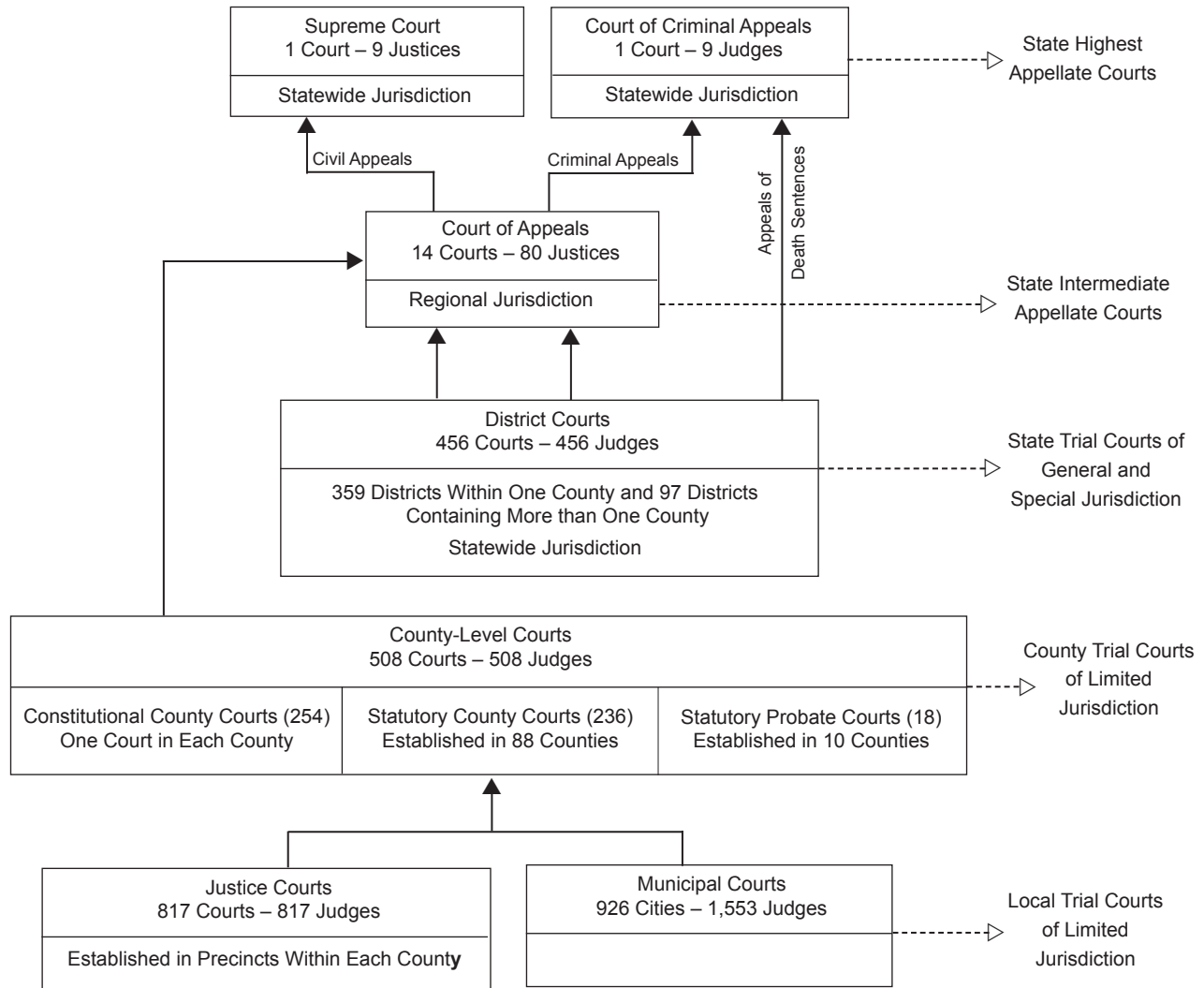
These recommendations would not have a fiscal impact to the State.

