

Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER)

Report to
the Mississippi Legislature



A Review of the Mississippi Commission on Judicial Performance

The Mississippi Commission on Judicial Performance (Commission) is responsible for investigating complaints about a judge's conduct; determining whether a judge has committed misconduct or is disabled; assisting judges who have committed minor ethical violations to change their behavior; imposing or recommending discipline, if appropriate, against a judge who violates ethical standards; and, when necessary, securing the removal of a judge from office.

Despite the absence of comprehensive policies and procedures, the Commission's process for collecting and evaluating evidence provides an equitable and unbiased method of regulating judicial conduct.

The processes for complaint intake and assessment offer open access to file a complaint and opportunity for the complaint's merits to be reviewed. The Commission's judicial process assures that it uses established, unbiased guidelines. Also, facts requiring action of the Commission are established through procedures for gathering clear and convincing evidence. The Commission also has defined guidelines in place for rendering informal commission actions and private admonishments for less serious misconduct violations.

PEER observed minor weaknesses in the Commission's investigative process concerning the absence of a comprehensive set of formal policies and procedures and methods of record keeping. However, the identified weaknesses do not threaten the integrity of decisionmaking or the Commission's ability to perform its regulatory duties. PEER also found minor weaknesses in the Commission's ability to perform its support functions because of the absence of policies and procedures to govern activities within its administrative process.

PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A standing joint committee, the PEER Committee is composed of five members of the House of Representatives appointed by the Speaker and five members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms with one Senator and one Representative appointed from each of the U. S. Congressional Districts. Committee officers are elected by the membership with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of three Representatives and three Senators voting in the affirmative.

Mississippi's constitution gives the Legislature broad power to conduct examinations and investigations. PEER is authorized by law to review any public entity, including contractors supported in whole or in part by public funds, and to address any issues that may require legislative action. PEER has statutory access to all state and local records and has subpoena power to compel testimony or the production of documents.

PEER provides a variety of services to the Legislature, including program evaluations, economy and efficiency reviews, financial audits, limited scope evaluations, fiscal notes, special investigations, briefings to individual legislators, testimony, and other governmental research and assistance. The Committee identifies inefficiency or ineffectiveness or a failure to accomplish legislative objectives, and makes recommendations for redefinition, redirection, redistribution and/or restructuring of Mississippi government. As directed by and subject to the prior approval of the PEER Committee, the Committee's professional staff executes audit and evaluation projects obtaining information and developing options for consideration by the Committee. The PEER Committee releases reports to the Legislature, Governor, Lieutenant Governor, and the agency examined.

The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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June 4, 2002

Honorable Ronnie Musgrove, Governor
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On June 4, 2002, the PEER Committee authorized release of the report entitled **A Review of the Mississippi Commission on Judicial Performance.**



Senator William Canon, Chairman

This report does not recommend increased funding or additional staff.

Table of Contents

Letter of Transmittal i

List of Exhibits v

Executive Summary vii

Introduction 1

 Authority 1

 Scope and Purpose 1

 Method 2

Background 3

 Key Facts About the Mississippi Commission on Judicial Performance..... 3

 Comparison of the Mississippi Commission on Judicial Performance with Similar
 Agencies in Comparable Southeastern States..... 5

 Legal Authority and Responsibility for Regulating the Profession..... 7

 Regulatory Process of the Mississippi Commission on Judicial Performance 10

Conclusions 15

 Case Review and Decisionmaking Process 15

 Administration and Support for Regulatory Process..... 21

Recommendations 25

Agency Response 27

List of Exhibits

1. Organization Chart of the Mississippi Commission on Judicial Performance..... 4

2. Comparison of Sanction Rates in Comparable Southeastern States (For CY 2000)..... 6

3. Comparison of Cost Per Case Disposed in Comparable Southeastern States (For CY 2000) 7

A Review of the Mississippi Commission on Judicial Performance

Executive Summary

PEER conducted a cycle review of the Mississippi Commission on Judicial Performance, which is a review not based on a complaint or allegation of misconduct. State law authorizes the Commission on Judicial Performance (Commission) to investigate complaints about a judge's conduct; determine whether a judge has committed misconduct or is disabled; assist judges who have committed minor ethical violations to change their behavior; impose or recommend discipline if appropriate against a judge who violates ethical standards; and, when necessary, secure the removal of a judge from office.

PEER compared the Mississippi Commission on Judicial Performance with similar agencies in comparable southeastern states on the basis of sanction rates and cost per case disposed. Mississippi sanctioned 9.5% of judges against whom complaints were lodged. Sanction rates of comparable states ranged from a low of 2.2% in Tennessee to a high of 13.1% in South Carolina, with Alabama and Missouri at 5.8% and 7.9%, respectively. PEER determined that the Commission's cost per case averaged \$1,067.41 (for 328 cases disposed during calendar year 2000). The Commission's cost per case is slightly higher than in comparable southeastern states, however, cost computations are largely dependent on the total number of complaints lodged and processed annually.

The review examined the Mississippi Commission on Judicial Performance's management process for regulating the conduct of members of the judiciary in Mississippi. The processes for complaint intake and assessment offer open access to file a complaint and opportunity for the complaint's merits to be reviewed. The Commission's judicial process assures that it uses established, unbiased guidelines. Also, facts requiring action of the Commission are established through procedures for gathering clear and convincing evidence. The Commission has defined guidelines in place for rendering informal commission actions and private admonishments for less serious misconduct violations.

Although it is the responsibility of the Supreme Court to formally sanction judges for misconduct violations, the Commission initially conducts an investigation and hearing to determine whether such allegations of misconduct have merit and provides its recommendations to the higher court for discipline. In cases where complaints become formal proceedings, the Commission conducts a formal hearing process before an impartial decisionmaking body.

Despite the absence of comprehensive policies and procedures, the Commission's process for collecting and evaluating evidence provides an equitable and unbiased method of regulating judicial conduct. The Commission's procedure for disqualifying judges from the evaluation committee in appropriate circumstances promotes the unbiased review of case merits.

The majority of the Commission members are active judges who are responsible for hearing and interpreting evidence, determining guilt, and imposing sentences upon guilty defendants. The Commission's decisionmaking process is based on discovery of clear and convincing evidence that assures that the facts offered as proof are true.

