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Abstract: In *Garner v. Cherberg*, the Washington Supreme Court upheld certain rules of inviolate confidentiality adopted by the Washington Commission on Judicial Conduct. This Note examines the justifications for such confidentiality rules, and proposes temporary, rather than inviolate, confidentiality to better balance interests of fairness and the public's right to know.

Confidentiality in judicial misconduct proceedings has been a source of constant friction since the creation of the first state judicial conduct commission twenty-nine years ago. Confidentiality rules are intended to maintain fairness in the proceedings for the protection of all participants. Such rules, however, collide with the public's right to know about judicial misconduct. Moreover, such rules prevent the public from determining when a judicial conduct commission has abused or misused its discretion in dismissing complaints against judges. Without this knowledge, it is impossible to maintain public confidence in the judiciary and the legal system.

In *Garner v. Cherberg*, the Washington Supreme Court sought to reconcile fairness interests with the public's right to know. In *Garner*, the Washington State Senate Committee on Rules issued a *subpoena ducem tecum* to the Washington Commission on Judicial Conduct ("CJC") for files on Judge Gary Little. The senate was investigating CJC activity to determine an appropriate legislative response to the CJC's handling of complaints against Judge Little. The CJC had secretly admonished Little in 1982 for *ex parte* contacts with juveniles, but had taken no action on similar complaints in 1984 and 1985. The public was unaware of these events. Little, running unopposed, automatically retained his seat on the bench in the 1984 election. In 1988, Judge Little killed himself amid allegations that prior to his election in 1980 to the superior court he sexually molested young men.

The court quashed the senate's subpoena, upholding confidentiality laws designed to maintain fairness. Then, legitimating the public's

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2. In 1987, the Judicial Qualifications Commission was renamed the Commission on Judicial Conduct. *COMMISSION ON JUDICIAL CONDUCT RULE 1(a)* ("CJC RULE") (rev. Apr. 3, 1987). In this Note, "CJC" will denote both the Judicial Qualifications Commission and the Commission on Judicial Conduct.
countervailing right to be informed, the court granted legislative rep-
resentatives limited access to the files. This tortured approach illus-
trates the tensions inherent in balancing the needs of the public with
fairness. Although intended to promote such fairness, confidentiality
rules instead undermine it.

This Note examines the need for confidentiality in CJC proceedings.
Confidentiality is necessary to allow uninhibited CJC investigations
and to protect judges from unscreened attacks. However, keeping files
secret after disposition of a complaint deprives the public of its right to
monitor the exercise of CJC discretion. This Note proposes that the
legislature adopt “temporary confidentiality” in CJC proceedings.
Temporary confidentiality means that ongoing investigations or hear-
ings are confidential until the complaint is disposed of, then all files are
opened to the public. This system at once ensures overall fairness and
accommodates the public’s right to know.

I. BACKGROUND

A. Judicial Conduct Commissions: An Overview of Procedures and
Confidentiality Provisions

States use one of two basic models for investigating and acting on
allegations of judicial misconduct or disability.3 Although all juris dic-
tions’ procedures for handling complaints are similar,4 the point where
confidentiality ends and proceedings become public varies signifi-
cantly. In twenty-four states, including Washington, confidentiality

Washington has a "one-tier" system, as do 40 other states and the District of Columbia. A single
commission investigates and adjudicates complaints, then recommends discipline to the state
supreme court. In the "two-tier" system, one body receives and investigates complaints. If that
body finds probable cause for disciplinary action or removal, the case is handed to a separate
body for adjudication. Id.

4. The Washington CJC procedure typifies one-tier models. Upon receipt of a complaint, the
CJC Executive Director makes an initial determination whether the complaint falls within CJC
jurisdiction as a possible violation of the Code of Judicial Conduct. If not, the CJC dismisses the
complaint. But if the complaint may represent a violation, the CJC solicits a verified statement
from the party, the judge is notified, and "initial proceedings" commence.

After investigation, if the CJC finds insufficient grounds for further proceedings, the CJC takes
no action. But if the CJC determines that probable cause exists that the judge has violated a rule
of judicial conduct, the CJC can either publicly admonish or reprimand the judge, or order the
filing of a statement of charges to begin a public fact-finding hearing.

After the hearing, charges may be dropped, or if the CJC concludes that clear, cogent, and
convincing evidence of a violation exists, then the CJC can either dispose of the matter with an
admonishment or reprimand, or recommend to the supreme court that the judge be disciplined,
removed, or retired. See CJC RULES 5, 6, 8, 16 (rev. May 5, 1989); Public Hearing for the
Director, CJC).
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ends with a finding of probable cause of a violation and the subsequent filing of a formal complaint against the judge. Nineteen states go further and conduct secret fact-finding hearings, ending confidentiality only when a recommendation for discipline is filed with the state supreme court. Eight states and the District of Columbia maintain confidentiality until discipline is ordered by the state supreme court. Thus, all fifty-one jurisdictions provide some degree of confidentiality.

