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Annual Report 2012

MINNESOTA BOARD ON JUDICIAL STANDARDS

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STATE OF MINNESOTA
BOARD ON JUDICIAL STANDARDS
2012

Judge Members

Honorable Vicki Landwehr
Judge of District Court
St. Cloud, MN

Honorable David Knutson
Judge of District Court
Hastings, MN

Honorable Jill Flaskamp Halbrooks
Court of Appeals
St. Paul, MN

Honorable Dan Mabley
Judge of District Court
Minneapolis, MN

Honorable Shaun Floerke
Judge of District Court
Duluth, MN

Attorney Members

William Egan
Edina, MN

William Wernz
Minneapolis, MN

Public Members

Douglas Fuller
Bemidji, MN

Cynthia Jepsen
Marine on St. Croix, MN

Patrick Sexton
Edina, MN

Timothy Gephart
Minneapolis, MN

Terry Saario
Minneapolis, MN

Staff

David S. Paull
Executive Secretary

Deborah Flanagan
Executive Assistant

TABLE OF CONTENTS

ANNUAL REPORT 2012

Foreword from the Chair	2
Introduction	4
Authorization	5
Organization	5
Code of Judicial Conduct	5
Rules and Procedures	6
Jurisdiction	6
2012 Case Disposition	7-11
2012 Advisory Opinions	12

FOREWORD FROM THE CHAIR

The Minnesota Board of Judicial Standards is charged with enforcing the Minnesota Code of Judicial Conduct (the “Code”). The Code establishes a high standard for judicial conduct in the State of Minnesota. The Preamble to the Code states:

The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all of the Rules contained in this Code of precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest public confidence in their independence, impartiality, integrity, and competence.

As each member of the Board is well aware, an independent, impartial judiciary is indispensable to our system of justice. The Board has a vision of a judicial system in which every judge not only aspires to meet, but in fact does meet these high aspirations. Equally important is the continuing confidence of the public in the integrity and impartiality of the Minnesota judiciary. Since 1972, in its 41st continuous year of operation, the Board on Judicial Standards continues to make every effort to fulfill its mission – the adherence to those principles which encourage the achievement of these essential goals.

In carrying out its responsibility to oversee and enforce the Code, the Board’s primary function is to process complaints of judicial misconduct. To that end the Board receives complaints, investigates and conducts hearings, makes certain limited summary dispositions, issues private disciplines and public reprimands, seeks public disciplines through formal complaints, and makes recommendations to the Supreme Court concerning allegations of judicial misconduct, allegations of physical or mental disability of judges, matters of voluntary retirement for disability, and review of a judge’s compliance with the statutory requirement that written motions and matters submitted to a judge be decided within ninety days of submission.

The Board received 108 written allegations of judicial misconduct in 2012. As in years past, the majority of those complaints were dismissed by the Board either because the complaints were frivolous, did not allege an actual violation of the Code of Judicial Conduct, or the Board investigated and concluded that the complaint was without merit. Last year, eleven formal investigations were conducted.

The Board also continued to take action to increase the transparency of its policies and procedures and improve internal operations. Highlights of those activities include the following:

Policies and Procedures. In 2012, the Board completed a multi-year project of updating its Policies and Procedures. The Policies and Procedures have been posted on the

Board's website. The Board also clarified its Mission Statement. The Board adopted a new policy, by which its Chair would appoint one or more members to assist the Executive Secretary and outside counsel in especially important disciplinary and disability matters.

2013 Board Goals. The Board has set several goals for 2013. First among these is creating a new website. Another important goal is establishing a fiscal calendar for Board activities. The Board is also committed to enhancing its opinion-issuing function. The Board will continue to review its procedures to ensure compliance with legal standards and Board policies. The Board elected the following members to the Executive Committee for 2013 – Hon. Vicki Landwehr (Chair), William J. Wernz (Vice-Chair), Terry Saario.

Outreach. The Board invited legislative leaders to meet with the Board, and met with the former chair of the Senate Judiciary Committee. Several important additions have been made to the Board's website, including the Board's Policies and Procedures, and Supreme Court judicial discipline cases. The Board communicated with legislators and with the Minnesota Supreme Court regarding its revised expungement policy and procedure. The Board also met with representatives of the Minnesota District Judges Association. The Executive Secretary made several presentations to outside groups.

