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STATEMENT OF
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TO THE
JOINT LEGISLATIVE BUDGET COMMITTEE HEARING
ON THE
2015-16 EXECUTIVE BUDGET



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Members of the Legislature:

My name is Robert H. Tembeckjian, and I am the Administrator and Counsel to the New York State Commission on Judicial Conduct. As you know, the Commission is the constitutionally created independent agency of state government that enforces judicial ethics by investigating and disciplining judges for misconduct. I thank you for the opportunity to discuss the Commission's budget for the coming fiscal year, as proposed in the Executive Budget.

Detrimental Impact of the Executive Budget on Judicial Ethics Enforcement

In this time of heightened attention to public ethics, I am proud to say that the New York State Commission on Judicial Conduct is arguably the most effective ethics enforcement entity in state government – 786 public disciplines of judges in 36 years (an average of 22 a year), including 168 removals and 51 stipulated resignations. Since 2007, when the Legislature took the lead in restoring our agency to adequate funding levels, we have significantly reduced our backlog of cases and reduced the time it takes to render discipline in appropriate cases, and to exonerate judges who have been wrongly accused.

Those gains are now in jeopardy because, for the fifth year in a row, the Executive Budget recommends no increase in our funding. A so-called “flat” budget is really a cut, because the only way to meet mandated operational

increases on the same dollar amount year after year is to reduce staff or services or both.

Over the past five years, we have tried hard to make do with less. We have made significant changes in our operations: reducing staff, giving up equipment, suspending our formal training program and in many cases adopting cost-saving technologies well before they became common in other state agencies. But those kinds of efficiencies can only go so far. We are a small agency with no “fat” to trim. Years of flat budgeting and corresponding cuts in staff and services have diminished our effectiveness. Unless the Legislature acts, I will be forced to make even more mission-impeding economies.

To put the matter into greater perspective, consider that in 1978, when we had a caseload of 641 complaints a year, we supported a staff of 63 on a budget of \$1.644 million, which would be the equivalent of \$6 million today. In contrast, with an average caseload of over 1,800 complaints a year, I will be forced to make more cuts because a flat budget of \$5.484 million will not cover our expenses, and that will undermine our ability to do our job.

In 2010, when this prolonged period of flat budgeting began, the Commission’s appropriation was \$5.406 million. Accounting for inflation, that \$5.406 million in 2010 would be equivalent to \$5.869 million today. I am asking

for less than that – a budget of \$5,757,300, representing an increase of \$273,300 (5%) – the minimum amount necessary for us to maintain the *status quo*.

This modest increase will allow us to cover contractual increases in our rent and related real estate obligations (\$121,000),¹ to pay our staff the legislatively mandated 2% increase in salaries (\$77,100) and to give ordinary performance step increases to staff who are eligible in the same manner as all other state agencies (\$69,200). There is no money in our budget proposal for new cars, additional travel, new programs or facilities. All I am asking is that the Legislature give us sufficient resources so that I can retain the staff that I have and continue to do the work we do at the same level of excellence.

Judicial Ethics Enforcement: The Importance of Proper Funding

A properly-funded and prudently-managed Judicial Conduct Commission is essential to promote public confidence in the administration of justice. If the public is to have any assurance that judges are accountable for their behavior,

¹ Figure includes increases in rent, standard tax escalations and utilities. The Commission has offices in Albany, Rochester and Manhattan – an appropriate and necessary statewide presence consistent with our jurisdiction over 3,500 judges stationed throughout this geographically large state. In Manhattan and Rochester, our 10-year leases were negotiated by the Office of General Services and approved by the Division of Budget and the Office of the Comptroller. In Albany, we occupy rent-free space in the Corning Tower, although we contribute to building costs as all agencies do. Our Manhattan facility includes a courtroom, where we conduct our own adjudicative proceedings.

without encroachment on their fundamental independence to call cases as they see them, the Commission must function efficiently as well as fairly.

The resources allocated to the Commission must appropriately reflect its significant responsibility. To protect the public, those judges who are guilty of misconduct should be disciplined, and unfit incumbents removed from the bench, as promptly as possible, consistent with due process. To protect the independence of the judiciary, unfounded complaints of wrongdoing should be dismissed as soon as possible. Without adequate funding, neither of these goals can be met.