Confidentiality is considered essential in judicial conduct proceedings to promote fairness. Its traditional justifications include: Encouraging complaints by providing protection from possible retribution or recrimination; protecting judges from injury resulting from publication of unexamined and unwarranted complaints; maintaining the integrity of the judiciary by avoiding premature announcement of groundless claims of judicial misconduct or disability; encouraging retirement as an alternative to costly and lengthy formal hearings; protecting commission members from outside pressures; and avoiding media exploitation. Such justifications, however, potentially conflict with the public's growing desire to be informed. The number of federal and state freedom of information laws, sunshine laws, and similar legislation demonstrates that the public believes it has a right to information about its government.
B. The Washington Commission on Judicial Conduct

In 1980, Washington became the last state to create a judicial conduct commission\(^4\) when Washington voters passed amendment seventy-one to their state constitution.\(^5\) The amendment directed the CJC to "establish rules of procedure for [CJC] proceedings including . . . confidentiality of proceedings."\(^6\) In 1981, the legislature responded with a statute, again mandating that the CJC establish rules of confidentiality.\(^7\) The CJC then adopted rules requiring confidentiality in all CJC proceedings until it made a recommendation to the supreme court for discipline.\(^8\)

In 1986 Washington voters amended the constitution again, to provide for confidentiality only through "initial proceedings."\(^9\) The stated intent of the amendment was to increase public confidence in the judiciary by introducing openness into the CJC process.\(^10\) Although the amendment provided for public viewing of hearings if they occurred, the constitution mandated that all initial proceedings of the CJC remained cloaked in secrecy.\(^11\)

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17. Judicial Qualifications Commission—Appropriation, 1981 Wash. Laws 268, § 12. The only role for the legislature articulated in the original constitutional amendment was to "provide for commissioners' terms of office and compensation," WASH. CONST. art. IV, § 31, but the legislation also addressed CJC discovery powers, CJC budget reports, and rules for confidentiality. WASH. REV. CODE §§ 2.64.060, .100, .110 (1989). Why the legislature felt compelled or authorized to pass legislation exceeding the constitutional dictate is unclear.
19. See WASH. CONST. art. IV, § 31 (1986, amend. 77); CJC RULE 6(b), (e) (rev. Apr. 3, 1987).
20. OFFICE OF THE WASH. SECRETARY OF STATE, VOTERS & CANDIDATES PAMPHLET 8-9 (6th ed. 1986). It has been alleged that the CJC's amendment of its rules subsequent to the constitutional amendment subverted the voters' intent. When the amendment was passed, CJC Rule 5 was titled "Initial Proceedings." CJC RULE 5 (rev. Sept. 1, 1984). Rule 6, titled "Preliminary Investigation," provided for informal disposition of complaints. CJC RULE 6 (rev. Sept. 1, 1984). According to the allegations, the language of the amendment was purposeful; the intent was to provide for confidentiality only through "initial proceedings" under the 1984 CJC Rules. The effect of this would have been to make public the informal disposition of complaints under CJC Rule 6.

The CJC, however, subsequent to the passage of the constitutional amendment, reversed the titles of Rules 5 and 6 when it revised the Rules. CJC RULES 5, 6 (rev. Apr. 3, 1987). Thus, Rule 5 became "Preliminary Investigation" and Rule 6 was retitled "Initial Proceedings." Id. This brought informal disposition of complaints within the section titled "Initial Proceedings," ensuring that the CJC could continue to admonish or reprimand judges in private.
21. WASH. CONST. art. IV, § 31 (1986, amend. 77).
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C. History of the Judge Little Case

In 1981, the King County Prosecutor’s Office prepared a 107-plus-page report alleging improper ex parte contacts between Judge Little and male juveniles under the jurisdiction of the King County Superior Court. The CJC privately admonished Little in March of 1982. In January of 1984, the prosecutor’s office advised the CJC that Little had again engaged in ex parte contact with a juvenile in violation of the CJC’s admonition. The CJC dismissed these allegations due to insufficient evidence. Because CJC proceedings were secret, the public was unaware of these events and Little, unopposed in the 1984 election, retained his seat on the bench without his name even appearing on the ballot.

In April, 1985, then-presiding Judge Quinn permanently removed Little from the juvenile bench for his ex parte contacts with juveniles. An anonymous King County Superior Court judge wrote the CJC in July, 1985, with specific information regarding these contacts by Little. But in October of 1985 the CJC again ignored the allegations, claiming there was “insufficient evidence to substantiate any violation of the Code of Judicial Conduct or of the terms of the previous admonishment.” In May of 1986, the anonymous judge again wrote to the CJC relaying names of two persons with specific information about the allegations. The Executive Director of the CJC interviewed one of the sources who had “substantial hearsay information” and documents clearly establishing that at least one

22. Seattle Post-Intelligencer (“Seattle P.I.”), Aug. 19, 1988, at A1, col. 2. This report formed the basis of the King County Prosecutor’s Office complaint of October 16, 1981, to the CJC calling for discipline of Judge Little. Id.
23. Gary Little was elected to the King County Superior Court in 1980. Id. at A6, col. 1.
26. Id. at 17.
27. Id.
31. Id. at 22.
32. Id. at 24.
extra-judicial contact had occurred. The Executive Director prepared an event-by-event summary of the 1985 allegations and recommended to the CJC that “[n]othing further be pursued unless or until someone is identified with specific information that is in [CJC] jurisdiction . . . .” Behind closed doors, the CJC voted unanimously “to close the case and provide no communication to anyone.”

The public had not been privy to any of this information because of CJC confidentiality provisions. Beginning in 1985, however, the media reported Little’s suspension from Juvenile Court, and the secret 1982 admonishment by the CJC. Rumors and reports of Little’s activities persisted and, on July 19, 1988, Little announced that he would not run for reelection to the Superior Court. One month later, a reporter told Little that his newspaper would publish a story detailing allegations of sexual misconduct by Little before he became a judge. That evening, in the county courthouse, Little shot himself.

A furor in the press, public, and legislature followed, capturing front page headlines for months.

