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The views expressed in the article are those of Judge Bellacosa and do not reflect the views of the New York State Bar Association.

Point of View: Time to Reform Judicial Reform

*(Quis custodiet ipsos custodes?
Who will watch the watchdogs?)*

By Joseph W. Bellacosa

In my opinion, the marketing marquee “reform” has lost its buzz as a call for change – at least in one corner of the judicial arena. Thirty-three years ago, the Commission on Judicial Conduct was created to reform the investigation and discipline of judicial misconduct. Now, New Yorkers need a transparent accounting of how that body and its staff conduct their public responsibilities, which affect judges throughout the state.

In 1977 as part of a set of reforms – a constitutional package involving appointment of judges to the Court of Appeals and centralized administration and financing of the courts – the cumbersome and creaky Court on the Judiciary was replaced by an independent Commission on Judicial Conduct (COJC).

This extra-judicial entity is invested with the exclusive power to investigate and prosecute matters of judicial misconduct and to impose appropriate disciplinary sanctions. When its decision is final, its adjudicative work becomes public and is subject to an exclusive judicial review process – appeal to the Court of Appeals only in very limited circumstances.

Right from the start, some structural problems arose from the comprehensive sweep of the Commission’s authority over *all* judges in New York State, including judges of courts of record, whether appointed or elected, and the mass of lower local court judges of the towns and

villages (police and traffic court-types with lesser and inferior jurisdiction). All judges are placed in the same COJC fishbowl (or apple barrel), even though some local lower-level judges are not even attorneys.

One unintended consequence of this one-size-fits-all approach is the skewing of the public perception of the magnitude and nature of judicial misconduct. The COJC has capitalized on the relatively more numerous lower court judges’ misdeeds, which has fostered the notion of serious and pervasive judicial misconduct. Its numerous prosecutions (with attendant media publicity on determinations of lower court judicial misconduct) and its annual reports have led the public to believe there are a lot more bad apple judges and more problems of misconduct than is empirically true. The distorted picture has generated a regrettable misimpression of the Judicial Branch and its function that adversely and unfairly affects the reputations generally and individually of judges of courts of record – the higher courts. This, in my opinion, also contributes to a diminishment of respect for the overall integrity of the judicial process.

By and by, after the tension of the start-up years – the late ’70s and early ’80s – with the rather broad-reaching town and village justices’ ticket-fixing scandal petering out, matters started to get reasonably sorted out and settled down. The COJC seemed to be functioning as

originally contemplated, though here and there episodic dust-ups continued to occur among the judges, their membership organizations and the Commission operation. But these problems seemed less systemic and more ad hoc – involving policies or rules of conduct applied to individual cases. Generally, institutional tension between the independent COJC and judges is inevitable and cannot be avoided entirely.

Because of recent developments, however, this is a good time for a fresh examination of the COJC. The whole environment has been roiled and tensions escalated, as I see it, because judges and the judicial branch of government have been demoralized by a host of non-conduct-related, extra-Commission events. High on the list is the failure of the other two branches of government to provide adequate compensation to judicial officers.¹ It has been 11 years since the judiciary last received an increase in pay, which implies a disdain and disregard for an entire branch of government, which is not lost on the public and media, who feed that attitude.

Against that background, the COJC has further undermined respect for the weakened branch. I have come to the view that the Commission has gone astray because hardly any structural or operational checks and balances are in place – that is, no one is watching the watchdogs.

My perspective is informed by my multidimensional angles of experience as well as by my personal opinion and judgment. (It is at least a “3D” look-see, the revived *Avatar*-like movie and TV rage of our day and culture.)

I was Clerk and Counsel to the Court of Appeals from 1975 to 1983. I observed and aided the then-Chief Judge (Charles D. Breitell, the principal force behind the court reforms of that era) in the technical drafting, construction and implementation of the 1977 constitutional regimes. To be sure, my role was subordinate, on the back lot so to speak, working along with many other far more significant officials.

