

**FEBRUARY 14, 2023 SUBMISSION OF
THE COMMISSION ON JUDICIAL DISABILITIES AND TENURE
(PERFORMANCE OVERSIGHT PRE-HEARING QUESTIONS)**

Fiscal Year 2022 Performance Oversight Questions

Commission on Judicial Disabilities and Tenure

PREAMBLE

The District of Columbia Commission on Judicial Disabilities and Tenure (“Commission” or “CJDT”) is pleased to respond to the Committee on the Judiciary & Public Safety (“the J&PS Committee” or “the Committee”) “Fiscal Year 2022 Performance Oversight Questions” in advance of the Chairperson’s appearance for testimony.

This Preamble is intended to provide important background information and context on the Commission, its statutory framework and mission, as well as changes the Commission has been implementing in recent years to improve its internal processes and efficiencies and, where possible, to increase its visibility and accessibility to the community.

While the Preamble and information herein confirm a range of Commission activities and action in recent fiscal years, especially FY 2021-FY 2023, the Commission wishes to emphasize and acknowledge that the District of Columbia Courts has a well-earned reputation for having one of the best Court systems in the country. Unlike other jurisdictions that have dealt with more serious, scandalous, and very public misconduct of judges, the District has not experienced that embarrassment. This is due in no small part to the work of the Commission who over the years has disciplined judges when appropriate and has ensured that only well-qualified Associate Judges were reappointed and only well qualified Senior Judges were recommended for continued judicial service. Further, and while the Commission and judiciary have different roles and do not always agree on these matters, the Commission’s proactive work with a willing, engaged, and thoughtful Court leadership and individual judges who are open to reflection and improvement, also has contributed greatly to productive discussions that are critical to avoiding more serious issues or problems.

I. CJDT Funding for FY 2023 and FY2024

On the present record, the CJDT believes it has sufficient funding for FY 2023 to support its functions, as well as legal and investigative services and planned software upgrades funded by the DC government. For FY 2024, after an appeal, the Commission achieved an increase in federal funding that, if approved in federal appropriations, will support its legal and investigative services, among other operational expenses. However, as discussed below and given the Commission’s transition from a largely paper-based system to a digitized system, the Commission will need supplemental FY 2024 support for permanent upgrades to CJDT’s in-office network infrastructure that exists downstream from the network switch, and to aid in fully implementing CJDT’s paper digitization and case management solutions.¹

¹ The Commission appreciates the support of the DC government in funding critical functions of the Commission in the last fiscal year. As the Committee is aware, the Commission’s budget challenges are well-documented and, in the past decade, CJDT has been under-funded in a number of areas,

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II. Commission Organization, Membership, and Background

The Commission is a unique, independent body, created by federal statute, with limited but important jurisdiction that provides an accountability check on DC judges and, in some instances, the DC court system. The Commission’s jurisdiction is limited to judges in the DC Court of Appeals and DC Superior Court, and includes judicial conduct, reappointments, and senior judge reviews.

- Congress created the Commission in Title I of the District of Columbia Court Reorganization Act of 1970 (“Court Reorganization Act”).² From the outset and as is true today, the Commission’s mission is to maintain public confidence in an independent, impartial, fair, and qualified judiciary and to enforce the high standards of conduct judges in the District of Columbia courts must adhere to both on and off the bench.
- In 1973, the Commission’s mission to review complaints of misconduct against judges in the District of Columbia Courts was reaffirmed and expanded by Congress to include reappointment evaluations of Associates Judges by District of Columbia Self-Government and Governmental Reorganization Act of December 24, 1973 (known as the “Home Rule Act”).
- It was further expanded to include a decade later the performance and fitness reviews of Senior Judges by the Retired Judge Service Act of October 30, 1984. The District of Columbia Courts within its jurisdiction include the District of Columbia Superior Court and the District of Columbia Court of Appeals.