Record Retention Compliance. In 2011, the Board determined that under Rule 17 of its Rules, as in effect before July 1, 2009, contemplated destruction of several categories of files that the Board had retained, namely where the Board found a complaint "without sufficient cause." The Board had previously believed that under prior Rule 6(f), it could retain certain records where the complaints were "without sufficient cause." On reconsideration, the Board concluded that the law clearly requires record destruction, subject to several file-retention exceptions for (1) public discipline files, (2) private disciplines issued after June 30, 2009 (Rule 19), and (3) files that the Board Chair determines should be retained "upon good cause shown." In 2012, the Board began the significant undertaking of reviewing every retained file to determine which would be retained under these exceptions, and which should be destroyed. The Board enlisted the assistance of a retired Minnesota trial court judge to review all disciplinary files that were closed prior to July 1, 2009, but nonetheless retained. The destruction/retention task is scheduled for completion in the first half of 2013. Under Rules 6(f) and 19, as amended in 2009, the Board retains until judges' deaths all files, including private admonitions, in which the Board finds there is reasonable cause to believe the judge committed misconduct.

The Board meets to review complaints and monitor investigation and ongoing processing of complaints. The material reviewed by the Board at these meetings is voluminous and often is complex. I continue to be impressed by the high volume of work processed throughout the year by the Board's two-person staff, Executive Director David Paull and his assistant Deborah Flanagan, who announced her decision to retire at the end of 2012. On behalf of the Board, let me express my appreciation for the diligent and timely work of both of these dedicated public servants. I especially wish to recognize and thank Deb Flanagan for her 37 years of service to the Board.

William J. Egan
Chairperson

INTRODUCTION

A society cannot function without an effective, fair and impartial procedure to resolve disputes. In Minnesota, the constitution and laws provide a system designed to fit these essential criteria. The preservation of the rule of law, as well as the continued acceptance of judicial rulings, must depend on unshakeable public recognition that the judiciary and the court system is worthy of respect and trust. The maintenance of justice in our State is directly dependent on the proper personal conduct of our judges. It is the Board's mission to guard public confidence in the independence, integrity and impartiality of our judicial system through the observance by our judges and judicial officers of proper conduct.

To accomplish its goal, the Board discharges three general responsibilities:

- The Board processes complaints alleging judicial misconduct or disability.
- In cases in which misconduct is determined, the Board recommends public discipline where appropriate and may issue non-public discipline where the improper conduct is isolated and non-serious.
- The Board advises and educates interested citizens, as well as lawyers and judges, with regard to the role of the Board in the judicial disciplinary and disability process, as well as the application of the Code of Judicial Conduct.

The Board's investigation, interpretation and disciplinary processes recognize the unique role of elected and appointed judges in our State. The Board acts to preserve the rights and dignity of the bench, bar and public while maintaining compliance with the Code of Judicial Conduct.

AUTHORIZATION

Minn. Constitution, Art. 6, Section 9, authorizes the legislature to “provide for the retirement, removal, or other discipline of any judge who is disabled, incompetent, or guilty of conduct prejudicial to the administration of justice.” The legislature authorized the court to discipline a judge for “incompetence in performing the judge’s duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” The 1971 Legislature created the Board on Judicial Standards to assist in this task and authorized the Supreme Court to make rules to implement judicial discipline. *Minn. Statutes 490A.01, 490A.02 (2006) [M.S.490.15 and 490.16 (1982).]*

ORGANIZATION

The Board has ten members: one judge from the Court of Appeals, three trial court judges, two lawyers who have practiced law in the state for at least 10 years, and four citizens who are not judges, retired judges, or lawyers. All members are appointed by the Governor and, except for the judges, require confirmation by the Senate. Members’ terms are four years and may be extended for an additional four years.

The Board meets at least nine times annually and more often if necessary. The judge members are not paid but do receive expense reimbursement. Non-judge members may claim standard state per diem, as well as expense reimbursement.

The Board is supported by a two-person staff, the Executive Secretary and the Executive Assistant. At the direction of the Board, the staff is responsible for reviewing and investigating complaints, maintaining records concerning the operation of the office, preparing the budget, administering the Board funds and making regular reports to the Board, the Supreme Court, the legislature and the public.

CODE OF JUDICIAL CONDUCT

In addition to the applicable laws, the Minnesota Supreme Court has adopted the Code of Judicial Conduct to govern judicial ethics. Intrinsic to the Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The Code should not be construed so as to impinge on the essential independence of judges in making judicial decisions.

The Board considers only complaints involving the professional or personal conduct of judges. Complaints about the merits of decisions by judges may be considered through the appellate process.

RULES AND PROCEDURES

The rules of the Board are issued by the Minnesota Supreme Court. Under its rules, the Board has the power to investigate allegations of judicial misconduct or, on its own motion, to make inquiry into the conduct of a judge, as well as his or her physical or mental condition. If a complaint provides information about conduct that might constitute grounds for discipline, the Executive Secretary first conducts a confidential investigation.