In this charged atmosphere, the Senate Committee on Rules (“Senate Committee”) requested unrestricted access to the CJC’s Little files for three senate attorneys. The CJC, citing confidentiality rules, refused. Hoping to stave off a legislative subpoena, the CJC offered instead the Danielson/Cody Report, a thirty-seven page summary of the files prepared by two attorneys hired by the CJC. Unappeased, the Senate Committee issued a subpoena duces tecum to the CJC for

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33. Id.
34. Id. at 25.
35. Id. This decision was later roundly criticized by the Commission on Washington Courts, a panel appointed by the Board for Judicial Administration to determine what, if any, changes would be desirable concerning the selection, retention, and discipline of judges. The Commission called the CJC’s post-1984 actions “questionable,” its follow-up “minimal . . . and that at a slow pace,” and its response to complainants “at best, perfunctory.” Commission on Washington Courts, Report of Findings and Recommendations on Proposed Legislation 5–6 (Mar. 1989) (copy on file with Washington Law Review).
36. See, e.g., Seattle Times, May 25, 1985, at A1, col. 6. Judge Little responded to the stories with letters to local newspapers claiming he had been an “effective and innovative judge” who took “an active role in monitoring the probation of about 10 percent of the juveniles” that appeared before him. Seattle Times, July 11, 1985, at A15, col. 6.
39. Id.
42. Id.
Rather than comply, the CJC filed an original action with the Washington Supreme Court, requesting that the subpoena be quashed.

II. GARNER V. CHERBERG: A CRITIQUE

The CJC's action to quash the legislature's subpoena duces tecum drew the supreme court into the middle of the political maelstrom. In its decision, the court strove to solve two distinct problems. First, the court tried to balance fairness, which confidentiality is intended to ensure, with the public's right to know. Second, the court attempted to preserve the independence of the CJC. The court's solution to both problems was to quash the subpoena, yet offer legislative leaders the opportunity to view the Little files in camera with the Chief Justice.

A. The Stick: The Court Quashes the Subpoena Duces Tecum

The court in Garner quashed the subpoena duces tecum based on the legislature's own statute. The court noted that in similar situations

43. The subpoena duces tecum, although forcing the CJC's hand, was itself a carefully crafted compromise gesture. The Senate Committee specified that the review would be conducted in the offices of the CJC by three senate attorneys; that the CJC could be represented at the review sessions; and that the CJC could delete the identity of witnesses or victims contained in the documents. Subpoena Duces Tecum, Wash. State Senate, Committee on Rules Inquiry of the Commission on Judicial Conduct and the Judge Little Matter, 51st Leg. Reg. Sess. (Oct 24, 1987) (copy on file with Washington Law Review).

44. Seattle Times, Oct. 28, 1988, at C1, col. 6. The chronology presented in Garner v. Cherberg of the last few events leading up to the confrontation between the Senate Committee and the CJC is mistaken. 111 Wash. 2d at 813, 765 P.2d at 1284–85. The court represented that the CJC offered the Danielson/Cody Report in response to the subpoena. Id. In fact, the CJC offered the Danielson/Cody Report to two senators by transmittal letter dated October 14, 1988 in a final effort to avert the subpoena, which the committee issued 10 days later. To further complicate matters, the subpoena was mistakenly dated October 24, 1987, rather than October 24, 1988.

45. The court had not remained entirely above the fray; justices' views on the controversy had been widely quoted in the press, and not always harmoniously. See, e.g., Tacoma News Tribune, Sept. 27, 1988, at A1, col. 1 (“In speaking out against the commission's actions on Little, some justices took issue with Chief Justice Vernon Pearson's spirited defense of the commission.”).

46. This critique focuses on the court's efforts to balance confidentiality with other interests, as well as the effect of the court's decision on continued confidentiality.

47. Garner, 111 Wash. 2d. 811, 812, 765 P.2d 1284, 1284 (1988). The statute exempted all pleadings, papers, evidence records, and files of the CJC compiled or obtained during the course of the investigation from the “public disclosure requirements of ch. 42.17 RCW.” WASH. REV. CODE § 2.64.110 (1989).
other courts have maintained confidentiality of judicial conduct commission files.\(^4\) The court asserted that without confidentiality, witnesses would be unprotected from retaliation and might hesitate to come forward, judges would have no reason to step down in silence, and exposure of the CJC's deliberative process would stifle CJC activity and subject members to external pressures. Such results, the court claimed, would cripple the CJC, contrary to the citizens' intent in creating the CJC.\(^4\)

In endorsing confidentiality, the court favored the interests of fairness over the information needs of the public.\(^5\) Attempting to maintain CJC independence, the court crafted its decision to make it as inoffensive to the legislature as possible, and to place responsibility for the decision to quash squarely on the legislature. Instead of citing the statute, the court could have rested its decision to quash on the confidentiality mandates in the constitution or CJC rules.\(^5\) But to assert the power of the constitution or the CJC over the power of the legislative subpoena was likely to incite radical reform of the CJC.\(^5\) To deny the subpoena on the basis of the legislature's own statute was the court's best hope to diffuse potential legislative backlash.