These statutes, the Commission’s Rules, and the DC Code of Judicial Conduct are found on the Commission’s website at <https://cjdt.dc.gov/page/governing-provisions-and-regulations>, and are attached for the Committee’s background. *See* Attachments PRE. 1.-5.³

The Commission has seven members: One is appointed by the President of the United States, currently Mr. Thomas Fitton. Two are appointed by the Board of Governors of the District of Columbia Bar, currently Hon. Diane Brenneman, Ret. and Ms. Amy Bess, Esq. Two are appointed by the Mayor of the District of Columbia, currently Mr. William P. Lightfoot, Esq. and Ms. Nikki Sertsu. One is appointed by the City Council of the District of Columbia,

including its office operations and its critical function of investigations and legal services. While the quality of the Commission’s work remained high during this period, the status quo is not sustainable. Therefore, the Commission greatly appreciates the Committee’s willingness to engage and support CJDT in its efforts to correct this serious problem.

² Approved July 29, 1970 (84 Stat. 492; D.C. Official Code § 11-1521 et seq.).

³ *See* Attachments PRE. 1. DC Code §§ 11-1521 et seq (statute creating the Commission);

PRE. 2. DC Code §1-204-31 (Statute Reestablishing the Commission – Reappointments);

PRE. 3. DC Code § 11-1504 (Statute_enlarging_jurisdiction - retired judges); PRE. 4.

CJDT Rules, 28 DCMR §§ 2011 et seq. (2019); PRE. 5. District of Columbia Code of Judicial Conduct (2018 ed.).

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currently Dr. David P. Milzman, M.D. One is appointed by the Chief Judge of the United States District Court for the District of Columbia, currently Hon. Colleen Kollar-Kotelly.⁴ Our newest member as of October 2022, Ms. Bess, replaced our colleague and former Chairperson, Ms. Jeannine Sanford, Esq., who passed away last summer. Aside from Dr. Milzman, two members of the Commission are non-lawyers, including Mr. Thomas Fitton, President of Judicial Watch, and Ms. Nikki Sertsu, Senior Director, Planet Word. The term of office of the President's appointee is five years. All others serve six-year terms.

By statute and in accordance with the Commission's rules, Commissioners appoint a Chairperson and Vice Chairperson annually. Recently, the Commission unanimously re-elected for a second-term Judge Kollar-Kotelly as Chairperson and Ms. Brenneman as Vice Chairperson. The Chairperson and Vice Chairperson oversee and carry out the routine of Commission business with the assistance of its Staff and, as deemed necessary, other D.C. employees and the Commission's Special Counsel.⁵

III. Commission Operations, Administration, and Support

Since 1973, the Commission has had one permanent staff member, the Executive Director, a career service D.C. government employee, who was tasked with performing all essential operational and day-to-day business functions of the agency. The Executive Director consulted with the Chairperson on important and/or sensitive matters, as needed, and handled routine day-to-day matters independently. During certain periods, at her discretion and with the support of the Commission, the Executive Director hired an assistant or temporary staff contractor to support her on administrative matters.

In and around 2018 to 2019, under the leadership of former Chairperson Sanford, the Commission recognized the need for certain incremental changes and modernization of the Commission's offices and operations. The increasing complexity and volume of its work, increased use of technology in the community, and changes in how courts in the District (and across the country) conduct business also played a role in these changes. Around the same time, the Commission was transitioning its key role of outside Special Counsel following the retirement of Mr. Henry F. Schuelke III, who served the agency with distinction for 36 years until December 2018.⁶

⁴ On May 4, 2022, Chief Justice John Roberts of the United States Supreme Court appointed Judge Kollar-Kotelly to the Judicial Conference Committee on Codes of Conduct.

⁵ See DC Code § 11-1525 (Operations; personnel; administrative services); DC Code §1-204-31(d)(1) (Judicial powers); 28 DCMR § 2001.6 (Transaction of Commission Business).