Since 1978, when the law under which we operate went into effect, the Commission has been a model of ethics enforcement and judicial discipline. We have received, analyzed and individually addressed nearly 50,000 complaints, conducted over 10,000 preliminary inquiries and nearly 8,000 full-fledged investigations, issued over 1,500 cautionary letters and publicly disciplined 786 judges.² At the same time, we have successfully defended against every challenge to our procedures – over 100 lawsuits in all – initiated in the courts by either a complainant, witness or investigated judge.

The Commission's unique structure – appointed by the leaders of all three branches of government but not controlled by any of them – has been a

² 168 removal determinations, 51 stipulated resignations, 312 censures and 255 admonitions.

significant reason for its success and consistency over the years. At a time of renewed attention to government ethics, the Commission is an example to be emulated. Indeed, a bill presently pending to create a commission on prosecutorial conduct is directly modeled after the Judicial Conduct Commission.

Request for a Modest but Necessary Increase in Funding

I recognize and applaud the significant efforts of both the Governor and the Legislature to reduce government costs and manage resources. The Commission has fully participated in that effort.

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

These rising costs in an era of flat budgeting effectively reduced the amount of money available to perform our constitutionally-mandated function. Until now, we have been able to cushion the impact of this effectively reduced funding by utilizing technology and finding efficiencies in our operations. But despite these efforts, five years of flat budgeting came with consequences, the most significant of which is an 18% reduction in staff from 55 approved full-time

employees (FTEs) to 45 present FTEs, and a slowdown in our processing and disposing of complaints.³

Now, however, as the Comptroller and the Division of Budget have proclaimed improved fiscal conditions and forecast a surplus, I believe the time is right for a modest correction in the Commission's budget. The Executive Budget calls for an overall increase in agency spending of nearly 2%, yet for the Judicial Conduct Commission it offers not one penny more. Continued flat budgeting for us would mean more service cuts, a greater backlog and less efficiency: in short, we are now beginning to backslide on the great gains made seven years ago in managing our heavy caseload and keeping current.

The Toll from Years of Flat Budgeting

In 2007, then-Governor Spitzer recommended a budget of \$2.8 million for the Commission, which was virtually identical to our prior-year funding. As a result of Judiciary Committee hearings and the leadership of Senator John DeFrancisco and Assemblywoman Helene Weinstein, the Legislature increased our budget by 70% to \$4.8 million, the first installment in a two-year effort to redress years of inadequate funding, clear up a growing backlog and bring our disciplinary resources and facilities up to date.

³ I recently submitted paperwork to bring on an entry-level attorney, to replace a senior-level attorney who recently left for another position. This would bring us back to 46 staff, but at a financial saving since the new salary is lower than the old one.

As a result of the Legislature's commitment to the Commission in 2007, we increased our staff, modernized our case management and information systems, and reduced a backlog of active investigations by 27% – all in the context of an annual complaint load that significantly *increased* in that same time period by 23% (more than 340 a year), to an annual average of 1,841, which is more than any other state.⁴ The number of preliminary inquiries and investigations has also increased over the years, from 605 in 2007 to an annual average of 649 – also more than any other state. Since the Commission's inception, its public disciplines have averaged 22 a year, which is likewise more than any other state, although two years ago the number was 17, and last year the number fell to 12.

However, after years of flat budgeting, the backlog in processing new complaints has hovered between 11% and 12% in the last two years, which is higher than any time since 2007, when it was only 3%.⁵

⁴ In 2006, just before the increase in our resources, we logged 1,500 complaints, which to that point was a record. From 2007 to the present, we have averaged over 1,800 a year. Thanks to the increased resources, the number of investigations pending at year's end dropped from 275 to 201. More significantly, the number of matters pending more than a year dropped by about 50% overall, to a low of about 50, but it has inched up in the last two years and is now at 62. To be sure, some of those matters are complex, involve voluminous records and many witnesses, and could not be completed quickly even if we were fully funded; but some are taking longer because of insufficient resources, particularly the vacancies in staff.

⁵ Of the 1767 complaints received in 2014, 202 (11%) were not processed in the same statistical year. In 2007, the year of our significant funding increase, only 51 (3%) out of 1711 new complaints were not processed in the same statistical year.