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- ¹ Section 33.003, Texas Government Code.
 - ² Section 325.019, Texas Government Code.
 - ³ Section 325.0195, Texas Government Code.
 - ⁴ Op. Tex. Att'y Gen. No. OR2011-01970.
 - ⁵ Section 551.001(3), Texas Government Code.
 - ⁶ Section 2001.003(7), Texas Government Code.
 - ⁷ Section 552.0035, Texas Government Code.
 - ⁸ Sections 325.0075, 325.011 (13), and 325.012 (a)(4), Texas Government Code.
 - ⁹ Section 33.005, Texas Government Code.
 - ¹⁰ S.B. 1618, 82nd Legislature, Regular Session, 2011.

APPENDICES

APPENDIX A

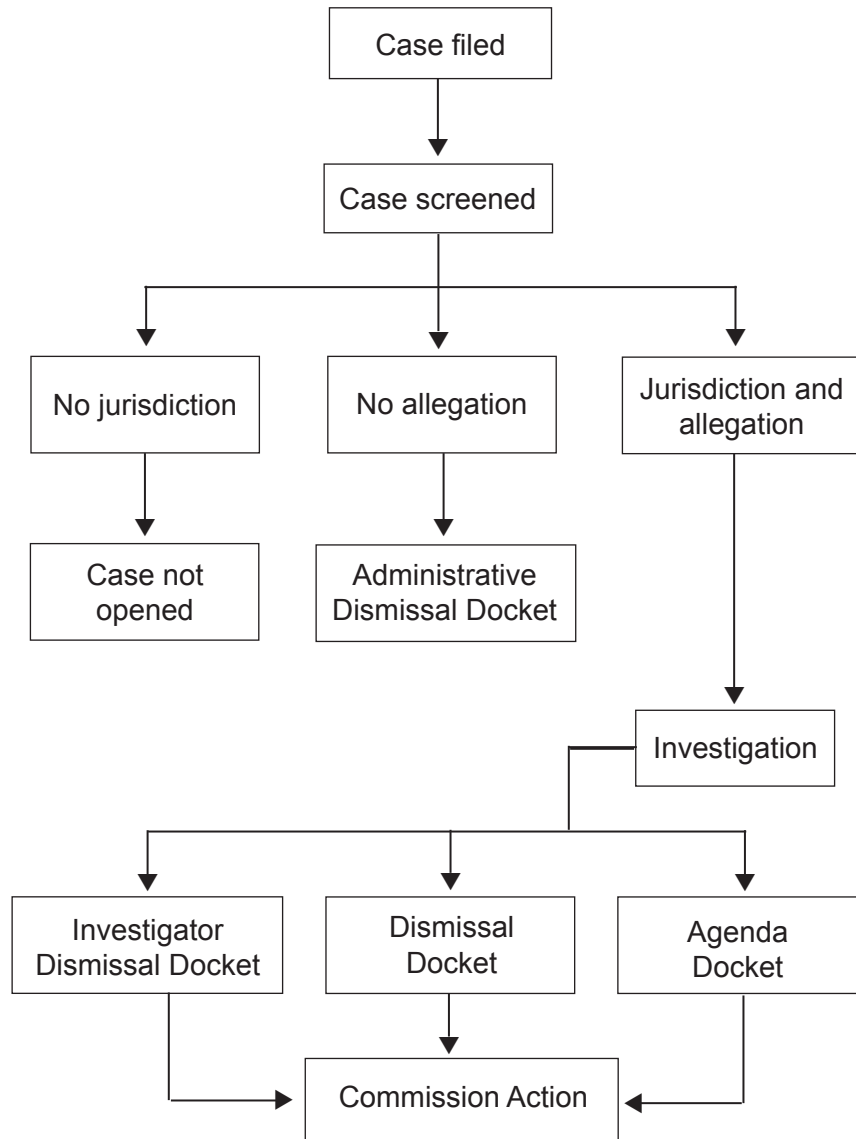
Court Structure of Texas



Source: Office of Court Administration, *Court Structures of Texas*, accessed January 17, 2012, http://www.courts.state.tx.us/oca/pdf/Court_Structure_Chart.pdf.