PEER observed minor weaknesses in the Commission's investigative process concerning the absence of a comprehensive set of formal policies and procedures and methods of recordkeeping. However, the identified weaknesses do not threaten the integrity of decisionmaking or the Commission's ability to perform its regulatory duties. With the lack of internal policies and procedures, the Commission cannot ensure that documentation gathering, interviews, and investigative reports are conducted consistently. In the area of investigative recordkeeping, the absence of specific guidelines can cause inconsistencies in gathering and reporting sensitive information.

PEER found minor weaknesses in the Commission's ability to perform its support functions because of the absence of policies and procedures to govern activities within its administrative process. The Commission has not formally adopted a comprehensive policies and procedures manual to use as a guide for conducting administrative operations. The Commission has not adopted policies and procedures to govern data management (recordkeeping), personnel management, and financial management activities.

PEER determined that no internal procedures provide instructions regarding how to input, retrieve, update, or remove information from the case management data system. The commission does not have human resource

policies and procedures to address vacation and sick leave policies, grievances/complaint procedures, or performance evaluation policies. Although no in-house guidelines are available regarding the collection of fines and costs, the Commission utilized state laws and state financial policies and procedures. Failure to adhere to contractual requirements led the State Auditor to recommend that the Commission establish policies and procedures to ensure that administrative functions are documented and performed uniformly.

Recommendations

Investigative Policies and Procedures

1. The Commission should adopt an investigative policies and procedures manual which would establish a uniform method of reporting information obtained from witnesses and informants; it should provide directions as to how to conduct a discreet inquiry/investigation; and it should outline methods used to obtain information, evidence, and court documents.
 - The Commission should develop a uniform method of documenting interviews of witnesses or potential witnesses. The report should clearly state why certain documentation was obtained and whether it was pertinent to a particular case. Additionally, all investigative reports should be dated and signed or initialed by the author.
 - In order to account for all documents in a case file, Commission staff should develop and utilize a docket sheet or form to note all pleadings or information obtained during the course of the investigation. This will ensure that all evidence obtained by the investigator, such as witness statements, court documents, and other information, is officially recorded as part of the case file.

Administrative/Financial Policies and Procedures

2. The Commission should develop a comprehensive policies and procedures manual or employee handbook that addresses agency operations and responsibilities. The manual should address how complaints are filed and coded as well as how sanction payments are processed and handled.

Personnel Administration Policies and Procedures

3. The comprehensive policies and procedures manual should address the Commission's current procedures regarding sexual harassment, conflict of interest, public and media contact, confidentiality violations, and compliance with the American Disabilities Act.

State Auditor Concerns About Policies and Procedures

4. In accordance with the State Auditor's findings, the Commission should modify procedures and guidelines to accomplish the following:
 - The Commission should establish procedures to ensure adherence to terms of contracts for private legal counsel and establish procedures to ensure written contracts are executed and signed by all parties.
 - The Commission should develop guidelines to ensure that all contracts between state agencies and private legal counsel are approved by the Attorney General's office prior to payment, as stated in MISS. CODE ANN. Section 27-104-105.

Commission Policy Resolutions

5. The Commission should amend, update, or abolish the Commission's policy resolutions (1-4, since the Commission no longer uses its policy guidelines.

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A Review of the Mississippi Commission on Judicial Performance

Introduction

Authority

The PEER Committee authorized a review of the Mississippi Commission on Judicial Performance. PEER conducted this review pursuant to the authority granted by MISS. CODE ANN. Section 5-3-57 et seq. (1972). This review is a "cycle review," which is not driven by specific complaints or allegations of misconduct.

Scope and Purpose

The review examined the Mississippi Commission on Judicial Performance's (Commission's) management process for regulating the conduct of members of the judiciary in Mississippi. The review sought to determine the following:

- whether policies and procedures are present to govern the Commission's functional processes;
- whether the Commission performs its investigative function in accordance with policy and procedure and recognized standards for completeness and timeliness;
- whether the Commission performs its prosecution function in accordance with policy and procedure and recognized standards for completeness and timeliness; and,
- whether the Commission recommends punishment uniformly and fairly based on the offense.

Method

In conducting this review, PEER:

- reviewed relevant sections of state laws, the state constitution, rules and regulations, policies, and procedures regarding the Mississippi Commission on Judicial Performance;
- interviewed staff and analyzed documents from other state judicial conduct commissions to compare the complaints and dispositions; and,
- obtained and reviewed annual reports and budgetary information from the Commission and similar agencies in other comparable southeastern states.

Background

Mississippi, along with forty-nine other states and the District of Columbia, has established a judicial conduct organization charged with investigating complaints against judicial officers. Like the organizations in most other states, the purpose of the Mississippi Commission on Judicial Performance is to:

- investigate complaints about judges' conduct;
- determine whether a judge has committed misconduct or is disabled;
- assist judges who have committed minor ethical violations to change their behavior;
- impose or recommend discipline, if appropriate, against a judge who violates ethical standards; and,
- when necessary, secure the removal of a judge from office.

Key Facts About the Mississippi Commission on Judicial Performance

The following includes basic information on program funding, staffing, jurisdiction, complaints received, and investigations conducted.