Since 2008, in order to make ends meet on the same dollar amount while rent and other mandated costs have increased, we have made significant cuts in staff and modernized our operations to achieve significant cost savings. For example:

1. ***Reduction in Staff.*** Our allotment of full-time employees (FTEs) has effectively dropped by 18%. Our authorized number of 55 was reduced to 50, of which we were only able to fill 45 last year due to funding constraints. We accomplished this by not replacing staff that retired or left for other employment. An 18% reduction in force is significantly higher than the overall state government average of about 9% in the same time frame.
2. ***Reduction in Fleet and Travel.*** We reduced our agency allotment of automobiles by 22%, from nine to seven. We have reduced investigative field travel, which has delayed the resolution of some matters and affected the comprehensiveness of our investigations. There is no substitute for visiting and developing an appreciation for the scene and context in which misconduct is alleged to have occurred. We have also reduced intra-agency meeting travel, relying instead on video conferencing, which is a positive development that we would continue in any event.

3. ***Administrative Cost-Cutting.*** With technology that became affordable to us only as a result of the 2007 increase in our funding, we have achieved significant savings, such as follows. (A) We switched from conventional telephone service to VOIP service (Internet-based telephony), cutting our local and long-distance billing to virtually *zero*. We pool our rate-plan coverage for those staff assigned cell phones. Overall, where we used to spend nearly \$38,000 a year on telephone services, we now spend around \$9,000 a year. (B) We scan virtually all documents into “pdf” format and distribute them electronically. Consequently, our photocopying, paper and postage costs have dropped dramatically, particularly as it pertains to the 11 sets of voluminous materials we must produce for our 11 Commission members for each Commission meeting. Where we used to spend over \$17,000 a year on postage, we now spend less than \$5,000. Where we used to spend over \$8,000 a year on paper, we now spend around \$3,000. (C) Where we used to spend more than \$14,000 a year on law books, periodicals and newspaper subscriptions, we now rely more and more on low-cost or no-cost Internet-based options and spend around \$2,000.
4. ***Elimination of Annual Training & Education Program.*** We no longer conduct an annual two-day training and education program for staff at the

Carey Conference Center in Rensselaerville, New York. This produced a one-time saving of \$25,000, which of course we no longer have in our budget and therefore cannot save again. The loss of this invaluable program – during which all staff participated in such training exercises as interviewing witnesses, properly memorializing such interviews, fielding complainant inquiries, identifying and analyzing court records, etc., and heard from guest lecturers on such topics as professional ethics, court administration and records management – negatively impacts our skill and efficiency.

5. ***Elimination of Stenographic Services.*** To save about \$150,000 a year, we again eliminated all outside stenographic services, as we had done prior to 2007.⁶ We now produce approximately 12,000 transcript pages every year in-house, by audio-recording testimony and then having our own staff type and proofread it. This process, which is much more time-consuming than a professional stenographic service, slows us in at least two ways. (A) Transcript production is delayed in individual cases;

⁶ We had given up steno services prior to 2007 as a cost-cutting measure, but with a statutory mandate and due process obligations, we still have to produce transcripts in order to create a record of our various investigative and formal disciplinary proceedings. In 2007 and 2008, after the infusion in our funding by the Legislature, we had the resources to resume stenographic services. This not only relieved our staff of this time-consuming responsibility but also contributed to the more prompt disposition of complaints.

therefore disposition of those cases is slowed. (B) Employees who are tied up preparing transcripts are not free to work on other matters, thus slowing down resolution of those matters.

Some of these changes, such as the loss of staff, are negative and should be reversed when budget conditions further improve. Others are positive and will be permanent. However, even the positive and permanent changes made in any given year do not save us money in succeeding years. For example, for Commission meetings we now prepare all agenda materials electronically, *i.e.*, no paper, and no mailing costs.⁷ But this only saved us money in 2011, the year we implemented the paperless agenda. Having saved thousands of dollars in paper and mailing costs that first year, we no longer have those items in our budget and therefore cannot cut them again.

All of these savings in prior years were used to cover mandated increases in costs and, to the extent possible, redirected toward new necessities. For example, with our increasing reliance on IT in lieu of more traditional media (*e.g.* scanning and emailing documents rather than photocopying and mailing them), we must pay to upgrade our computers when their warranties expire and keep our annual software licenses up to date.

⁷ The success of our paperless management is such that representatives of government agencies from New York and other states have come to study and emulate it.

After six years of creative belt-tightening on an already small budget, I am out of options.

Budget Request for 2015-16

For the reasons set forth above, I submitted a budget request for a modest increase of \$273,300, which would bring us to \$5,757,300 and allow us to maintain our current staff. However, the Executive Budget submitted to the Legislature proposes another flat budget for the Commission, which would keep us at \$5.484 million and force serious cuts.

