

STATE OF MINNESOTA

BOARD ON JUDICIAL STANDARDS



2016 ANNUAL REPORT

2025 Centre Pointe Boulevard
Suite 180
Mendota Heights, MN 55120
651-296-3999

Email: judicial.standards@state.mn.us

Website: www.bjs.state.mn.us

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MEMBERS AND STAFF*

Judge Members

Hon. Jill Flaskamp Halbrooks
Minnesota Court of Appeals
St. Paul, Minnesota

Hon. Ellen L. Maas
Tenth Judicial District
Stillwater, Minnesota

Hon. David L. Knutson, Vice-Chair
First Judicial District
Hastings, Minnesota

Hon. Kurt J. Marben
Ninth Judicial District
Thief River Falls, Minnesota

Attorney Members

Cindy K. Telstad
Winona, Minnesota

William J. Wernz
Minneapolis, Minnesota

Public Members

Carol E. Cummins, M.B.A.
Golden Valley, Minnesota

Gerald T. Kaplan, M.A., L.P.
Wayzata, Minnesota

Timothy Gephart, Chair
Minneapolis, Minnesota

Terry Saario, Ph.D.
Minneapolis, Minnesota

Staff

Thomas C. Vasaly
Executive Secretary

Sara Boeshans
Staff Attorney

John H. Fuller
Executive Assistant

* Brief biographies are appended at the end of this report.

FOREWORD FROM THE CHAIR

The Minnesota Board on Judicial Standards is charged with enforcing the Minnesota Code of Judicial Conduct and with interpreting the Code for the education of judges and others. The Minnesota Legislature created the Board and funds it. The Governor appoints the Board members: four judges, four public members, and two lawyers. The Minnesota Supreme Court adopts procedural rules for the Board and adopts the Code for judges.

The Judicial 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 are the 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 possible public confidence in their independence, impartiality, integrity, and competence.

The members of the Board take these principles to heart in carrying out their duties. As it has since its creation in 1972, the Board continues to make every effort to fulfill its mission.

The Board's primary function is to receive, investigate, and evaluate complaints of judicial misconduct. Complaints that do not allege conduct that violates the Code are dismissed. If the Board finds that a judge has violated the Code, the Board may issue private discipline or a public reprimand. In cases involving more serious misconduct, the Board seeks public discipline by filing a formal complaint against the judge with the Supreme Court. After a public hearing, potential disciplines include reprimand, suspension, or removal from office. In addition to cases involving misconduct, the Board has jurisdiction to consider allegations that a judge has a physical or mental disability.

Education is also an important Board function. The Board and its Executive Secretary respond to judges' requests for informal advisory opinions. The Board also issues formal opinions on subjects of importance. The Board's website provides links to the Code, the Board's procedural rules, Board opinions, public discipline cases, annual reports, and other resources.

The Board accomplished many important goals in 2016. These include:

- On February 24, 2016, the Supreme Court adopted the Board’s proposed amendments to the Board Rules. The Board’s proposed amendments were the product of the Board’s comprehensive review of the rules and discussions with the Minnesota District Judges Association and others.
- On May 2, 2016, the Supreme Court adopted the Board’s petition to amend Rules 3.7(A)(4) and 4.2(B)(3)(c) of the Code of Judicial Conduct.
- On December 13, 2016, the Board filed a petition with the Supreme Court to amend Rules 63.02 and 63.03 of the Rules of Civil Procedure, which provide standards for disqualification of judges. The Board seeks to harmonize these rules with the Judicial Code and case law.
- The Board issued formal opinions on judges’ charitable and civic activities (Advisory Opinion 2016-1) and on judges’ review of electronic court records (Advisory Opinion 2016-2).
- The Board’s Executive Secretary provided a record number of informal advisory opinions to judges faced with ethics issues.
- Board Member William J. Wernz authored an article on *Judicial Disqualification in Minnesota*, Bench & Bar of Minn. (Nov. 2016).
- On June 14, 2016, the Board presented a half-day seminar on judicial election law for candidates to judicial office, including both judges who were seeking re-election and challengers.
- The Board engaged in outreach efforts to judges by attending bench meetings and making presentations at seminars and conferences.
- Board members met with judges who had experienced difficulties in order to provide guidance and advice to the judges.
- The Board developed a comprehensive “Minnesota Judicial Ethics Outline” which will be publicly posted on the Board’s website in 2017. The Outline addresses a wide variety of subjects, such as the history of judicial discipline in Minnesota and summaries of the Board’s ethics opinions.