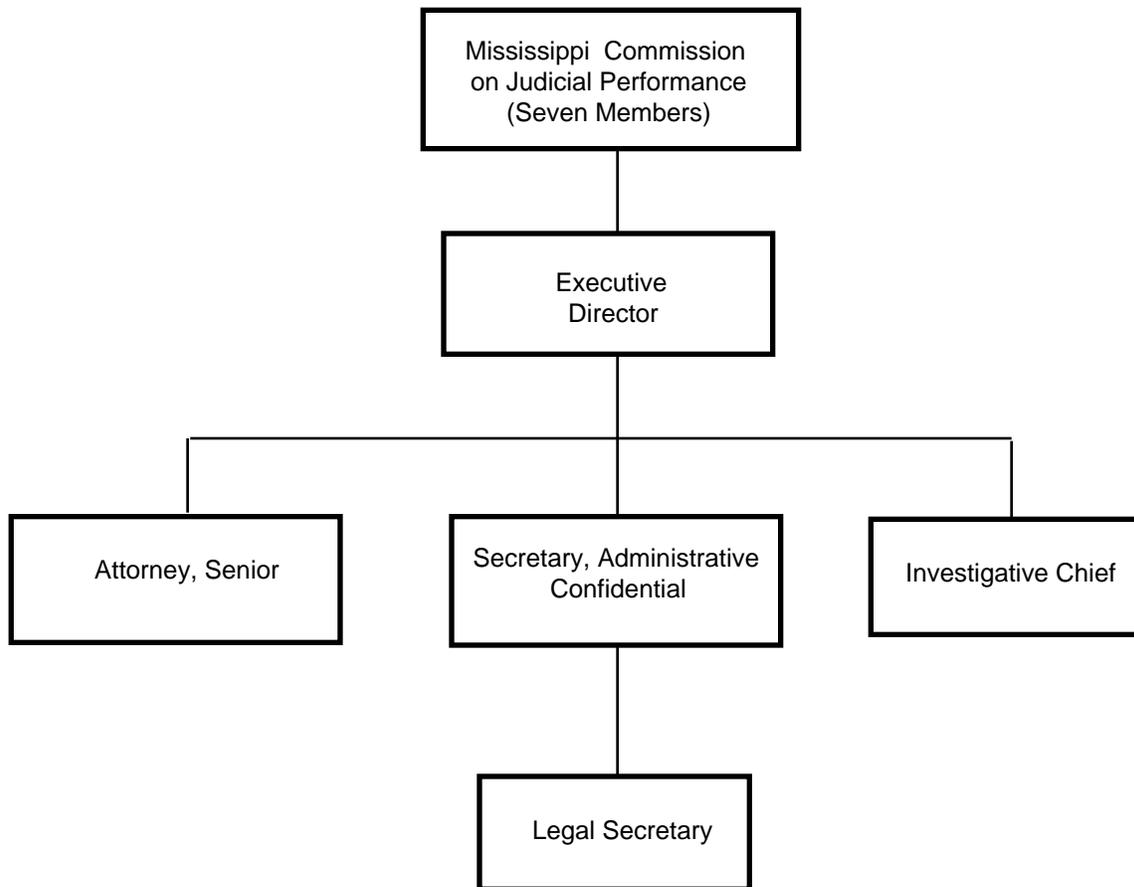
Funding

During fiscal years 1999 and 2000, the Commission's annual budget was \$344,648 and \$369,323, respectively. The commission's entire budget comes from state-appropriated general funds. (The amount includes personnel, travel, contractual, commodities, capital outlay, and equipment funding.)

Organization and Staffing

The Commission employs five people, including one attorney, one investigator, two support staff, and the executive director, who also is an attorney (see Exhibit 1, page 4).

Exhibit 1: Organization Chart of the Mississippi Commission on Judicial Performance



SOURCE: Compiled by PEER.

Jurisdiction

Approximately 800 judges fall under the Commission's authority. This includes nine Supreme Court justices, ten judges of the Court of Appeals, forty-five chancellors, forty-eight circuit court judges, twenty-four county court judges, 192 justice court judges, approximately 300 municipal court judges, and various other administrative law judges, masters, and referees.

Complaints Received

In calendar year 2000, the commission received 339 complaints and at the end of the calendar year, forty-three cases were pending. These dispositions include complaints pending at the close of CY 1999.

Investigations Conducted

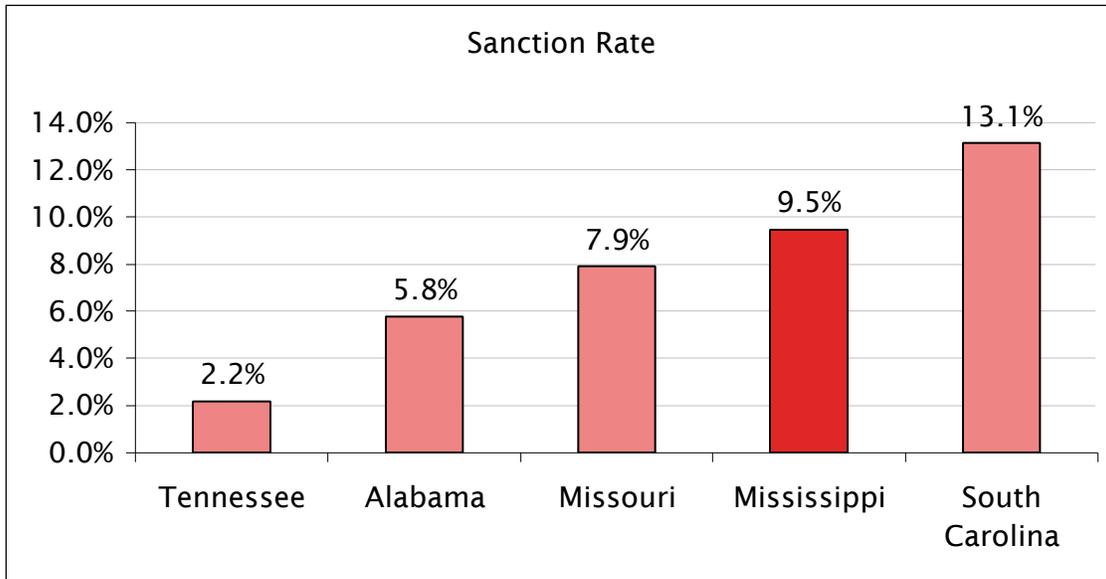
Of the 339 complaints processed in CY 2000, the Commission dismissed 237 complaints, or 70%, after initial review due to the lack of evidence or because they did not fall within the Commission's jurisdiction.

Comparison of the Mississippi Commission on Judicial Performance with Similar Agencies in Comparable Southeastern States

Sanction rates and cost per case disposed by the Commission compare favorably to those of similar organizations in other comparable southeastern states.

Sanctions Imposed by the Commission in Calendar Year 2000

During CY 2000 (the latest period for which comparable data was available), the Commission sanctioned thirty-one judges. Additionally, ten judges were removed and or resigned voluntarily, for an overall total of forty-one dispositions. When compared to Tennessee, Alabama, Missouri, and South Carolina, Mississippi sanctioned 9.5% of judges against whom complaints were lodged (see Exhibit 2, page 6). Sanction rates of comparable states ranged from a low of 2.2 percent in Tennessee to a high of 13.1 percent in South Carolina, with Alabama and Missouri at 5.8 and 7.9 percent, respectively.