⁶ Traditionally, the Commission has always been advised on important and sensitive legal matters by a dedicated and highly experienced outside Special Counsel who is knowledgeable about D.C. Court matters and who brings specialized experience, judgement, objectivity, and independence to the types of special, complex and, at times, unique matters before the Commission. The Commission requires this resource and skillset because its members must remain impartial, discreet, and objective in any disciplinary decisions or disposition of complaints involving potential judicial misconduct. Prior to Mr. Schuelke, the role was filled by Mr. Robert Bennett, Esq. Among other things, Special Counsel is tasked with reviewing complaints, conducting preliminary investigations, and advising on potential or actual disciplinary matters.

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Incremental changes between FY 2019 through FY 2023 have included, for example: (1) more formalized documentation around investigations and the review of complaints, as well as

reappointments and senior judge fitness reviews; (2) where possible and use of public statements or letters on matters of broader judicial or public importance; (3) staffing and other enhancements to improve and modernize the Commission's work.

A. Documentation (Complaints, Reappointments, Senior Judge Fitness Reviews)

- The Commission incrementally required more formalized documentation around investigations and the review of complaints to provide current and future Commissioners with better insight into a judge's historical performance and matters of precedent. While the Commission aimed to maintain the very high quality and sophistication of the CJDT's and Special Counsel's work, Commissioners also wanted to leverage historical records and data to facilitate and expedite their analysis of and response to sensitive and/or complex matters involving judges.
- Consistent with its approach to complaints, the Commission similarly encouraged individual Commissioners to enhance documentation prepared related to Reappointment and Senior Judge reviews.
 - During this period of FY 2020 through FY 2023, the Commission published five (5) Reappointment Evaluations, each of which is published on the CJDT website at <https://cjdt.dc.gov/node/574282>. A sixth judge who was up for Reappointment withdrew from consideration and retired. The Commission also conducted forty-five (45) senior judge fitness reviews.
 - In addition, in FY 2023, three (3) additional judges have declared their candidacy for reappointment as Associate Judges and will be under review in the coming months. An additional six (6) senior judges are up for senior judge fitness reviews.

B. Public Statements/Letters within Strict Confidentiality Limitations

- While the Commission is limited in what it can share publicly due to strict statutory confidentiality rules,⁷ the Commission became even more proactive in assessing where and under what circumstances it could share information publicly. The Commission sought to inform the community, litigants, and judges on matters of importance while balancing critically important and statutorily imposed confidentiality restrictions – both of which are essential to the Commission's mission and serve to protect judges, complainants, and witnesses.⁸

⁷ See Attachment PRE. 1. at § 11-1528 (privilege; confidentiality) and Attachment PRE. 4. at 28 DCMR § 2044 (confidentiality).

⁸ See D.C. Code § 11-1528.

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- During this period, the Commission issued in:
 - **FY 2022:**
 - One (1) public statement related to the misconduct of a judge who retired during the Commission’s review of the matter⁹
 - One (1) public statement related to an FY 2022 involuntary retirement and commenting on the obligation of attorneys and judges to comply with reporting requirements of Rules 2.14 and 2.15 of the D.C. Code of Judicial Conduct¹⁰
 - One (1) involuntary retirement in FY 2022 following a significant investigation in FY 2021¹¹
 - **FY 2020:**
 - One (1) public censure in FY 2020¹²
- During this period, the Commission also investigated other non-public concerns or complaints of possible judicial conduct and/or possible disability issues due to medical concerns that resulted in no action, monitoring, private resolutions, and/or retirement. The Commission is statutorily prohibited from releasing further information on these matters.
- Based on its review of complaints and concerns brought to its attention both formally and informally, the Commission recognizes its unique ability to observe actual or potential systemic issues and challenges that may impact an individual judge’s performance and/or ability to perform in accordance with the highest standards imposed by the Code of Judicial Conduct. Where such actual or potential issues and challenges are present, the Commission will interact with Court leadership and/or one or more individual judges to proactively manage appropriate awareness of issues or to stay abreast of systemic challenges and improvements. The Commission’s mission is to assure the public’s access to the fair administration of justice and the fair, impartial, courteous, and timely resolution of issues by judges is preserved.
- In recent years, the Commission engaged with the Court on matters of broader public interest that directly or indirectly impacted the work of the CJDT in a wide

⁹ See Attachment PRE. 6. (Commission Public Statement (Apr. 18, 2022)), also at <https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/Public-Statement-Reappointment-Investigation-41922.pdf>.