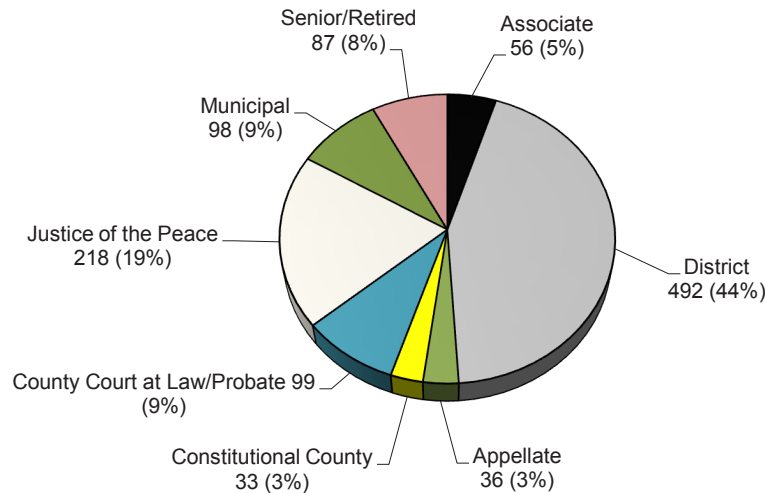
APPENDIX B

Complaint Process



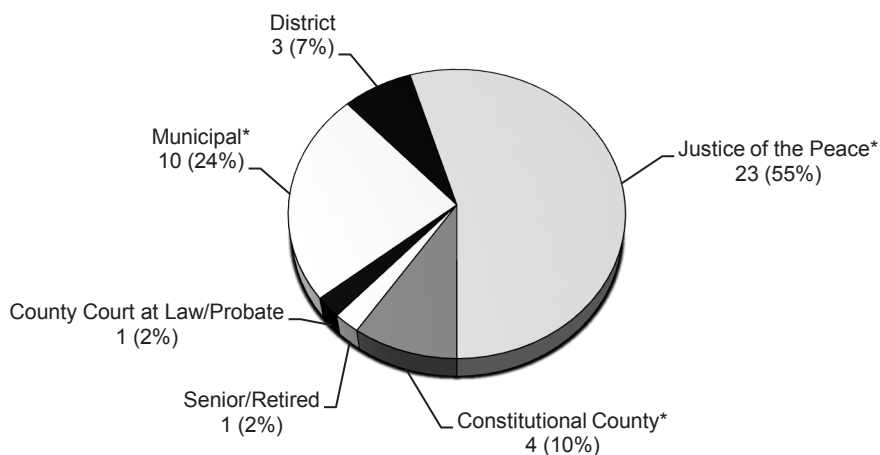
APPENDIX C

Complaints Filed by Type of Judge FY 2011



Total Complaints: 1,119

Disciplinary Actions by Type of Judge FY 2011

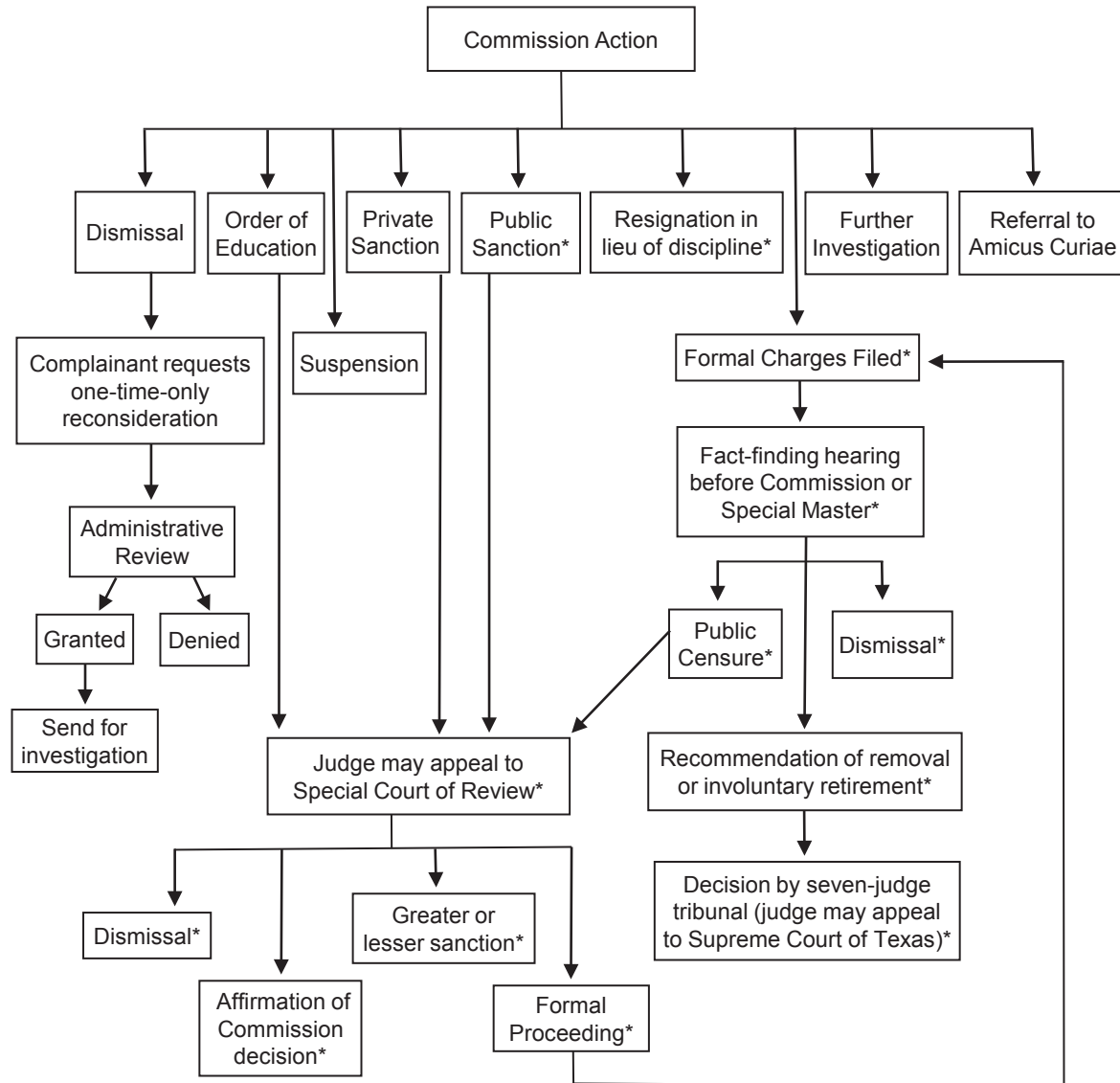


Total Disciplinary Actions: 42

*Justices of the peace, municipal judges, and constitutional county judges are not required to be attorneys. Non attorney judges make up 44% of Texas' judiciary, and in fiscal year 2011 half of all judges sanctioned were non attorney judges.

APPENDIX D

Enforcement Process



* public action, not confidential

APPENDIX E

Sanctions – FY 2011

Type of Sanction	Explanation	Number
Order of Additional Education	When a judge shows a lack of knowledge in a particular area of the law, or needs help maintaining proper judicial temperament, the Commission will order additional legal training or mentoring. Education may be public or private and can be combined with other sanctions.	1
Private Admonition	Used for minor infractions committed by less experienced judges where the Commission has determined that the public can be adequately protected without public disclosure of the misconduct. This sanction is often combined with an order of additional education for judges who failed to meet their continuing education requirements.	8
Private Warning	More serious than an admonition, this sanction is used for less serious infractions, especially when a judge has enough experience to have known that the conduct is prohibited, and the Commission has determined that the public can be adequately protected without public disclosure of the misconduct.	3
Private Reprimand	More serious than a warning, this sanction is used for infractions where the Commission has determined that the public can be adequately protected without public disclosure of the misconduct, but a strong message needs to be sent to the judge that the conduct is prohibited.	3
Order of Additional Education with Private Sanction	An order of education can be combined with a private sanction.	12
Public Admonition	Used for lesser violations that warrant letting the public know about the infraction. This places the judge and other judges on notice that the conduct is prohibited.	3
Public Warning	More serious than an admonition, this sanction is used for more serious violations that warrant letting the public know about the infraction, while placing the judge and other judges on notice that the conduct is prohibited.	2
Public Reprimand	More serious than a warning, this sanction is reserved for more egregious violations that warrant letting the public know about the infraction, while placing the judge and other judges on notice that the conduct is prohibited. This sanction has the additional consequence of barring certain judges from serving as visiting judges when they retire from the bench or lose an election.	1
Order of Additional Education with Public Sanction	An order of education can be combined with a public sanction when the Commission determines that the public should be aware of the additional training requirements imposed on the judge.	1
Total		34

APPENDIX F

Results of Sunset Survey of Complainants and Judges

As part of this review, Sunset staff designed a survey to obtain input from judges and complainants who have been through the Commission's complaint process. In October 2011, Sunset staff sent this survey to 875 individuals who had been through the complaint process during the last three fiscal years, 493 complainants and 382 judges. Sunset staff received 115 responses from complainants and 109 responses from judges.