Three times in the last five years, I agreed with the Executive and managed on a flat budget. That became impossible last year and this year.

Appeal to the Legislature

As I did in 2007 and in 2014, I respectfully appeal to the Legislature to recognize not only the sacrifices we have made over the past five years, but the harmful effect that continued flat budgeting will have on the Commission's operation and the fulfillment of its constitutional mandate. Given the state's encouraging revenue projections, and the emphasis elsewhere in the Executive Budget on strengthening New York's commitment to government ethics, a small increase in our budget seems appropriate.

As you have done both times I have made such an appeal, I hope you respond positively.

APPENDIX A:

BRIEF HISTORY OF THE COMMISSION ON JUDICIAL CONDUCT

The Commission's Constitutional Authority and Independence

The Commission was created in 1978 in the Judiciary Article of the Constitution (Article 6, Section 22). Its enabling statute is the Judiciary Law (Article 2-A, Sections 40-48). The Commission's 11 members are appointed by six different officers of government, none of whom commands a majority: four (4) by the Governor, four (4) by the leaders of the Legislature and three (3) by the Chief Judge of the State of New York. The Commission elects its own Chair and appoints its own chief executive officer (the Administrator, who in law is the agency head). It was purposely designed in such a fashion so as to work cooperatively with all three branches of government but not to be dominated or controlled by any one of them.

Although the Commission is not an Executive agency, historically its budget request has been submitted to the Legislature by the Executive, as have the budget requests of other independent officers of state government: the Attorney General (Department of Law) and the Comptroller (Department of Audit and Control). Usually, such budget requests are mutually arrived at. Occasionally, the Commission has disagreed with the Executive and appealed directly to the Legislature.

Notwithstanding its constitutional independence and the occasional budget disagreement, my office continues to enjoy mutually respectful and cooperative relations

with the Governor and the Legislature, as well as the Attorney General, the Comptroller and the Office of Court Administration.

The Commission's Core Function and Mission

The Commission is the sole state agency responsible for receiving, initiating, investigating and conducting evidentiary trials with respect to complaints of misconduct or disability against judges and justices of the New York State Unified Court System, which is comprised of approximately 3,500 judges and justices. Where appropriate, at the end of such proceedings, the Commission has authority to render disciplinary decisions of confidential caution, public admonition, public censure, removal or retirement from office.

The Commission, which was originally created by the Legislature as a temporary agency in 1974, began operations in January 1975 and expanded its authority as a result of constitutional and statutory amendments that took effect in April 1978 and remain in effect to the present.

The agency has only one program, *i.e.* its core constitutional mission. With their varying responsibilities, all agency staff – lawyers, investigators, administrative – are deployed and devoted to fulfilling the agency's sole and core mission: inquiring into and deciding complaints that judges have engaged in misconduct.

The agency also handles its own appellate caseload. By law, disciplined judges have the right of review in the New York State Court of Appeals. In addition, the agency works in conjunction with the Attorney General's Office in defending itself against outside litigation, such as when complainants or judges commence lawsuits

attempting to compel or enjoin the Commission from investigating or prosecuting complaints.

The September 2008 Report by the Special Commission on the Future of the New York State Courts highlights the unique and critical role played by the Judicial Conduct Commission in enforcing disciplinary rules among the far-flung statewide network of approximately 2,300 justices in approximately 1,250 town and village courts.

The Commission, which provides the only forum for complaints of misconduct against the 3,500 judges and justices in the state Unified Court System, undertakes comprehensive and efficient investigations of such complaints; exonerates those judges who have been falsely accused; takes appropriate disciplinary action against those who have violated the high standards of conduct applicable to judges; and, by its presence and actions, makes the judiciary more sensitive to ethics standards and less likely to commit misconduct.

This mission is of vital importance in protecting both the public and judges from potential abuse. Every judge wields considerable power and as such must follow high standards of ethical conduct. If a judge fails to follow these standards, it is in the public interest to provide the appropriate discipline, expeditiously yet with careful regard to due process; but if a judge is falsely accused, he or she should not be subject to prolonged procedures. Undue delay detracts from the Commission's mission and accomplishments and could inhibit the independence of the judiciary. It is therefore essential to insure that the Commission has resources appropriate to its important mission and significant caseload.