\section*{B. The Carrot: The Offer to Review the Little Files}

Having quashed the subpoena, the court then made a remarkable offer.\(^5\) It invited the Majority Leader of the Senate and the Speaker

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  \item \(^4\) Garner, 111 Wash. 2d at 818, 765 P.2d at 1287 (citing Stern v. Morgenthau, 62 N.Y.2d 331, 465 N.E.2d 349, 476 N.Y.S.2d 810 (1984)).
  \item \(^4\) Id. at 821, 765 P.2d at 1289. The court's adoption of these rationales for CJC confidentiality exemplifies the tendency of courts, legislatures, and judicial conduct commissions to endorse confidentiality without reconsidering its validity. The court quoted five functions allegedly served by confidentiality listed in a law review article. \textit{Id.} at 820, 765 P.2d at 1288 (quoting Shaman & Bégue, supra note 9, at 760). In repeating the stock reasons for confidentiality to support its position, the court overlooked or ignored the article's title: "Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process." Shaman & Bégue, supra note 9, at 755. The authors questioned the justifications for confidentiality, and recommended that legislators reconsider the need for confidentiality rules in light of countervailing policies calling for dissemination of information concerning government officials. \textit{Id.} at 796.
  \item \(^5\) Inexplicably, the court ended this portion of the opinion declaring that in passing the 1986 amendment to the constitution the citizens "evidenced their desire to \textit{increase} confidentiality of [CJC] proceedings . . . ." Garner v. Cherberg, 111 Wash. 2d 811, 823, 765 P.2d 1284, 1290 (emphasis added). Instead, mandating the termination of confidentiality before the probable cause hearing was intended to increase openness in disciplinary proceedings for judges and thus promote more confidence in the judiciary. \textsc{Office of the Wash. Secretary of State, Voters & Candidates Pamphlet} 8–9 (6th ed. 1986).
  \item \(^5\) Garner, 111 Wash. 2d at 816, 765 P.2d at 1286.
  \item \(^5\) See infra notes 58–60 and accompanying text.
  \item \(^5\) "Bizarre," according to some lawmakers. Seattle Times, Jan. 1, 1989, at A1, col. 3.
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of the House of Representatives to join the Chief Justice in inspecting the Little files "to satisfy themselves of the objectivity of the [Danielson/Cody] report." The court specified that the CJC would not be required to disclose any portion of records concerning CJC deliberative or quasi-judicial functions. It declared at the end of the opinion that "[c]omity of this nature is not unprecedented."

Whether intended by the court or not, this compromise satisfied the public's right, through the legislature, to learn the contents of the Little file. The court also recognized the legislature's legitimate interest in regulating judicial conduct and initiating constitutional change. Whether the court was motivated by a desire to accommodate competing interests, or only to preserve CJC independence, the result was appropriate: it gave individuals responsible to the public an opportunity to audit the Little files.

The court's compromise offer to legislative leaders to view the Little files, after quashing the subpoena, was its best—if not only—chance to maintain CJC independence. The justices knew from legislative posturing that if they quashed the subpoena the CJC would either be dismantled, reform, or removed from under the wing of the judiciary and made an independent body. On the other hand, not quashing the subpoena would establish the unpalatable precedent of the CJC opening up its files upon demand to the legislature. Because the Senate Committee got much of what it wanted, the court's offer was perhaps more capitulation than compromise. This path was not

54. Garner, 111 Wash. 2d at 823–24, 765 P.2d at 1290. Shortly after the release of the Garner decision, Chief Justice Callow (who took over as Chief Justice on January 5, 1989) announced in a strange addendum that he would not censor what the legislative leaders could say about the materials they saw in the files and that he would not rule out allowing lawyers for the legislature to view the files with names of witnesses deleted. Seattle Times, Jan. 4, 1989, at B4, col. 1.

55. Garner, 111 Wash. 2d at 824, 765 P.2d at 1290.

56. Id. (quoting Forbes v. Earle, 298 So. 2d 1 (Fla. 1974)).

57. See WASH. CONST. art. 5, § 1 (impeachment power); WASH. CONST. art. 23, § 1 (constitutional amendments).


59. An early senate proposal called for opening the process upon finding of "sufficient reason" rather than "probable cause," open CJC discussion and votes on discipline, and a non-attorney majority on the CJC. Chief Justice Pearson's response was that the system could grind to a halt with wide-open discipline, and he took offense at having a majority of non-attorneys in the CJC. Seattle P.I., Sept. 20, 1988, at A1, col. 6.

60. Seattle Times, Oct. 12, 1988, at D1, col. 3.

61. The subpoena requested: (1) Access to the files for three senate attorneys; (2) with the names of complainants deleted; (3) to determine what was the appropriate legislative response to the handling of the Little case. Subpoena Duces Tecum (Oct. 24, 1987). The court quashed the subpoena, but offered: (1) Access to the files to two legislative leaders (and maybe their attorneys, see supra note 54); (2) with deliberative processes and attorney-client privileged matters deleted;
without danger; the court also knew that the contents of the files could prompt the legislature to eliminate CJC independence. 62

The degree to which the court succeeded in fending off legislative threats to control the CJC can only be gauged by the legislature's response. 63 But the court's solution could not address the continuing problem of confidentiality—that is a legislative function. Until the legislature initiates the modification of confidentiality strictures in Washington to accommodate the competing interests of fairness and the public's right to know, the court will be relegated to the painful dual role of unwilling participant in, and arbiter of, these conflicts.

III. TEMPORARY CONFIDENTIALITY: A SOLUTION TO SATISFY COMPETING INTERESTS

The Little controversy and the Garner court's response illustrate that confidentiality has caused a crisis of confidence in the judiciary and the CJC. 64 Moreover, so long as any CJC proceedings remain permanently confidential, they preclude checks on CJC discretion. The solution is to replace the current system with one of "temporary confidentiality," where confidentiality is maintained while the investigation or fact-finding hearing is in progress. When, however, a complaint is dismissed or the CJC makes a recommendation of discipline


62. Ironically, the legislature directed its ire against a conduct commission it created, and confidentiality rules the legislature mandated. Individual legislators railing against CJC secrecy seldom mentioned this. Senator Talmadge, a recent critic of the CJC's use of confidentiality, defended secrecy during the 1981 Judiciary Committee discussion. Senator Rasmussen made the perhaps prophetic observations: "Here everything is secret. There is no public disclosure, there is no access by the press at all; all actions by this section 12 are privileged. Nobody can touch it . . . . I do not see the extra privilege that they need of the protection of all this secrecy." Talmadge responded: "Senator, I simply do not see it as a problem . . . ." Sen. J., 1981 Reg. Sess., 47th Leg., Feb. 11, 1981, Vol. 1 at 314.