Exhibit 2: Comparison of Sanction Rates in Comparable Southeastern States (For CY 2000)

SOURCE: Compiled by PEER.

In CY 2000, the Commission issued nine private admonishments, nine informal commission actions, and initiated thirteen formal complaints. All formal complaints are submitted to the Supreme Court for sanctioning.

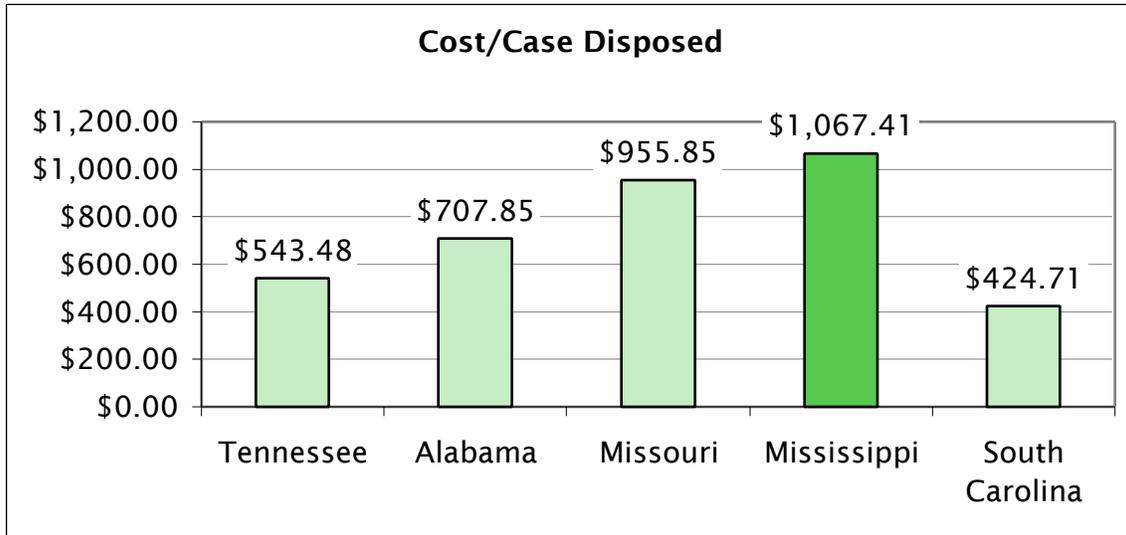
Comparison of Cost Per Case Disposed

PEER reviewed the Commission's annual budget and number of cases received and filed. PEER also reviewed case dispositions that include private admonishment and informal judicial actions, as well as the number of formal complaints forwarded to the Supreme Court for sanction.

PEER compared the Commission's budget to the number of complaints disposed of during CY 2000 to Tennessee, Alabama, Missouri, and South Carolina (see Exhibit 3, page 7).

PEER determined that the Commission's cost per case averaged \$1,067.41 (for 328 cases disposed during CY 2000). The Commission's cost per case is slightly higher than that of similar organizations in comparable southeastern states; however, cost computations are largely dependent on the total number of complaints lodged and processed annually.

Exhibit 3: Comparison of Cost Per Case Disposed in Comparable Southeastern States (For CY 2000)



SOURCE: Compiled by PEER.

Legal Authority and Responsibility for Regulating the Profession

Guidelines prescribed in Section 177A of the MISSISSIPPI CONSTITUTION of 1890, MISS. CODE ANN. Section 9-19-1 et seq., as well as the Commission's Rules of Procedures, the Code of Judicial Conduct, and other policies and procedures provide authority to the Commission to enforce standards of judicial conduct. This authority provides for the Commission to inquire into judicial misconduct and protect the public from judicial misconduct and unfounded allegations.

The Commission determines whether misconduct has taken place by reviewing information submitted by the complainant and evidence gathered by Commission staff.

The following statutes and judicial guidelines outline criteria by which the Commission must abide when deciding the type of sanction to impose on a judge.

MISSISSIPPI CONSTITUTION Section 177A and MISS. CODE ANN. Section 9-19-1 Establish the Commission on Judicial Performance

The Mississippi Commission on Judicial Conduct was created by the passage of an amendment to the

MISSISSIPPI CONSTITUTION, Section 177A, during the November 1979 general election.

The Commission is currently regulated through MISS. CODE ANN. Section 9-19-1 et seq. (1972) and the constitutional guidelines that authorized the Commission to enforce standards of judicial conduct, which falls within the following grounds of discipline or retirement:

- (1) actual conviction of a felony in a court other than a court of the State of Mississippi;
- (2) willful misconduct in office;
- (3) willful and persistent failure to perform his duties;
- (4) habitual intemperance in the use of alcohol or other drugs;
- (5) conduct prejudicial to the administration of justice, which brings the judicial office into disrepute; and,
- (6) physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character.

MISS. CODE ANN. Section 9-19-1 (1972) defines the membership of the board and establishes qualifications of Commission board members.

Code of Judicial Conduct (Canons)

The Commission may consider willful violation of the law constituting a serious misdemeanor or felony and violation of codes of judicial conduct or professional responsibility. The *Code of Judicial Conduct* consists of seven canons.

Compliance with the *Code of Judicial Conduct* (canons) extends to anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate. The Mississippi Supreme Court adopted the canons February 15, 1995, as amended. Some exceptions apply to part-time judges, judges pro tempore, and retired judges.

During April 2002, the Mississippi Supreme Court adopted a revised *Code of Judicial Conduct* consisting of five canons.

Rules of the Mississippi Commission on Judicial Performance

The Rules of the Commission also outline standards of judicial conduct. Eleven rules outline the constitutional authority found in Rule 6 (Probable Cause). During the review, the Commission's executive director related that he considered the rules his office's policies and procedures. However, none of the rules relate to the administrative duties and responsibilities of the Commission. Outlined below are the areas of responsibility that the rules address:

- Rule 1-General
- Rule 2-Jurisdiction
- Rule 3-Organizational Makeup of the Commission
- Rule 4-Confidentiality of Proceedings
- Rule 5-Procedures of the Commission Regarding Initiation of an Inquiry
- Rule 6-Probable Cause which Constitutes Grounds for Discipline and Retirement
- Rule 7-Interim Suspension of Judge
- Rule 8-Formal Hearing
- Rule 9-Mental or Physical Disability
- Rule 10-Supreme Court Review
- Rule 11-Charges Against a Justice of the Supreme Court

Commission Policy Resolutions

The Commission members and staff once used undated policy resolutions (#1 through #4) as internal policy guidance. The resolutions referenced the Commission's meeting schedule, handling of business matters, investigative report/complaint summaries, private admonishment, and other judicial functions.