¹⁰ See Attachment PRE.7. (Commission Public Statement (Dec. 20, 2021), also at <https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/berk2.pdf>.

¹¹ See Attachment PRE. 8. (Uncontested Order of Involuntary Retirement of Judge Steven Berk, Associate Judge of the DC Superior Court (Nov. 4, 2021), also at https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/3839_001.pdf.

¹² See Attachment PRE. 9. (Determination and Undertaking (Apr. 20, 2020) (relating to an investigation that spanned FY 2020 and FY 2021), also at <https://cjdt.dc.gov/node/1473551>.

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array of matters including, for example: the Court’s response to the COVID-19 pandemic and public emergency; the Court’s response to significant judicial vacancies and their impact on court business, such as management of

increased caseloads/pending motions, etc.; the development, implementation, and updates to the DC Court Employee Dispute Resolution Plan (EDR Plan); and challenges presented by the recent implementation of the DC Superior Court case management system. While the Commission and the DC Courts have different functions and may not always agree on matters, the Commission and the DC Courts have a long-standing tradition of cooperation, and the Commission has always found these discussions to be productive in serving the public interest.

- Although some of the Commission’s inquiries are non-public and confidential, examples of public inquiries are found on its website and include, for example:
 - **FY 2023:** The Commission sent a letter to Chief Judge Anita Josey-Herring of the DC Superior Court regarding challenges with the Court’s new case management system and the CJDT’s concerns about the impact of these technology problems on: (i) fair access to the courts, especially pro se litigants, and (ii) the potential negative impact workarounds may have on overburdening judges who must maintain the highest of ethical standards.¹³
 - **FY 2022:** Following the Commission’s December 20, 2021 Public Statement that reminded attorneys and judges of their obligations under Rules 2.14 and 2.15 of the Code of Judicial Conduct, the Commission re-reviewed and, on January 14, 2022, requested minor updates to the DC Court’s Employee Dispute Resolution (“EDR”) Plan as it pertained to judicial conduct matters. Those changes were adopted and published on January 26, 2022.¹⁴
 - **FY 2021:** The Commission issued a letter to the Chief Judges of DC Superior Court and the DC Court of Appeals regarding a range of

¹³ See Attachment PRE. 10., CJDT Letter to Chief Judge Anita Josey-Herring (DC Superior Court case management system) (Feb. 6, 2023), also at [Commission Letter to Chief Judge Anita Josey-Herring Re: DCSC Case Management System Challenges February 6, 2023 | cjdt.](#)

¹⁴ See Attachment PRE. 11. (EDR Plan, as amended), also found at [Employee Dispute Resolution | District of Columbia Courts \(dccourts.gov\)](#). The EDR plan discussions were not new. The Court had previously briefed the Commission of its staff reporting processes prior to the implementation of the EDR plan and on the ongoing development of the plan itself. See also Attachment PRE. 12. (CJDT Letter to DCCA and DCSC Chief Judges) (encouraging court and judicial staff to report instances of sexual harassment to the Commission, acknowledging concerns often present with such complaints, and confirming the Commission’s confidential process) (Apr. 2, 2018), also found at <https://cjdt.dc.gov/node/1325626>.

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perceived and/or actual ex parte communication concerns brought to its attention and recommending additional training of judges.¹⁵

C. CJDT Staffing and Other Enhancements

As these investigative and complaint review processes were occurring, and considering a noted uptick in the Commission’s activities due to a wide range of issues, the Commission also focused on staffing needs and enhancements.