63. The legislature proposed a constitutional amendment that left the CJC as an independent body, sealing the success of the court's approach. See infra notes 100-06 and accompanying text.

64. The level of public concern is difficult to gauge. Although the prevalence and duration of headlines may indicate an underlying public discontent, it could also reflect a continuing vendetta of the press, which has been accused of "hounding" Little to death. See Seattle Times, Sept. 18, 1988, at A23, col. 1.

But there are indicia of citizen concern. CJC Chairman Wes Nuxoll acknowledged "extensive public interest." Seattle Times, Aug 30, 1988, at A1, col. 5; see also Seattle Times, Jan. 12, 1989, at C4, col. 1 (the Board of Judicial Administration's appointment of the Commission on Washington Courts to study judicial selection and discipline); Petition to Governor Gardner, Senate Law and Justice Committee Chair, and the House Judiciary Committee Chair (signed by over 3,600 citizens, expressing concern and requesting an investigation into the possibility of CJC misconduct) (copy on file with Washington Law Review).
to the supreme court, the file would become public. Temporary confidentiality would not detract from fairness, and would satisfy the public's right to know.

Because the public believed that the CJC mishandled the Little affair behind closed doors, public mistrust of the CJC now undermines its very purpose: the promotion and maintenance of public faith in the judiciary. Confidentiality thus jeopardizes the very judicial interests it was intended to protect. The CJC can only gain and retain the public confidence if the public is assured that the CJC is functioning with vigor and effectiveness. So long as any aspect of CJC proceedings occurs in secrecy, public mistrust will persist.

Inviolate confidentiality also precludes any check on CJC discretion. If the CJC is exercising any discretion in private, anything could happen: Simple error in judgment, inadequate investigation, misinterpretation of a rule of judicial conduct, or a subtle extension of favoritism to a judge when assessing whether or not probable cause exists. It may not happen now, when public attention is focused on the CJC, but later, when the public is lulled into a false sense of security. The best way to ensure that error or abuse of discretion will be discovered and corrected is to curtail confidentiality, while still preserving fairness.

A. The Proposed Rule of Temporary Confidentiality

The legislature can resolve the conflict between the need for confidentiality and for openness by allowing both. The problem with the current CJC scheme is that confidentiality is inviolate; charges dismissed without a finding of probable cause forever escape public scrutiny. This frustrates the public's right to know and the need to check CJC discretion. These interests can only be satisfied if, at some point

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65. "[T]he raison d'etre of the judicial disciplinary system is nothing more or less than the imperative that the people shall have confidence in their judiciary." Greenberg, The Task of Judging the Judges, 59 JUDICATURE 458, 462 (1976).
67. CJC discretion played a key role in two phases of the CJC handing of the Little case. In 1982, the CJC chose to privately reprimand Judge Little for his ex parte contacts with minors. Then, in 1984 and 1985, the CJC dismissed charges of further ex parte contacts by Little made in violation of the admonishment terms. In both instances the public was not informed. See supra notes 22-35 and accompanying text.
68. The statement of one commission's lay member conveys how vulnerable proceedings can be to abuse of discretion: "I assure you that the Commission members give great weight to the judge, his or her testimony, and the high position the judge holds in the administration of justice. I believe it is fair to say that we err on the side of the judge, more often than not . . . ." New York Commission Protects Judges' Rights, Independence, JUD. CONDUCT REP., Fall 1984, at 5, 5.
in the process, all files become open. The solution to the conflict between confidentiality and openness lies in keeping files and investigations confidential temporarily, as long as necessary to preserve fairness, then in opening them to the public. The question is, how long must the CJC maintain confidentiality before opening the files?

In a system of temporary confidentiality, confidentiality is maintained throughout ongoing judicial conduct proceedings. At the conclusion of the proceedings, however, the files become public. Thus, the vast majority of investigative files dismissed before a finding of probable cause would become available to the public upon dismissal.69 If further proceedings are warranted, the CJC would continue its investigation and hold a confidential fact-finding hearing.70 At the end, the entire file would be opened, whether the hearing resulted in dropped charges, admonishment or reprimand of the judge, or recommendation to the supreme court for discipline or retirement. This temporary confidentiality approach would provide fairness during the pendency of all complaints, yet guarantee the public check on CJC discretion by granting review of all CJC actions upon complaint resolution.71

69. See infra note 99. The timing of the release might be adjusted to accommodate two possible abuses of the system. Litigants, hedging their bets in a losing effort, could file nuisance complaints against the judge, knowing that he or she would be aware of the publicized dismissed charges. This strategy to establish prejudice as a grounds for reversal could be avoided by withholding public release of the files until the end of the litigation. Similarly, the system could be subject to attempts at pre-election abuse. Inflammatory complaints could be filed before an election in the hope that, even though dismissed, the publicity would injure the judge. To prevent this, any complaint filed within a set number of months preceding an election, but dismissed before the election, could be kept confidential until voting has ended.