Later, I moved to the front lines and onto the main stage, during the '80s and '90s, as Chief Administrative Judge (promulgator of the Rules of Judicial Conduct) and Associate Judge of the Court of Appeals (the institution with exclusive judicial review of COJC determinations via appeals taken at the instance of aggrieved and sanctioned judges). In those two posts I was directly and intensely engaged in reviewing some of the COJC's work and activities.

The third phase of my look-see, during the Decade of the Aughts to present, has involved watching essentially from the sidelines as a citizen and lawyer (with one notable exception²). The subject of judicial discipline and the operation of COJC have remained areas of high interest and concern for me because the theoretical structure and the practical applications are both important and fascinating.³

To illuminate, I now advert to two recent developments, related but quite distinct. The first was New York City Corporation Counsel Michael Cardozo's proposal in December 2009,⁴ and the second, one week later, was the Court of Appeals decision in *In re Gilpatric*.⁵ They startled me out of my retirement reveries and have led me to believe that the 1977 reform, however well intentioned and reasonably well executed, has “jumped the shark.” The COJC's billowing power is headed in the wrong direction and needs to be subjected to structural checks and balances with a piercing spotlight of transparency. Simply stated, reform itself needs reform.

The classical Latin aphorism I invoked to subtitle this article was uttered and applied historically long before even our country's founders adopted it as one of the new republic's foundation pillars of good governance.⁶ Experience has proved that the separation of powers principle, the diversified allocation and distribution of cross-checking balance levers, is the firmest bedrock anyone could imagine for the proper administration of human institutions of governance.

So how did the judicial disciplinary process escape that equalizing supervision? However it happened and however long it has persisted, it is a crucial missing link that deprives the COJC process of the legitimacy that comes from independent accountability and transparency.

The Commission on Judicial Conduct is structurally and practically devoid of meaningful checks and balances because the ultimate Court of Appeals appellate review (the only judicial oversight, which, though plenary, pertains only to exceptionally appealed cases) is limited to those few adverse determinations against judges in end-stage situations. Healthy sunlight is not let in through that narrow lens of the Court of Appeals cases.

Actually, the more important question is, What are the Commission and its (occasionally excessively) zealous staff up to in the earlier stages? Consider that investigations and unsuccessful prosecutions get no meaningful external supervision or review.⁷ No one has appeal rights as to those early critical stages where enormous damage and irreparable harms may be inflicted on unseen judges and the judicial process.

Yet, the Commission boldly boasts, in its annual reports and in most of its appeal briefs, that the Court of Appeals overwhelmingly (statistically correct as to the relatively few that get to the Court) accepts and approves of its formal *Determinations* (when and if they get that far along in the process). This is perhaps false or at least misleading advertising, suggesting that there is broader Court of Appeals approbation of the COJC's activities than is actually the fact. Thus, the question is, Is any independent entity reviewing and overseeing the COJC's *investigations* and *prosecutions*? In my loose translation of the venerable Latin maxim posed at the outset (Who is

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guarding these guardians?), and with all due respect to the individual Commission members, I would earnestly submit that no one is conducting an institutional and independent level of scrutiny at those critical early stages of Commission and staff activity.

As I noted earlier, two recent developments jump-started my heightened concern. One was Corporation Counsel Michael Cardozo's misguided suggestion (number six in his list of 10 proposals), uttered on the occasion of his acceptance of the Cyrus Vance Award from the Fund for Modern Courts. I was a member of the audience and was somewhat stunned by the proposition that the Office of Court Administration, through the good and powerful offices of the Chief Administrative Judge (a post I proudly occupied 25 years ago), should file complaints with the COJC against judges for "failure to file" reports relative to the 60-day pending cases tabulations. That proposal, along with the rest of his bold proffer, was published and publicized in the *New York Law Journal*; a firestorm of critical responses ensued.⁸

Such a notion suggests to me that the word "reform" has become oxymoronic. The tattletale role would transmogrify the roles of OCA and the CAJ from helper to judges (as originally intended) to routine whistleblower against the interests of judges. Nothing I can think of would be more counterproductive than seriously considering such an imprudent suggestion. It should be rejected summarily and emphatically because the OCA should not become a routine collaborator with the COJC in accusing judges.⁹

The jurisdictional tentacles of the Commission over these last four decades have been expanding as it is.¹⁰

The COJC's encroachments on the principle of judicial independence have begun to tip the balance of the always-desirable accountability it was intended to provide concerning the relatively rare instances of judicial misconduct, especially by judges of courts of record and superior jurisdiction. The question should be asked, however, at what sacrifice and at whose expense? The COJC's probes, initial investigations and incomplete or failed prosecutions are sealed off against any checks and balances of accountability as to what and how it exercises its powers and judgments.