Regulatory Process of the Mississippi Commission on Judicial Performance

The Commission is regulated through various laws, judicial rules, and policies and procedures, which authorize the enforcement of established standards of judicial conduct.

Complaint Intake and Assessment of Validity

Processes for complaint intake and assessment offer open access to file a complaint and opportunity for the complaint's merits to be reviewed.

Complaint Receipt and Initiation

A citizen, litigants, attorneys, law enforcement officials, judges, public officials, the Commission on Judicial Performance, and others can initiate complaints of judicial misconduct. All complaints are required to be submitted in writing to the Commission for review. Each complaint must outline the misconduct in detail.

Once the Commission receives and files the complaint, it assigns a case number to the complaint. The executive director designates a three-member panel selected from the seven commissioners to review each new complaint. Prior to the meeting, the panel reviews a copy of the complaint and makes a recommendation to the full commission. The panel presents the new complaint to the full commission for its consideration in deciding whether sufficient information was submitted to conduct an inquiry or whether the complaint should be dismissed.

The full Commission reviews complaints and dismisses those that are not within the Commission's jurisdiction, lack sufficient evidence, relate only to claimed errors of law or fact, or are unfounded.

Investigative Process

If the complaint is not dismissed and additional information is needed to substantiate or clarify allegations, the Commission authorizes the investigator to conduct an inquiry. The investigator obtains the necessary information and meets with the executive director and staff attorney to decide the correct course of action. The investigator interviews the complainant and witnesses and inspects documents, books, and court records to determine whether the allegation of misconduct can be corroborated.

If the complaint is found to have merit, the Commission may request that the complainant file a sworn complaint at a later date.

Complaint Evaluation by an Unbiased Subcommittee

Facts requiring action of the Commission are established through procedures for gathering clear and convincing evidence.

It is the responsibility of the Commission to review the evidence gathered by the investigator. Commission Rule 8 states, "Facts requiring action of the Commission shall be established by clear and convincing evidence." Such evidence is a lower burden of proof than the "beyond a reasonable doubt" standard required to convict someone of a crime. "Clear and convincing evidence" is a higher burden of proof than the "preponderance of the evidence" required in a civil case.

Defined Guidelines for Application of Sanctions

The Commission has defined guidelines in place for rendering informal Commission actions and private admonishments for less serious misconduct violations.

The Commission can at any point dismiss a complaint or render a decision in the form of an informal commission action, which could be a letter, telephone call, or meeting with the judge. Further, the commission can initiate formal actions, including issuing a private admonishment, entering into a memorandum of understanding with the judge, or filing a formal complaint against the judge.

Types of Sanctions

The types of sanctions imposed by the Commission are:

- **Informal Commission Action** - These are imposed on a judge as a warning for small violations that do not warrant other actions.
- **Private Admonishments** - These are imposed by the Commission for more serious offenses wherein the judge and the commission agree on the method of discipline.
- **Judge Removed or Resigned** - The Commission can remove and direct a judge

to resign or be removed from his duties as judge.

Sanction Criteria used by the Commission

MISS. CODE ANN. Section 9-19-11 grants the Commission authority to admonish privately a justice or judge found to have engaged in improper action or dereliction of duty affecting the administration of justice, subject to review by the Supreme Court.

To determine the appropriate sanction, the Commission must consider:

- the extent of the misconduct;
- whether the misconduct is an isolated instance or a pattern of conduct; and,
- whether the judge committed multiple offenses.

Formal Hearing Process Conducted by an Impartial Decisionmaking Body

The Commission conducts a formal hearing process before an impartial decisionmaking body.

A formal complaint can be served to a judge by personal service or by members of the Commission, the executive director, or by any adult person designated by the Commission, or by certified or registered mail. Within thirty days after service of the notice and the formal complaint, the judge may file an answer or motion with the Commission.

Formal Hearing - After the formal complaint has been served, the Commission schedules a formal hearing concerning the charges. The hearing will be held no sooner than five days after the filing of an answer or after the deadline for the filing of an answer. If no answer is filed, the hearing will proceed, whether or not the judge has filed an answer, and whether or not he appears in person or through counsel. The failure of the judge to answer or appear may be taken as evidence of the facts alleged in the formal complaint.

Under Rule 8C, a formal hearing is required to be conducted before the entire Commission, a committee of the Commission, or a master or fact-finder designated by the Commission. The Mississippi rules of evidence apply to any formal hearing. All witnesses take an oath or affirmation to tell the truth.

After the formal hearing, the commission has thirty days after the hearing to prepare its findings of fact and recommendations. Additional time can be granted for the preparation of the findings and recommendations. Within ten days from receipt of the Commission's findings and recommendations, the judge may submit written objections to the findings and recommendations.

Commission Recommendations - All formal hearing recommendations are provided to the Supreme Court for discipline. Such discipline may include removal from office, suspension, fine, public censure, reprimand, or retirement. The Commission's findings and recommendations and the numerical vote must be recorded; all other Commission action must remain confidential.

Case Review and Application of Sanctions by the Supreme Court

Although it is the responsibility of the Supreme Court to sanction judges for misconduct violations, the Commission initially conducts an investigation and hearing to determine whether such allegations of misconduct have merit and provides its recommendations to the higher court for discipline.

Once the Commission develops its findings and makes recommendations, the information is provided to the Supreme Court for further action.

The Supreme Court may accept, reject, or modify, in whole or in part, the findings and recommendations of the Commission. In the event that more than one recommendation for discipline of the judge is filed, the Supreme Court may render a single decision or impose a single sanction with respect to all recommendations. The Supreme Court may suspend, fine, publicly censure, reprimand, or remove a judge from office for misconduct. The Supreme Court may involuntarily retire a judge for physical or mental disability. Once filed with the Supreme Court all aspects of the case become public.

After the Supreme Court conducts its review of the recommendations provided by the Commission, it prepares and publishes a written opinion and judgment directing the appropriate disciplinary action, if any, as it finds just and proper.