70. As it was under the pre-1986 amendment. See WASH. CONST. art. IV, § 31 (1980, amend. 71).

71. The Washington Medical Disciplinary Board system for investigating and acting on complaints against physicians presents a well-tested model of temporary confidentiality. When a complaint is filed against a physician, the name of the complainant, nature of the complaint, and details of the investigation all remain confidential until the investigation is complete. WASH. REV. CODE § 42.17.310(1)(d) (1989). Then, if there is reason to believe that a code violation occurred, an open hearing is conducted. Id. § 18.130.090. Otherwise, the complaint is dismissed and the file made public. The identity of the complainant, and facts about the physician unrelated to the complaint, can be, for compelling reasons, kept permanently confidential. Id. § 42.17.310(2). Any of these protections can be overruled if, after a hearing with notice to every person with an interest, the superior court decides that the exemption of such records is "clearly unnecessary" to protect any individual's right of privacy or any vital government interest. Id. § 42.17.310(3). This approach to confidentiality could be used by the CJC, with a probable cause standard to replace reason to believe. The model would not afford the judiciary all the protections it needs, however, as the public fact-finding hearings could subject CJC members to undue pressures, and the judges to an unfair media circus. See infra notes 92, 96.
B. Temporary Confidentiality Ensures Fairness

Temporary confidentiality protects the public interest by ensuring that all files become open at some point. Temporary confidentiality also ensures fairness. To demonstrate this, the system must be evaluated in light of traditional justifications for inviolate confidentiality.

1. Protect Complainants from Publicity or the Possibility of Judicial Retribution

That inviolate confidentiality protects complainants from publicity and judicial retribution is largely a myth. The vast majority of complainants are litigants, their families, and private citizens. Many can wait to file a complaint with the CJC until their litigation ends. Those who do not wait are aware that the CJC notifies the judge of the investigation and the nature of the charge. They also know that the judge might discern their identity from the basis of the charges. If the CJC finds probable cause, complainants cannot reasonably expect to remain anonymous during the inquiry, as their identity may be deducible from the facts or they may be asked to testify.

Attorney-complainants, for the reasons just discussed, similarly should not expect to remain anonymous. An attorney is familiar with standards of judicial conduct and thus should be less likely to file a frivolous complaint. Given the greater reliability of their complaints, attorneys should have the expectation that probable cause will be found, and their identities revealed. Temporary confidentiality,
therefore, eliminates no safeguards for complainants because the protections of inviolate confidentiality are illusory.\footnote{79}

2. Protect the Reputation of Innocent Judges

Proponents claim that inviolate confidentiality protects judges from the devastating effects of publicizing frivolous complaints.\footnote{80} This argument assumes that frivolous charges would damage a judge’s reputation. This might be true under a system of immediate openness where complaints become public when filed. Some complainants do make extremely serious, but baseless allegations\footnote{81} that could injure a judge’s reputation or in-court effectiveness if published before declared unfounded.\footnote{82}

Temporary confidentiality would protect the reputations of innocent judges just as well as inviolate confidentiality. By keeping complaints

\footnote{Morgan and R. Rotunda, 1988 Selected Standards on Professional Responsibility 174 (1988). The Chairperson of the Illinois Judicial Board posited that judges and lawyers who fail to report should themselves be disciplined. Workshop on Off-Bench Conduct Held, Jud. Conduct Rep., Fall 1985, at 1, 4. Health care professionals are subject to license suspension or revocation for failure to report a physician’s unprofessional conduct or disability. Wash. Rev. Code § 18.72.165(1), (3) (1989). Perhaps the Washington Rules of Professional Conduct should be brought into conformance with the model rules, to clarify to the judge the attorney’s duty. The judge may feel less vindicative towards individuals compelled to complain.\footnote{79} If necessary, complainants’ identities could be kept confidential for compelling reasons, as in the Washington Medical Disciplinary Board model. See supra note 71.\footnote{80} Gillis & Fieldman, Michigan’s Unitary System of Judicial Discipline: A Comparison with Illinois’ Two-Tier Approach, 54 Chi.-Kent L. Rev. 117, 120 (1977). A related argument, commonly made, is that confidentiality preserves reputations by allowing private reprimands for minor indiscretions. While confidential discipline may protect individual judges, the system jeopardizes the integrity of the entire judiciary by undermining the public’s confidence in it. Private discipline allows disposal of complaints with a wink and a nod—a private joke at public expense. As the then-Executive Secretary of the California Commission on Judicial Qualifications stated, “[s]ometimes there may be reason to accept the plea, ‘I didn’t do it but I’ll see it doesn’t happen again.’” Frankel, The Case for Judicial Disciplinary Measures, 49 J. Am. Judicature Soc’y 218, 221 (1966). Private discipline also ignores the public’s right to know about misconduct of the elected judiciary. Without information about judicial indiscretions, the public check by election is enervated.\footnote{81} For example, the Michigan commission has received unfounded complaints accusing judges of running prostitution houses and dope dens. Gillis & Fieldman, supra note 80, at 120.\footnote{82} Whether unscreened publicized complaints, frivolous or otherwise, injure a judge’s reputation is speculative. One woman spent 18 days parading in front of the Pierce County Courthouse before a primary election with signs accusing a judge of obstructing justice and file tampering. See Public Hearing for the Commission on Washington Courts 74, 76 (Jan. 24, 1989) (statement of J. Anderson). She complained that in spite of her protest the local newspaper endorsed the judge’s reelection bid. Id. at 106 (Feb. 16, 1989). Unscreened complaints seem to be more nuisance than threat.\footnote{968}}
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confidential until disposition, the CJC will already have declared the complaint meritless. Thus, the judge will have the benefit of exoneration by the CJC. The press probably would ignore the publicized complaint, and even if reported, the electorate will readily discern and dismiss the complaint as unfounded or unsubstantiated.