The rules permit the Board, upon a finding of reasonable cause, to issue private admonitions, public reprimands, seek public discipline or commence a public hearing. Public hearings are conducted by a three-person panel appointed by the State Supreme Court. The rules also permit the Board to defer a disposition, impose conditions on a judge's conduct or require professional counseling or treatment. After a public hearing, a Panel's recommendation of censure, suspension or removal can be imposed only by the Minnesota Supreme Court.

All proceedings of the Board, except public reprimands, are confidential until a formal complaint and response have been filed with the Minnesota Supreme Court.

An absolute privilege attaches to any information or related testimony submitted to the Board, its staff, or its lawyers, and no civil action against an informant, witness, or his or her counsel may be instituted or predicated on such information.

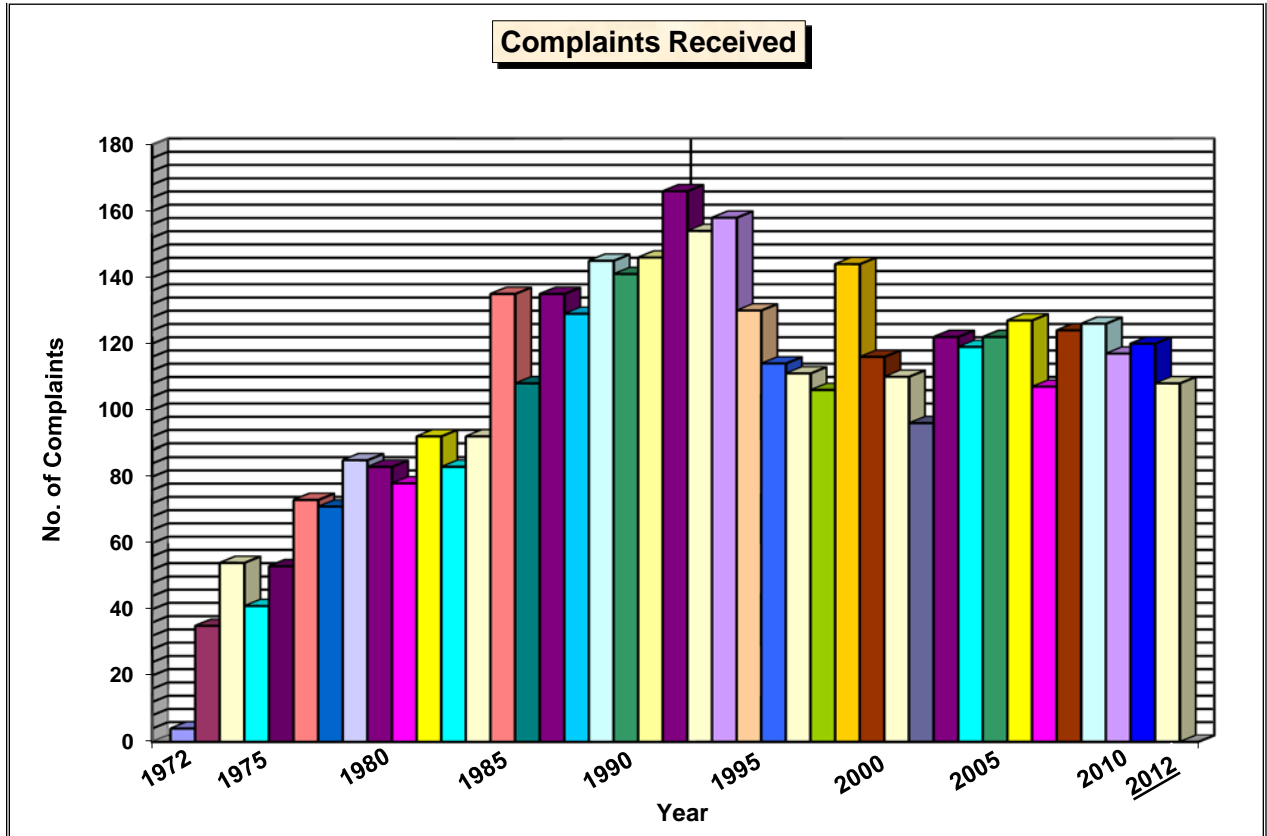
JURISDICTION

The Board's jurisdiction extends to certain persons exercising judicial powers and performing judicial functions, including all judges and judicial officers employed by the judicial branch of state government. During 2012, this included 289 trial court judge and 26 appellate judges. The Board's jurisdiction also includes: retired judges serving on orders from the Supreme Court, child support magistrates, referees, and part-time conciliation court judges. In addition, the Board has jurisdiction over judges of the Minnesota Tax Court, judges of the Workers' Compensation Court of Appeals and the Chief Administrative Law Judge.