Survey	115 Complainants	109 Judges
Please rate how well SCJC makes information about its functions easily accessible to the public:	8.3% excellent 35.7% satisfactory 56% unsatisfactory	20% excellent 68% satisfactory 12% unsatisfactory
Please rate how well SCJC makes information about its functions easy to understand:	9.2% excellent 40.3% satisfactory 50.5% unsatisfactory	26.2% excellent 57.3% satisfactory 16.5% unsatisfactory
Does the Commission's complaint process make it easy for members of the public to file a complaint?	42.7% said yes 57.3% said no	94.7% said yes 5.3% said no
Please rate the content and ease of use of the Commission's website:	7.2% excellent 53% satisfactory 39.8% unsatisfactory	20% excellent 70.6% satisfactory 9.4% unsatisfactory
Please rate the fairness of the Commission's complaint process overall:	3.6% excellent 18.2% satisfactory 78.2% unsatisfactory	29.7% excellent 56.4% satisfactory 13.9% unsatisfactory
Please rate the thoroughness of a Commission complaint investigation:	2.8% excellent 19.6% satisfactory 77.6% unsatisfactory	38.1% excellent 51.6% satisfactory 10.3% unsatisfactory
Please rate the timeliness of the Commission's handling of complaints:	2.7% excellent 20% satisfactory 77.3% unsatisfactory	10% excellent 67% satisfactory 23% unsatisfactory
Please rate how well the Commission keeps complainants and respondents informed of their case status:	4.6% excellent 23% satisfactory 72.4% unsatisfactory	18.9% excellent 65.3% satisfactory 15.8% unsatisfactory
Please rate how well the Commission protects the confidentiality of judges and people who file complaints:	26.3% excellent 39% satisfactory 34.7% unsatisfactory	40.4% excellent 12.1% satisfactory 47.5% unsatisfactory
Are there any situations where confidentiality requirements hinder the Commission from carrying out its functions?	62% said yes 38% said no	7.8% said yes 92.2% said no

Appendix F

Results of Sunset Survey of Complainants and Judges

Survey	115 Complainants	109 Judges
Please rate how well the Commission's sanctions address judges' misconduct:	2.8% excellent 11.1% satisfactory 86.1% unsatisfactory	29.5% excellent 60% satisfactory 10.5% unsatisfactory
Does the Commission appropriately publicize actions taken against judges?	13.1% said yes 86.9% said no	91.3% said yes 8.7% said no

APPENDIX G

Staff Review Activities

During the review of the State Commission on Judicial Conduct, Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with Commission staff; conducted interviews and solicited written comments from Commission members, interest groups, and the public; reviewed Commission documents and reports, state statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar state agencies in other states; and performed background and comparative research using the Internet.

In addition, Sunset staff also performed the following activities unique to the Commission.

- Surveyed individuals who filed complaints against judges that led to official investigations and the judges against whom these complaints were filed.
- Interviewed staff from the Office of Court Administration.
- Interviewed a justice of the Supreme Court of Texas.
- Visited courthouses in Travis County.
- Observed the proceedings of a justice of the peace courtroom.
- Observed a post-suspension hearing for a judge.

Sunset Staff Review of the *State Commission on Judicial Conduct*

————— *Report Prepared By* —————

Erick Fajardo, *Project Manager*

Steven Ogle

Dawn Roberson

Ginny McKay, *Supervisor*

Ken Levine
Director

Sunset Advisory Commission

Location
Robert E. Johnson Bldg., 6th Floor
1501 North Congress Avenue
Austin, TX 78701

Mail
PO Box 13066
Austin, TX 78711

Website
www.sunset.state.tx.us

Email
sunset@sunset.state.tx.us

Phone
(512) 463-1300