To ensure that the judges are in fact fully protected by the CJC's determination, under a system of temporary confidentiality the CJC could expand its role as educator and ombudsman. That ninety percent of all complaints are readily dismissed reveals a rooted public ignorance of, or frustration with, "the system." Explaining carefully and openly why a judge was not disciplined would heighten public awareness of appropriate judicial conduct. More importantly, allowing the public to see that many of the complaints are without merit can only reinforce the perception that the vast majority of judges in Washington are serving the public well.

83. "[I]f you want to get reporters off your case, put it all on the table. They will get bored." Id. at 23 (Feb. 16, 1989) (statement of Seattle Times Managing Editor). Although this statement may seem unbelievable after the relentless attention the Little case has received, it is not without support. A recent Washington Medical Disciplinary Board hearing involved a physician who allegedly listened and did nothing on the telephone while a known-suicidal patient announced that he was taking an overdose of medication. She wrote in the chart the next day: "patient died, overdose." When she learned of his survival, she obliterated the entry. These are serious allegations against a professional of stature in the community, yet the story was relegated to page D4. Seattle Times, Feb. 16, 1989, at D4, col. 1.

84. The Commission on Washington Courts identified this deficiency in the current method of responding to complaints: "[T]he manner in which the CJC responded to complainants in the Little case and other cases has been, at best, perfunctory . . . . [I]t would not be unjustified to describe many of the CJC responses, particularly those involving form letters, as insensitive." Commission on Washington Courts, supra note 35, at 6.

The institution of ombudsman, prevalent in Scandinavia, the U.K., Canada, and New Zealand presents an excellent partial model for the CJC to follow when dismissing complaints. An ombudsman is an accessible, independent, impartial expert on government, empowered with extensive investigatory powers to review and, if appropriate, criticize, publicize, and explain government actions. Hill, The Self-Perceptions of Ombudsmen: A Comparative Survey, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 43 (G. Caiden ed. 1983). The courts are within the ombudsman's purview in Sweden and Finland. Anderson, Judicial Accountability: Scandinavia, California & the U.S.A., 28 AM. J. COMP. L. 393, 394 (1980). The ombudsman explains to complainants why the official action was correct, even if it was misunderstood and a sense of injustice lingers. To remove public doubts is considered as important as to correct wrongdoing. The ombudsman is reducing friction between government and citizen. In nine out of ten cases, the government body has in the ombudsman a public relations officer who justifies its actions to persons who feel aggrieved at them. Pickl, Investigating Complaints: A Comment, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 92 (G. Caiden ed. 1983). It is this attribute of the ombudsman that the CJC could adopt.
3. *Encourage Retirement*

Commentators claim that errant judges are more likely to resign or retire if their misconduct is kept secret until formal action is recommended, rather than made public. This argument implies that if files were open upon disposition, a judge who knows the charges are true and removal is warranted might decide to fight, knowing that retiring or resigning could be construed as an admission of guilt.

If it is true that fewer judges would be encouraged to silently step down under a system of temporary confidentiality, this disadvantage would be outweighed by confidence gained in the judiciary from opening up the system to the public. But temporary confidentiality would offer a judge some protections. It would allow a judge to leave office voluntarily, before the substance of the charge is known, with the option of avoiding much of the negative publicity. The file would become public only after the judge had stepped down, dissipating much of the adverse reaction. This solution, although not ideal for the judge, strikes a fair balance which benefits the judiciary as a whole by assuring the public that the CJC is handling judicial misbehavior.

4. *Avoid Media Exploitation*

Open CJC investigations or fact-finding hearings can be exploited by the media, and thereby jeopardize a judge’s reputation or the integrity of the judiciary. For example, in a California proceeding, Associate Supreme Court Justice Mosk sought to quash a subpoena ordering him to appear as a witness at public hearings before the California Commission on Judicial Performance (“CJP”). The CJP was investigating allegations that one or more California Supreme Court justices improperly delayed the filing of controversial decisions until after an election in which four Supreme Court justices were on the ballot. Because of the spectacular nature of the charges and attendant publicity (the allegations were leaked to the press), the CJP asked the Judicial Council to modify confidentiality requirements to allow

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85. See, e.g., W. Braithwaite, supra note 11, at 89, 94.
87. 601 P.2d at 1033 n.1, 159 Cal. Rptr. at 497 n.1.
commission proceedings to be publicly conducted after the preliminary investigation. The hearings present a stunning example of public judicial discipline turning into a media circus which ended with no formal charges filed against any supreme court justice.

This threat of media distortion can be avoided by retaining confidentiality through the fact-finding hearing, and only thereafter opening the record. Whether the CJC elects to dismiss the charges, admonish or reprimand the judge, or recommend discipline to the supreme court, delayed openness grants the public its right to know. The judge still receives the protection of a private fact-finding hearing; the opening of a file simultaneously with CJC conclusions prevents rampant pre-decision speculation which could cause irreparable damage to a judge's reputation.

5. Protect Commission Members from Outside Pressures

The claim that confidentiality protects commission members from outside pressures has never received widespread endorsement. There is no factual support for the claim that the CJC is more susceptible than any other governmental body to outside pressures. If it were, rules easily could be adopted to prohibit attempts to unduly influence commissioners' adjudicative functions. Because temporary confidentiality insulates both the judge and CJC members until the end of

88. Id. at 1039 n.11, 159 Cal. Rptr. at 503 n.11. The California Supreme Court held that the Judicial Council could not authorize public hearings. Id. at 1047--48, 159 Cal. Rptr. at 507.

89. The California Commission on Judicial Performance ... marched into the evening television news to conduct a probable cause hearing. Internal operating procedures of the California Supreme Court were dragged into public view; personal opinions, habits and prejudices of the members of the supreme court were revealed and explored. The minutiae of the deliberative process were unveiled and discussed, the public entertained and titillated, and the California Supreme Court extensively damaged.