Mr. Cardozo's suggestion number six should be scrutinized through yet another prism – the OCA or CAJ as the proposed source of the complaint to the COJC. No amount of disclaimed non-judgmentalism and expressed neutrality will be able to discount or deflect the impact – the official "ooomphh" – that such a routine referral will carry with it. Any handoff by the CAJ is inescapably freighted against the allegedly time-mismanaging judge. The subtext of such referrals will always include: "I, the CAJ, cannot manage or handle this 'allegedly' incorrigible judge with all the power I have as CAJ, but I discern enough basis and concern to refer it to you, COJC, to take it over and grind it – and the judge – through your investigatory and disciplinary process." No more need be said about the tilted playing field of such referrals.

Within a week of Mr. Cardozo's proposal, my revered¹¹ Court of Appeals added a new complication.¹² As noted earlier, *In re Gilpatric* modified and cut back on the *In re Greenfield*¹³ bright-line demarcation between administrative activities and sanctionable misconduct. The COJC can now investigate and prosecute administrative activities under the category of delays in decision rendering. To be sure, the Court of Appeals added that "not every case involving caseload delays will rise to the level of misconduct." That caveat, however, will provide no comfort to judges subjected to even the preliminary investigatory scrutiny of the Commission. Nor will it deter imprudent investigations generated by unfounded complaints rooted in strategic or retaliatory agendas of litigants, lawyers or public officials.¹⁴ This precedential authorization hangs a sword of Damocles precariously, unfairly and unnecessarily over countless judges. This is overkill for the subject area of conduct in question. It is disproportionate and is being placed in unchecked hands, irrespective of the attempt to qualify the sweep of the rule in the description of the holding. One only has to read the headline and lead in the NYLJ story on the report of *In re Gilpatric* to appreciate the impact of the ruling.¹⁵

Further, it is no answer that the Court of Appeals might eventually review (and pass on) the rare appeal by a judge against whom a full proceeding has ended in an adverse determination. That stage is too late and too little for most judges subjected to the irreparable injury and debilitating investigation and blotch on their careers



and service records. No check-and-balance entity or procedural stepladder exists with the capacity to uncover error or lack of prudence in how the Commission and its staff exercise this wide swath of new probing power. That alone is reason for pause, re-examination and course correction of the COJC's runaway authority.

Enough time has passed since the enactment of this initially constructive disciplinary reform in 1977 that a plenary re-examination of the structure and its operation makes sense. The annual reports of the Commission do not transparently expose what is really going on behind the scenes at the staff and even early preliminary Commission supervisory level (necessary and appropriate confidentiality rules contributing to some of that, to be sure). Skepticism about the "spin" of such self-generated and inherently non-independent reports is entirely appropriate. Nor do those reports and the self-laudatory Commission press releases on adjudicated cases, nor the paucity of Court of Appeals's across-the-board rulings, provide a full-face, peripheral or back-story exposition of the impact (and damage in my view) to the fair application – and on the indispensable principle – of judicial independence. Fairness to individual judges (investigated, charged or adjudicated) and faithfulness to judicial process independence require something better than what is now erupting.

I could not agree more that accountability, transparency and appellate checks and balances are needed as to the conduct of judges and their public duties. Correspondingly however, on the goose-gander axiom, those civic governance virtues should be demanded of the watchdog as well.