When the Commission makes a recommendation for discipline or retirement to the Supreme Court, the charges and recommendation of the Commission become public record.

Conclusions

Despite the absence of comprehensive policies and procedures, the Commission's process for collecting and evaluating evidence provides an equitable and unbiased method of regulating judicial conduct.

The Commission has seven members. An alternate for each member is selected at the same time and in the same manner in each representative class to replace those members who might be disqualified or absent.

Case Review and Decisionmaking Process

Commission's Consideration and Evaluation of Evidence

The Commission's process is equitable and allows for an unbiased decision to be recommended.

Once a complaint is filed, the full Commission decides whether to dismiss the complaint for one of the following reasons:

- it does not fall within the Commission's jurisdiction;
- it lacks sufficient evidence;
- it relates only to claimed errors of law or fact; or,
- it is unfounded.

If the complaint is not dismissed and is deemed to have merit, the commission requests that the investigator obtain additional supporting information. Such information can come from witnesses as well as from court documents.

After gathering additional information, the investigator presents this information to the full Commission.

The complainant is informed of the Commission's actions by letter. When the complaint is not dismissed, within ninety days of its receipt the judge will be notified of the investigation and nature of the complaint.

Complaint Assessment by an Unbiased Subcommittee

The Commission's procedure for disqualifying judges from the evaluation committee in appropriate circumstances promotes the unbiased review of case merits.

At this point, the chairman of the Commission selects a three-member panel to review the allegations. The panel's findings of fact and recommendations are presented to the full Commission for consideration.

A Commission member shall be disqualified to serve on any inquiry or complaint when:

- he is related to the judge or complainant by affinity or consanguinity;
- the judge is a resident of his county; or,
- the member has personal knowledge or information that could interfere with the member impartially considering such matter.

A member may voluntarily disqualify himself when:

- the member resides in the judge's judicial district; or,
- upon a showing of good cause, the Commission approves the member's request for voluntary disqualification.

The Commission's process of disqualifying judges from the three-member panel promotes an unbiased process.

Professional Expertise of the Commission Promotes Valid Assessment of Evidence

The majority of the Commission's members are active judges who are responsible for hearing and interpreting evidence, determining guilt, and imposing sentences upon guilty defendants.

Most of the Commission's members are active judges, except for the two lay members and their respective alternates. The Chief Justice of the Supreme Court of Mississippi appoints the lay members of the Commission.

Judges preside over courtroom proceedings and decide on questions of law. They determine bail, oversee jury trial, jury selection, and jury instruction on applying law to fact. Further, they decide facts, law, and determine guilt as well as sentence guilty defendants. This means they possess expert knowledge of how to weigh the evidence gathered by the Commission's investigator. They review the

complaints presented by the complainant and other supporting evidence and documentation, as well as statements provided by witnesses.

All evidence is taken into consideration when the Commission deliberates on an appropriate sanction for misconduct on the part of a judge.

All findings and recommendations are presented before the full Commission for consideration. This presentation provides information about the judge and the office held and cites pertinent facts about the alleged misconduct. In the finding of fact, the judge may or may not have provided a response to the allegation.

Requirements for Clear and Convincing Evidence

The Commission's decisionmaking process is based on the discovery of clear and convincing evidence, which assures that the facts offered as proof are true.

Misconduct is proven by clear and convincing evidence. This is a lower burden of proof than the "beyond a reasonable doubt" standard required to convict someone of a crime. In some states, misconduct is proven by a "preponderance of the evidence," which requires less convincing proof than the "clear and convincing" standard.

"Clear and convincing evidence standard" means that the evidence must be of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability that the fact for which it is offered as proof is true--in other words, a high probability that the judge has committed acts that constitute misconduct. To be clear and convincing:

- evidence must be cogent, strong, definite, weighty, and direct;
- the witnesses must be found to be credible;
- the facts to which they testify must be distinctly remembered; and,
- the details narrated must be exact and in due order.

Investigative Process

PEER observed minor weaknesses in the Commission's investigative process concerning the absence of a comprehensive set of formal policies and procedures and methods of recordkeeping. However, the identified

weaknesses do not threaten the integrity of decisionmaking or the Commission's ability to perform its regulatory duties.

The Commission employs one investigator. The investigator is responsible for conducting investigations prescribed by the Commission with instructions from the executive director and the staff attorney.

The investigator is charged with conducting interviews, inspecting documents, books, and court records, and obtaining information for the Commission.

When additional information is required relative to a complaint, the Commission may request that the investigator conduct a preliminary inquiry to substantiate allegations of misconduct.

Description of Investigative Process

During the Commission's monthly meeting, the investigator may be directed to obtain additional information regarding a complaint. After receiving the request, the investigator discusses the matter with the executive director and the staff attorney. According to the executive director, no written investigative procedures have been developed to instruct the investigator on how to perform an investigation. An investigation may consist of obtaining court documents, making a telephone call, or interviewing the complainant or other witnesses.

Once the investigator has obtained additional information, a written report outlining all interviews is provided to the Commission. The report does not detail any court documents obtained during the investigation.

Although no written formal report is provided, the investigator discusses all findings with the executive director before presenting the information to the full Commission.

Absence of Policies and Procedures Governing Key Investigative Activities

Due to the lack of internal policies and procedures, the Commission cannot ensure that documentation gathering, interviews, and investigative reports are conducted consistently.

PEER staff found no investigator's manuals, policies, procedures, or guidelines to govern methods used by the investigator during the execution of investigative functions.

PEER staff conducted a review of various Commission complaint files and board minutes to determine whether they included any complaints or comments about the investigator's ability to gather evidence. PEER staff found no complaints or comments concerning weaknesses relative to the investigator's ability to conduct Commission investigative tasks. However, PEER did notice minor concerns regarding the investigator's reports.

The current investigator was a former City of Jackson, MS, investigator with fifteen years of law enforcement experience prior to his employment with the Commission. According to the executive director, the investigator required little training when hired because of his extensive law enforcement background. Although no formal investigative training relative to the Commission has been provided, the investigator has attended the Prosecutor's Association and the Association of Judicial Disciplinary Council seminars. Both seminars have provided some investigative training that relates to judicial performance commissions.