- While the Commission’s initial priority focused on interim administrative support and the increased use of technology, by late 2021 through 2022, the Commission’s attention increasingly turned to modernization of the Commission’s acquisition of and effective use of technology and business continuity. These efforts resulted in the conception of an office technology upgrade project, now referred to as the Commission’s “Modernization Project.”
- Further, on matters of significant importance and at the recommendation of Special Counsel, the Commission increased its collaboration on highly sensitive and critical matters with the Legal Counsel Division of the District of Columbia Office of the Attorney General (OAG), as well as other District of Columbia agencies who have and continue to provide invaluable assistance to the Commission’s operations.
- While no formal plans had been arranged, in recent years, Commission leadership also was keenly aware of the need for succession-planning and the eventual transition of the Executive Director role given her long-standing service and inevitable retirement.

The Commission’s current Special Counsel, Amy Conway-Hatcher, Esq., has been assisting and advising Commission leadership on these and other substantive investigative matters since 2019. She is a former prosecutor in the District of Columbia who has - for over twenty years – conducted and advised organizational and individual clients on sensitive internal investigations, as well as proceedings involving federal and state enforcement agencies and high-profile crisis management matters on a wide range of conduct issues. Ms. Conway-Hatcher was selected based on her extensive experience, judgment, and approach to sensitive investigations, risk management, and remediation, as well as her practical approach and experience with organizations undergoing change.

IV. Commission Modernization Project

In the fall of 2021 (FY 2022), with the unanimous support of the Commission and after serving as Vice Chairperson and directly overseeing several Commission investigations of significance, Hon. Colleen Kollar-Kotelly agreed to serve as the new Chairperson to carry

¹⁵ See Attachment PRE. 13. (CJDT Letter to DCCA and DCSC Chief Judges (ex parte matters) (Jun. 14, 2021), also found at https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/3674_001.pdf.

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forward the Commission's agenda and the goals initiated under Commissioner Sanford's leadership.

The top priority for Chairperson Kollar-Kotelly's term was and is continuing the Commission's high standard of excellence in appropriately reviewing and resolving delicate judicial matters.¹⁶ In parallel, Chairperson Kollar-Kotelly has been committed to pressing forward with former Chairperson Sanford's agenda including, among other things, the planning, funding, and executing of critical operational upgrades that would allow the Commission to be more nimble, responsive, and proactive in monitoring, reviewing, and addressing concerns of the community as it pertains to the conduct and reappointment of judges – whether raised formally or informally, or directly or indirectly through other sources.

Importantly, as envisioned, these operational upgrades eventually would allow for Commissioners to access precedent including, for example, (i) public and non-public disciplinary actions, (ii) significant investigations, and (iii) trends in concerns or complaints for judges, certain types of conduct or repetitive filings by complainants or about a specific judge – all of which the Commission will be able to review on an individual basis or in the aggregate during a specific discrete time period or over decades of judicial service.

After Chairperson Kollar-Kotelly's testimony in February 2022 and confirmation of funding for FY2023 in late spring 2022, the Chairperson, Vice Chairperson, Executive Director, and Special Counsel, reviewed possible complaint tracking technology solutions alongside the Commission office's specific needs. In the Fall 2022, with various and ongoing inputs from experts at the District of Columbia Office of the Chief Technology Officer (OCTO) and OAG's Chief Information Officer (CIO),¹⁷ the Commission's team selected a new complaint tracking platform that would allow the Commission to achieve its objectives.