Cicero always closed as he began, and so shall I: "*Quis custodiet ipsos custodes?*" ■

1. *Lippman v. Paterson*, __ N.Y.3d __ (Feb. 18, 2010).
2. While a nostalgic tilt stemming from the privilege of my joyful service in the Judicial Branch for over 30 years is obvious, an overt disclaimer is still worth declaring in connection with this piece. I undertook a professional representation in a COJC matter on behalf of an accused judge in 2008–2009 as *pro bono* counsel with another retired judge, the Honorable John Martin, S.D.N.Y. The Honorable Michael Ambrecht, though ultimately exonerated by the Commission after a full and expanded proceeding, was *de facto* removed from his judicial office by the Governor's refusal to re-appoint Judge Ambrecht. See *Censure Advised for Judge Whose Personal Lawyer Appeared in Court*, N.Y.L.J., Nov. 10, 2008, p. 1, col. 3; *Letters to the Editor*, N.Y.L.J., Nov. 20, 2008, p. 2, col. 4; see also *Judge's Ouster Raises Independence Issue*, N.Y.L.J., June 8, 2009, p. 6, col. 1.
3. On October 17, 2009, Court of Appeals Sr. Associate Judge Carmen Beauchamp Ciparick, as Visiting Jurist in Residence at St. John's School of Law, gave the Joseph W. Bellacosa Lecture on "Judicial Independence and the Commission on Judicial Conduct" (to be published).
4. *10 Suggestions for Court Reform*, N.Y.L.J., Dec. 7, 2009, p. 6, col. 4.
5. 13 N.Y.3d 586, 2009 WL4794212 (2009).
6. *Myers v. United States*, 272 U.S. 52 (1926). In his dissent, Justice Brandeis noted, "The doctrine of separation of powers was adopted . . . not to avoid friction, but . . . to save the people from autocracy." *Id.* at 293. See Melvin I. Urofsky, Louis D. Brandeis, A Life (especially ch. 23, p. 571 *et seq.*).
7. The redacted and generalized COJC annual reports are not transparent checks or balances of independent value as to pre-determination activity or cases.
8. See, e.g., *Cardozo's Comments Insulting, First Department Justices Say*, N.Y.L.J., Dec. 17, 2009, p. 1, col. 4; *Cardozo's Court Reform Suggestions Are Misguided, Misplaced and Insulting*, N.Y.L.J., Dec. 17, 2009, p. 2, col. 1.

9. There are extraordinary individual instances where a referral for founded wrongdoing is necessary. See e.g., *In re Gelfand*, 70 N.Y.2d 211, 518 N.Y.S.2d 950 (1987), where I, as Chief Administrative Judge, referred a serious matter to the Chair of the COJC that resulted in removal of a judge from office.

10. See *In re Gilpatric*, 13 N.Y.3d 586, the December 2009 ruling from the Court of Appeals, retreating from the ruling in *In re Greenfield*, 76 N.Y.2d 293, 551 N.Y.S.2d 1177 (1990) (bright-line demarcation between administrative delay and misconduct). I am not alone in this particular concern, as even Commission members (usually in rueful but admonitory dissent) have expressed some legitimate concerns from time to time (i.e., Commissioner Richard Emery). See *Panel Rebukes City Judge Over 2006 Campaign Improprieties*, N.Y.L.J., Dec. 4, 2009, p. 1, col. 3.

11. My lifelong reverence for the Court of Appeals springs from 25 years of service in various roles at the greatest Court on this planet. Let anyone conclude that I nostalgically yearn for my old role, let me reassure readers that from day one of my retirement as a judge in 2000 to now 10 years down the road, I am quite a contented unaffiliated free spirit. So I include this rare expression and commentary as a singularly focused serious concern, and not as an erstwhile dissent.

12. See *Judicial Tardiness Can Trigger Discipline, Ruling Concludes*, Dec. 16, 2009, N.Y.L.J., p. 1, col. 4.

13. 76 N.Y.2d 293. Another disclaimer: I voted for that *per curiam* opinion.

14. See Joseph W. Bellacosa, *The Retaliatory Removal of a Judge*, *The Jurist*, Fall-Winter 2009–2010, p. 3; see also *supra* note 1.

15. See *Judicial Tardiness Can Trigger Discipline*, *supra* note 12.

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