The Commission's Rule 5 is the only expression of its investigative policy. It states, "The executive director can conduct a prompt, discreet, and confidential preliminary inquiry and evaluation under guidelines approved by the Commission." This process can determine whether the complaint has merit. PEER found no investigative guidelines in MISS. CODE ANN. Section 9-19-1 et seq., the code of conduct, or other Commission policies.

Administrative Policies and Procedures of Other States' Organizations

In determining whether other states had separate internal policies, PEER found that the Mississippi Commission on Judicial Performance was not the only state that used its rules as internal policy guidelines to address daily administrative duties and responsibilities.

During the review, PEER found that Missouri, Virginia, South Carolina, Tennessee, and Alabama also utilized guidelines in their respective commission rules as a policy guide. The referenced states have not established separate policies and procedures. The Commission's Rules of Procedure outline information relative to the organizational makeup of the Commission, confidentiality, and other general procedures of the Commission.

Comprehensive Set of Formal Policies and Procedures Developed in Arkansas

Arkansas has developed comprehensive internal policies and procedures to inform its staff, as well as the public, of additional rules that pertain to the Commission and its ability to ensure integrity when investigating judicial misconduct.

The Arkansas Judicial Discipline and Disability Commission has developed guidelines and operating policies for commission members, alternates, and staff. The operating policies are provided in the 2000 Annual Report. The guidelines address the following:

- Recusal - concerning when a commission member, alternate member, or staff member should initiate a recusal when he or she does not think he or she is able to act fairly and impartially in a matter;
- Public and media contacts, i.e., correspondence, telephone calls, face-to-face meetings, or encounters;
- Notification of a complaint and its referral to the executive director or the commission;
- Confidentiality requirements, i.e., violations of the rule of confidentiality;
- Involvement of commission members, alternates, and staff members in all campaigns for judicial office;
- Issuance of subpoenas;
- Obtaining a sworn complaint or preparing statement of allegations; and,
- Timely submission of documents for probable cause hearings.

Investigative Recordkeeping

The absence of specific guidelines can cause inconsistencies in reporting and gathering sensitive information.

PEER reviewed several investigative reports that did not clearly explain the reason for gathering certain documentation or interviewing certain individuals. Additionally, the reports provided no subject or reference. The Commission has not established guidelines that set forth requirements for investigative file content and reporting.

Such guidelines should require identifying all evidence collected, the name and location of the organization where the information was collected, and a summary or cover memo stating the reason for obtaining such information. Also, such guidelines should require utilizing a docket sheet or form to note all pleadings or information obtained during the course of the investigation. This would ensure that all evidence obtained by the investigator, such as witness statements, court documents, and other information, is officially recorded as part of the case file.

The absence of specific guidelines could cause inconsistencies in reporting, gathering, and conducting sensitive investigations, especially when a less experienced individual is hired to conduct such tasks.

Administration and Support for Regulatory Process

PEER found minor weaknesses in the Commission's ability to perform its support functions because of the absence of policies and procedures to govern activities within its administrative process.

The Commission's support functions include general operations, recordkeeping, personnel administration, and financial management.

Absence of General Operating Policies and Procedures

The Commission has not formally adopted a comprehensive policies and procedures manual to use as a guide for conducting operations.

During the review, the Commission's executive director reported that no in-house policies and procedures had been developed; however, he did locate a copy of "Commission Policy Resolutions 1 through 4." According to the executive director, the undated policy resolutions were once used as the Commission's internal policies guide for the Commission and its staff. However, the executive director advised that the policy resolutions are outdated, obsolete, and need revising.

For example, Resolution #3, Confidential Materials, states, "Complaint files shall not leave the Commission offices." Current practice does not comply with this resolution because, prior to all scheduled Commission meetings, copies of all new complaints and related information are mailed to all Commission members. The executive director could not recall when and if an amendment or

change to Resolution # 3 had taken place to allow files to be mailed or taken from the Commission office.

The Commission's policy resolutions are outdated and need updating.

Further, the executive director related that he uses the Rules of the Commission as a policy guide in administering its judicial responsibilities, since the Commission has not established more specific operating policies or procedures.

Absence of Policies and Procedures to Govern Specific Functions

The Commission has not adopted policies and procedures to govern data management (recordkeeping), personnel management, and financial management activities.

Electronic Data Case Management (Recordkeeping)

The case management system allows the Commission to input new complaint information and assign new case numbers. A database is available to obtain reports based on the following:

- total number and type of dispositions;
- number of complaints by judge (and jurisdiction); and,
- number of complaints by source (e.g., citizen, attorney).

PEER determined that no internal procedures were available to provide instructions regarding how to input, retrieve, update, or remove information from the case management data system.

Personnel Administration

The Commission does not have human resources policies and procedures to address vacation and sick leave, grievance/complaint procedures, or performance evaluation, or could PEER find policies to address:

- sexual harassment;
- conflict of interest;
- public and media contact;
- violation of the rule of confidentiality; or,

- the Americans with Disabilities Act.

The Commission's 2000 Annual Report recommended that specific training on sexual harassment be provided to judges, court administrators, clerks, and other court-related personnel.

Financial Management Activities

During the review, PEER determined that the Commission is responsible for collecting fines and costs from judges who have been sanctioned. The Commission's office receives sanction payments by check and remits them to the State Treasurer. Although the support staff is knowledgeable of such functions, no formal, written internal procedures exist to govern this process.

Although no in-house guidelines are available regarding the collection of fines and costs, the Commission follows state laws and state financial policies and procedures. The Mississippi Accounting Policies and Procedures manual provides guidelines and detailed instructions relative to the state's financial requirements and procedures. Therefore, the Commission does not have to establish its own internal financial guide.

State Auditor's Financial Management Concerns

The Commission's failure to adhere to contractual requirements led the State Auditor to recommend that the Commission establish policies and procedures to ensure that administrative functions are documented and performed uniformly.

The State Auditor conducted a limited internal control and compliance review of the Commission for FY 1999. The Auditor's office recommended in two instances that the Commission establish procedures to ensure that written contracts are executed and signed by all parties involved and to ensure adherence to terms of contracts for private legal counsel.

The Auditor's office identified an instance in which the Commission paid outside counsel for services without obtaining prior approval from the Attorney General's office. MISS. CODE ANN. Section 27-104-105 states that the Attorney General is required to approve all contracts between state agencies and private legal counsel. The invoice is required to be submitted to the Attorney General's office for approval prior to payment.