The Board does not have jurisdiction over court administrators, court administrative personnel, court reporters or law enforcement. The Board has no authority over federal judges. Complaints against federal judges are filed with the Eighth Circuit Court of Appeals, as prescribed in 28 USC, Section 372(c).

2012 CASE DISPOSITION

During 2012, the Board received 108 written complaints. The number of complaints received annually by the Board since its creation in 1971 is set forth below:



<u>SOURCE OF COMPLAINTS - 2012</u>	
Litigants	65
Board	14
Inmates/Prisoners	7
Other	6
Attorneys	5
Citizen	5
Anonymous	4
Government Agency	1
Law Enforcement	1
TOTAL	108

ALLEGATIONS REPORTED - 2012

General demeanor and decorum	60
Bias, discrimination or partiality	55
Delay in handling court business	25
Conflict of interest	14
Ex parte communication	13
Loss of temper	12
Improper conduct on the bench	8
Improper influence, ticket fixing	7
Abuse of authority	6
Failure to follow law or procedure	6
Chemical dependency	5
Corruption, bribery	4
Failure to perform duties	4
Health, physical or mental capacity	3
Reputation of judicial office	3
Administrative irregularity	2
Educational requirements	1
Practicing law	1
Unassigned	1
Other	1

JUDGES SUBJECT TO COMPLAINTS - 2012

District Court Judges	95
Justices - Supreme Court	0
Referees/Judicial Officers	6
Retired - Active Duty	1
Child Support Magistrates	4
Court of Appeals Judges	0
Judicial Candidates	0
Tax Court Judges	0
Workers Comp-Court of Appeals	0
Chief Administrative Law Judge	0
Part time judge	0
Conciliation Court Judge	0
Disability retirement during pendency	0
No longer a judge	0
Resigned during pendency	1
Pro tem judge	1
Deceased	0
TOTAL	108

The Board requested 14 judges to respond in writing to the Board for explanation of their alleged misconduct. Two judges appeared before the Board this year. On one occasion, a Board delegation visited with the judge. After initial inquiries, 10 complaints required supplemental investigation.

DISMISSAL REASONS - 2012

No grounds or frivolous	44
No misconduct; no violation	34
Within discretion of judge	15
Insufficient evidence	14
Legal or appellate issues	13
Corrective action by judge	6
Lack of jurisdiction	4
Unsubstantiated after investigation	2
No issue left to resolve	1

Prior to January 1, 1996, the Board had the authority to issue private, confidential reprimands. Reprimands imposed by the Board after January 1, 1996, are public. Effective July 1, 2009, the Board was specifically authorized to issue admonitions, deferred dispositions, and letters of caution under the newly revised *Rules of the Board on Judicial Standards*.

In 2012, no public reprimands were issued.

SAMPLES OF CONDUCT FOUND TO BE IMPROPER

The purpose of these examples is to educate the public and to assist judicial officers in the avoidance of improper conduct. To maintain confidentiality, the Board requires the elimination of certain details of the individual cases summarized below. Rather than omit them completely, the Board believes it is better to provide these abridged versions. References are to the *Minnesota Code of Judicial Conduct*, as revised.

- Delaying decisions in submitted cases for an unreasonable time or failing to issue an order in a submitted case within the statutory 90-day period. [*Canon 2, Rule 2.5 and M.S. 546.27*]
- Failing to act with courtesy, dignity and respect toward all participants. [*Canons 1 and 2, Rule 2.8*]
- Habitually failing to begin court proceedings in a timely manner [*Canon 2, Rules 2.5*]
- Issuing a warrant for the arrest of a party who failed to comply with an order to remain in court for an indefinite period because her cell phone accidentally rang in court during proceedings. [*Canon 1, Rule 1.1 and Canon 1, Rule 1.2, Canon 2, Rule 2.2, Canon 2, Rule 2.8*]
- Initiating and engaging in *ex parte* communication relating to a pending case with a person who had previously acted as a witness in that same case. [*Canon 1, Rule 1.1 and Canon 1, Rule 1.2, Canon 2, Rule 2.2, Canon 2, Rule 2.9 (A)*]
- Presiding in a criminal trial without disclosing to the defendant that a retainer contract to act as an expert witness was at that time in existence with the county in which the trial was taking place. [*Canon 1, Rule 1.1 and Canon 1, Rule 1.2, Canon 2, Rule 2.1, Canon 2, Rule 2.2, Canon 2, Rule 2.11*]

PUBLIC CASES

No public cases were resolved in 2012.