The platform design phase has since been expanded to include organization of key data by judge at the "parent level" and will include sub-levels linked to data and various required actions specifically tied to: (i) complaints; (ii) reappointments, (iii) senior judge reviews, and (iv) other Commission actions related to statutorily required judicial annual financial reporting, review of judicial timesheets, and ethics training. The software project is being led by OAG pursuant to an MOU. As of FY 2023, the hardware, connectivity, office upgrades, and data repository/sharing capabilities are being led by OCTO.¹⁸ Both OCTO and OAG have dedicated senior level personnel to advise and coordinate services on behalf of the Commission. Both OCTO and OAG have been essential in advising the Commission on its current and future needs and are working collaboratively together and with the Commission to move these projects ahead quickly.

¹⁶ In her prepared written testimony submission, the Chairperson will outline some important and notable achievements leading up to and including FY 2022 and FY 2023.

¹⁷ The CIO recently changed roles, and the OAG project is now being ably led by the Acting CIO and Director of Practice Technology and Practice Administration.

¹⁸ Although OCTO's survey results are not yet complete, OCTO has stepped in to provide much needed critical short-term assistance. The Commission expects to enter into a separate MOU with OCTO in FY2023.

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As of last week, the Commission was informed that prototypes of the parent level and several sub-level designs will be ready on a rolling basis between February and April 2023. Meanwhile, OCTO is evaluating necessary office and other technology upgrades that will bring the Commission's office in-line with present-day standards.

As of today, the software tracking system element of the project is funded and in progress. Meanwhile, in January and February 2023, using existing resources, OCTO's Citywide Messaging team has resolved account access, file recovery, password reset, training, Office 365, and software access permission issues to CJDT's ongoing operational transition. At the same time, OCTO's DC Net team has installed a temporary upgraded network switch, provided additional bandwidth, and installed Wi-Fi access points on premises to drastically improve CJDT's connectivity. Further, OCTO's DC Net team has provided a senior staff member to serve as CJDT's single point of contact for technical advice as they navigate this stage of the modernization project. CJDT is now awaiting results of the OCTO-led survey of its office, existing hardware, storage, scanning, security, IT services, etc., as well as the estimated budget needs to achieve a largely paperless system, including CJDT historical records, for the future ("OCTO Survey"). CJDT will update the Committee further on both the survey results and related budget impact by March 10, 2023. For more information, see *infra* I.A. Organization and Operations, Response to Question 2.

V. Office Transitions

In November 2022 after forty-seven (47) years of service, the Executive Director announced her retirement, effective December 31, 2022. While Commission leadership anticipated the Executive Director's inevitable retirement, the timing of the decision was not part of a formal or coordinated succession plan. Thereafter, the Commission and the Executive Director began working very quickly in cooperation on essential knowledge transfer and an expedited transition plan.

Since the Executive Director's announcement, the Chairperson, Vice Chairperson, and Special Counsel have been and continue to coordinate with various agencies to assure access to Commission materials and communications, and to assure the agency's continuity and ability to meet all of its important obligations. Agencies that have provided invaluable assistance include:

- District of Columbia Office of the Attorney General (OAG), Legal Counsel Division, Personnel, Labor & Employment Division, and Practice Technology Department (legal, employment, information technology)
- District of Columbia Office of the Chief Technology Officer (OCTO) (technology matters)
- District of Columbia Office of the Chief Financial Officer (OCFO) (financial and budget matters)

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- District of Columbia Human Resources (DCHR) (human resources advice and support)

The Commission has received the necessary support in all areas by senior level personnel, and its operations are continuing uninterrupted.

Further, given the various ongoing projects and her special, unique knowledge of the Commission, the Chairperson has asked Special Counsel, along with the Vice Chairperson, to temporarily fulfill the duties of the Executive Director while the Commission conducts a search for a permanent replacement of this essential role. Due to the Commission's immediate priorities and as informed by guidance from OAG (and DCHR), the search for other permanent staff will be temporarily delayed until an Executive Director is hired.

VI. Conclusion

In summary, the Commission believes it is well-positioned to make significant strides on these and other priorities in FY 2023 on time and with its existing budgeted funds. The Commission will update the Committee on estimated FY 2024 needs by March 10, 2023.