The Auditor's office also advised the Commission that contractual services provided by court reporters for transcripts should be supported by written agreement. The auditors could not locate the contract documenting the terms of the agreement between the Commission and court reporters for preparation of transcripts.

Good management practices dictate whenever contractual agreements are made, they should be documented in writing and all services to be performed should be outlined. Further, it is necessary that all parties sign the agreement.

The Commission's staff overlooked critical administrative steps due to the lack of established policies and procedures regarding judicial administrative functions.

Recommendations

Investigative Policies and Procedures

1. The Commission should adopt an investigative policies and procedures manual which would establish a uniform method of reporting information obtained from witnesses and informants; it should provide directions as to how to conduct a discreet inquiry/investigation; and it should outline methods used to obtain information, evidence, and court documents.
 - The Commission should develop a uniform method of documenting interviews of witnesses or potential witnesses. The report should clearly state why certain documentation was obtained and whether it was pertinent to a particular case. Additionally, all investigative reports should be dated and signed or initialed by the author.
 - In order to account for all documents in a case file, Commission staff should develop and utilize a docket sheet or form to note all pleadings or information obtained during the course of the investigation. This would ensure that all evidence obtained by the investigator, such as witness statements, court documents, and other information, is officially recorded as part of the case file.

Administrative/Financial Policies and Procedures

2. The Commission should develop a comprehensive policies and procedures manual or employee handbook to address agency operations and responsibilities. The manual should address how complaints are filed and coded as well as how sanction payments are processed and handled.

Personnel Administration Policies and Procedures

3. The comprehensive policies and procedures manual should address current Commission procedures regarding sexual harassment, conflict of interest, public and media contact, confidentiality violations, and compliance with the Americans with Disabilities Act.

Financial Management Policies and Procedures

4. In accordance with the State Auditor's findings, the Commission should modify procedures and guidelines to accomplish the following:
 - The Commission should establish procedures to ensure adherence to terms of contracts for private legal counsel and establish procedures to ensure written contracts are executed and signed by all parties.
 - The Commission should develop guidelines to ensure that all contracts between state agencies and private legal counsel are approved by the Attorney General's office prior to payment, as stated in MISS. CODE ANN. Section 27-104-105.

Commission Policy Resolutions

5. The Commission should amend, update, or abolish the Commission's policy resolutions 1-4, since the Commission no longer follows them.

Agency Response

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June 3, 2002

Dr. Max Arinder
Executive Director, PEER Committee
501 N. West Street
Woolfolk Building
Jackson, Ms 39201



Re: PEER Committee Review of the Mississippi Commission on Judicial Performance

Dear Dr. Arinder:

Please accept this letter in response to the PEER Committee's cycle review of the Mississippi Commission on Judicial Performance.

The Commission appreciates the thorough and professional manner in which the PEER Committee staff conducted this cycle review of the Commission and the opportunities the Commission staff has been afforded for input into the review. On behalf of the Commission, I would like to submit additional information regarding comparison data and respond to the recommendations regarding docket sheets and prior audit concerns.

The PEER review compares the Commission sanction rates and cost per case disposed with those of similar agencies in comparable southern states. The states included Alabama, Missouri, South Carolina and Tennessee. The Commission would submit that the following data from Arkansas and Louisiana would also be relevant. While each state's judicial disciplinary system is unique to that state, Arkansas's system is the one most similar to Mississippi (as it was patterned largely after ours). Mississippi and Louisiana are the only southeastern states with a significant number of non-lawyer judges.

ARKANSAS: According to data acquired from the Executive Director of the Arkansas Judicial Discipline and Disability Commission, for the year 2000, the Arkansas Commission disposed of 245 complaints, with discipline imposed in six (6) cases, for a discipline rate of 2.4%. Their budget was \$426,746.00, for a cost per complaint of \$1,742.00. For the year 2001, they disposed of 309 complaints, with discipline imposed in nine (9), for a discipline rate of 2.9%. Their budget was \$508,899.00, for a cost per complaint of \$1,647.00

LOUISIANA: According to data acquired from the Commission Legal Counsel of the Judiciary Committee of Louisiana, for the year 2000 the Louisiana Commission disposed of 434 complaints, with discipline imposed in 28 cases, for a discipline rate of 6.5%. The budget for the Commission itself was \$677,963.00, with additional funds and personnel supplied by the office of

the Court Administrator. Using the minimum figure of \$677,963.00, Louisiana's cost per complaint disposed of is approximately \$1,562.00.

The PEER review includes several recommendations, each of which will be presented to the Commission for its consideration. Two of the recommendations have already been addressed independently of the PEER review.

COMMISSION DOCKET SHEET: In the fall of 2001, the Commission staff attorney recommended, and the Commission's Executive Director agreed, that some form of Docket Sheet should be implemented for the Commission's Formal Complaints. Such a document was drafted, similar to a docket sheet which might be found in the trial courts of the State of Mississippi. Since approximately December 2001, the Commission has been using a docket sheet with each new Formal Complaint.

AUDIT CONCERNS: The PEER review also addresses prior audit concerns about Commission policies and procedures regarding contractual services. This arose from a question raised during a 1999 compliance audit. The Commission had engaged outside legal counsel to prosecute a single disciplinary complaint against a member of the Commission. The contract was properly executed and signed by all parties and approved by the Attorney General's office. This contract was a one-time isolated instance. While following all the necessary and proper procedures for entering into the contract, the Commission was not familiar with the procedures for payment. Certain individual payments under the contract were paid without being pre-approved by the Attorney General's office. They were, however, accepted, approved and paid by the Department of Finance and Administration. The Commission is now familiar with the proper procedure; and in the unlikely event of an outside legal service contract in the future, the Commission has safeguards in place to insure specific compliance with all applicable rules and regulations.

The Commission thanks you for the opportunity to submit this additional information. The Commission will further consider each of the PEER recommendations as it continually works to more efficiently and effectively perform its constitutionally mandated functions.

If you have any questions, please do not hesitate to contact me at your earliest convenience.

Very truly yours,



Luther T. Brantley, III
Executive Director

LTB:rr

cc: Sam Dawkins

Joyce McCants

Judge Clarence E. Morgan, III

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