INQUIRIES BY JUDGES

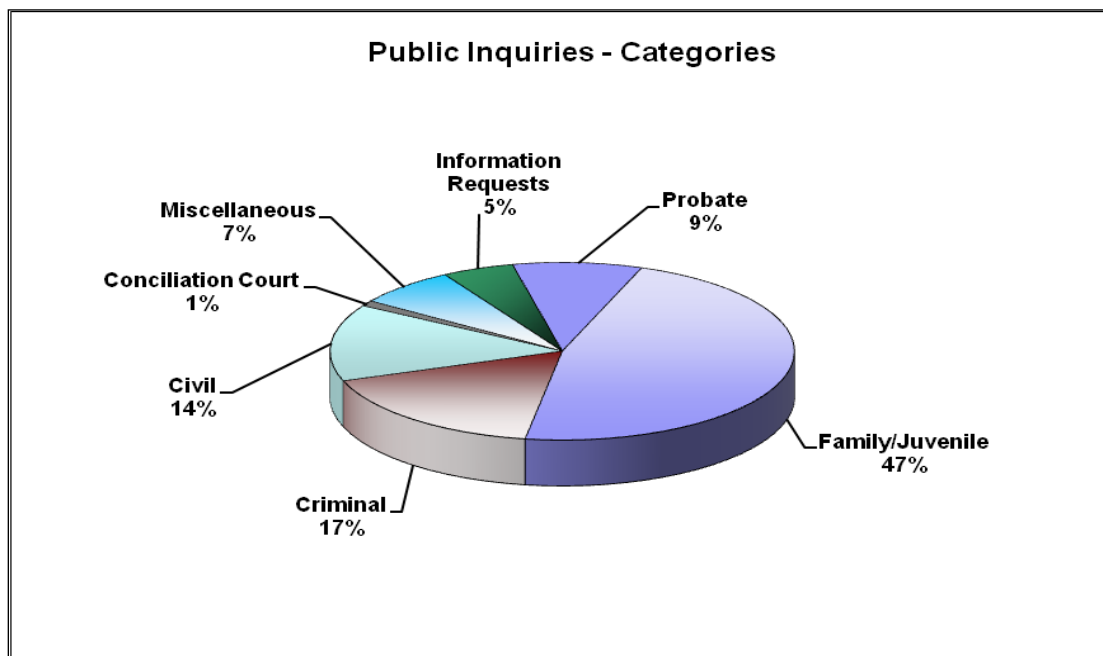
The Board encourages judges who have ethical questions to seek its guidance. The Board will issue an informal advisory opinion to any judge. In 2012, the Board issued one informal advisory opinion.

Judges regularly contact the Board's staff for information and material on various questions involving the Code of Judicial Conduct. During 2012, there were 281 inquiries by judges to the staff.

PUBLIC INQUIRIES

The staff often receives complaints that concern persons over whom the Board has no jurisdiction or that do not allege judicial misconduct.

Staff maintains a daily log of contacts that complain about judges or request information. In 2012, the staff responded to 1,511 such inquiries. The inquiries are generally from parties involved in a court proceeding and are coded by category; a tabulation of the inquiries by category is set out below.



2012 ADVISORY OPINIONS

Upon request, the Board issues advisory opinions applying the *Code of Judicial Conduct* to various specific questions submitted by judges. A synopsis of each advisory opinion issued by the Board in 2012 is provided below. References are to the rules of ethics contained in the *Code of Judicial Conduct*, as revised.

The prohibition in *Rule 3.9*, against acting “as an arbitrator or mediator during the period of any judicial assignment,” applies only “while serving as a judge.” Retired judges who are merely certified to act as retired judges, but are not actually “serving” in particular cases, are not prohibited from acting as arbitrator or mediator. The Board’s opinion is, further, that the prohibition against serving as a judge takes effect only when the arbitration or mediation has actually commenced; the prohibition would not be in place when the retired judge has merely accepted an offer to mediate or arbitrate or simply negotiated his or her fee for this service. The prohibition would be lifted when the judge has completed his or her involvement in the arbitration or mediation. The dictum in *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012) does not affect the Board’s opinion. [*Canon 1, Rule 1.2, Canon 2, Rules 2.2, 2.4, 2.6(A), 2.9(A), 2.9(C), 2.11(a)(1)*, as well as *Canon 3, Rules 3.1 and 3.5.*]

FURTHER INFORMATION

For additional information regarding the Board on Judicial Standards, please feel free to contact the Executive Secretary at 651-296-3999.