Cameron, The California Supreme Court Hearings—A Tragedy That Should and Could Have Been Avoided, 8 HASTINGS CONST. L.Q. 11, 18 (1980).

90. Id. at 15.

91. This protection is significant when compared to the current system, where the hearing would have been public. CJC RULE 8 (rev. May 5, 1989).

92. To the extent that this proposal guarantees the judiciary a fair and dignified fact-finding hearing, yet still protects the public, it is superior to the medical disciplinary board model, which would open the process to the public after the initial investigation. See supra note 71.


94. Shaman & Béguë, supra note 9, at 765. Ironically, there has been speculation that in the Little case powerful people influenced—and for years silenced—the press, not the CJC. Brown, Seattle's Press and the Case of the Judge Who Killed Himself, COLUM. JOURNALISM REV., Jan./Feb. 1989, at 31, 31.

95. Shaman & Béguë, supra note 9, at 765--66.
factfinding or until dismissal, the threat of outside pressures is minimized.96

C. The Washington Legislative and CJC Proposals: Missed Opportunities

In May of 1989, the CJC amended its rules, abolishing confidential admonishment or reprimand.97 But this action only addresses one facet of the confidentiality problem. The CJC is still screening complaints out of the public eye, publicizing the charges only upon a finding of probable cause.98 The public still obtains no knowledge of, and consequently has no check on, CJC discretion in the overwhelming majority of complaints.99

The legislature responded to the Garner decision100 with a proposed constitutional amendment101 and statute102 that fail adequately to address confidentiality concerns, and leave the CJC independent of the legislature.103 If adopted by the voters, the constitutional amendment

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96. The argument that commission members would be susceptible to outside pressures might apply under a model similar to the Medical Disciplinary Board, where the hearing would be open and members of the CJC exposed to possible public pressures. See supra note 71.

97. CJC RULE 19 (rev. May 5, 1989). The change was probably an attempt to forestall legislative response.

98. This is not to suggest that the CJC has been less than competent judging other charges. But the fact that hundreds of CJC files are closed to outside scrutiny impedes validation. See Anderson, supra note 84, at 408.


100. Final response. The initial response of individual legislators to the Garner decision was immediate, and extreme. See, e.g., Seattle Times, Dec. 30, 1988, at A1, col. 2 (Senator Rasmussen’s proposal, the day the decision was published, of a constitutional amendment); Seattle Times, Jan. 18, 1989, at H5, col. 1 (bill introduced to abolish the CJC).

101. It is beyond the scope of this Note to analyze the proposed constitutional changes beyond those concerning confidentiality. The constitutional amendment would (among other changes): Increase the lay membership of the CJC from four to six, giving lay members a majority over the three judges and two attorneys, Engrossed Substitute S.J. Res. 8202 § 1, 51st Leg., Reg. Sess. (1989); award the CJC censure power, and make all CJC disciplinary actions public, id. at 4; provide for a public, stipulated settlement between the judge or justice and the CJC or the court, id. at 7; and mandate the hiring of one or more investigative officers, who would report directly to the CJC, id. at 9.

102. Commission on Judicial Conduct, 1989 Wash. Legis. Serv. 367 (West). The implementing statute would go into effect only if the constitutional amendment passes. Id. § 12. The statute supplements the amendment language regarding confidentiality and would add an explicit directive making all pleadings, papers, evidence records, and files of the CJC, including complaints and the identity of complainants “exempt from the public disclosure requirements of chapter 42.17 RCW” during the investigation or initial proceeding. Id. § 6. Further, any person violating a CJC rule on confidentiality would be subject to a proceeding for contempt. Id. § 9.

103. Thus sealing the success of the court’s Garner opinion.
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will allow the CJC to continue establishing rules "for commission proceedings including due process and confidentiality of proceedings." The constitution, if the amendment passes, will still mandate confidentiality through the probable cause stage. The sole change affecting current CJC confidentiality rules will be that all records providing the basis for the CJC's conclusion that probable cause exists will be made public.

The proposed changes would in some measure increase the accountability of the CJC. But to the extent that the amendment fails to address the fundamental conflict brought on by confidentiality, and retains an initial period of inviolate confidentiality, the legislature has failed to protect completely the public interest.

IV. CONCLUSION

Inviolate confidentiality in judicial conduct commission proceedings, as demonstrated by the Little controversy and the Garner court's response, threatens to undermine the interests confidentiality is intended to protect. Temporary confidentiality—a process of confidential proceedings later made public—need not be greeted with dread by the elected judiciary; such a system preserves fairness while satisfying the public's right to know. Temporary confidentiality guarantees both that judges receive a private and dignified fact-finding hearing and that the public eventually will have access to the files. Competent judges have nothing to hide and, therefore, nothing to fear from an after-the-fact opening of the system to the public; greater openness stimulates more confidence, not less. Openness allows a public check on the activities of the CJC: vigilance, not vigilantism.

Judge Cardozo said "new times and new manners may call for new standards and new rules." The Little case demonstrated that a new rule is needed; unfortunately the legislature's proposed amendment is not an adequate new rule as it maintains inviolate confidentiality through a probable cause finding. Washington was the last state to adopt a judicial conduct commission; it could take the lead and be the

105. Id. at 2.
106. Id. at 3.
108. As Justice Brandeis said, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)).
first to adopt temporary confidentiality. This would both protect the fairness of the system and restore confidence in the judiciary by allowing the public to watch the watchdog. To implement temporary confidentiality would be "an appropriate end to the present situation."  

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