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, depends on unshakeable public recognition that the judiciary and the court system are worthy of respect and trust.

Unlike the executive and legislative branches of government, the judiciary “has no influence over either the sword or the purse.” The Federalist No. 78, at 465 (Alexander Hamilton). “The legal system depends on public confidence in judges, whose power rests in large measure on the ability to command respect for judicial decisions. Whether or not directly related to judicial duties, misconduct by a judge brings the office into disrepute

and thereby prejudices the administration of justice.” *In re Miera*, 426 N.W.2d 851, 858 (Minn. 1988).

It is the Board’s mission to promote and preserve public confidence in the independence, integrity, and impartiality of our judicial system by enforcing the Judicial Code and by educating judges and others regarding proper judicial conduct.

AUTHORIZATION

The 1971 Legislature approved an amendment to the Minnesota Constitution authorizing 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 1971 Legislature also created the “Commission” (now “Board”) on Judicial Standards and authorized the Supreme Court to make rules to implement the legislation. (Current version at Minn. Stat. §§ 490A.01-.03.) In 1972, Minnesota voters approved the constitutional amendment (Minn. Const. Art. VI, § 9), and the Minnesota Supreme Court adopted the Code.*

ORGANIZATION

The Board has ten members: one Court of Appeals judge, three district court judges, two lawyers, and four citizens who are not judges or lawyers. The Board members are appointed by the Governor and, except for the judges, are subject to confirmation by the Senate. Members’ terms are four years and may be extended for an additional four years.

The Board meets approximately eight times annually and more often if necessary. Non-judge members of the Board may claim standard State per diems as well as reimbursement for expenses such as mileage. Judge members are not paid per diems.

The Board is supported by a staff consisting of the Executive Secretary, an executive assistant, and a part-time staff attorney. At the direction of the Board, the staff is responsible for reviewing and investigating complaints, providing informal opinions to judges on the application of the Code, 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.

* Until 1972, Minnesota appellate and district court judges could be removed or suspended from office for misconduct only by the rarely used impeachment process, which involves impeachment by the Minnesota House of Representatives and conviction by the Minnesota Senate. Since 1996, judges have also been subject to recall by the voters, although this has never happened. Minn. Const. Art. VIII, § 6.

CODE OF JUDICIAL CONDUCT

The Minnesota Supreme Court has adopted the Code 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 Board considers only complaints involving the professional or personal conduct of judges. The Code is not construed so as to impinge on the essential independence of judges in making judicial decisions. 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 authority to investigate complaints concerning a judge's conduct or physical or mental condition. If a complaint provides information that furnishes a reasonable basis to believe there might be a disciplinary violation, the Board may direct the Executive Secretary to conduct an investigation.

Under the rules, the Board may take several types of actions regarding complaints. It may dismiss a complaint if there is not reasonable cause to believe that the Code was violated. A dismissal may be accompanied by a letter of caution to the judge. If the Board finds reasonable cause, it may issue a private admonition, a public reprimand, or a formal complaint. The Board may also defer a disposition or impose conditions on a judge's conduct, such as obtaining professional counseling or treatment.

The Board affords judges a full and fair opportunity to defend against allegations of improper conduct. If the Board issues a formal complaint or a judge appeals a public reprimand, a public hearing will be held. Hearings are conducted by a three-person panel appointed by the Supreme Court. After the hearing, the panel may dismiss the complaint, issue a public reprimand, or recommend that the Supreme Court impose more serious discipline, such as censure, suspension, or removal from office. If the panel recommends that the Court impose discipline or if the judge or the Board appeals the panel's action, the final decision is made by the Court.

All proceedings of the Board are confidential unless a public reprimand is issued or a formal complaint has been filed with the Supreme Court. The Board notifies complainants of its actions, including dismissals and private dispositions, and gives brief explanations.

An absolute privilege attaches to any information or testimony submitted to the Board, and no civil action against a complainant, witness, or his or her counsel may be based on such information.

AUTHORITY AND JURISDICTION

The Minnesota Board on Judicial Standards has jurisdiction over complaints concerning the following judicial officials:

- State court judges, including judges of the District Courts, Court of Appeals and Supreme Court. There are 289 district court judge positions and 26 appellate judge positions.
- Approximately 88 retired judges in “senior” status who at times serve as active judges.
- Judicial branch employees who perform judicial functions, including referees, magistrates, and other judicial officers.
- Judges of the Minnesota Tax Court and the Workers’ Compensation Court of Appeals and the Chief Judge of the Office of Administrative Hearings*

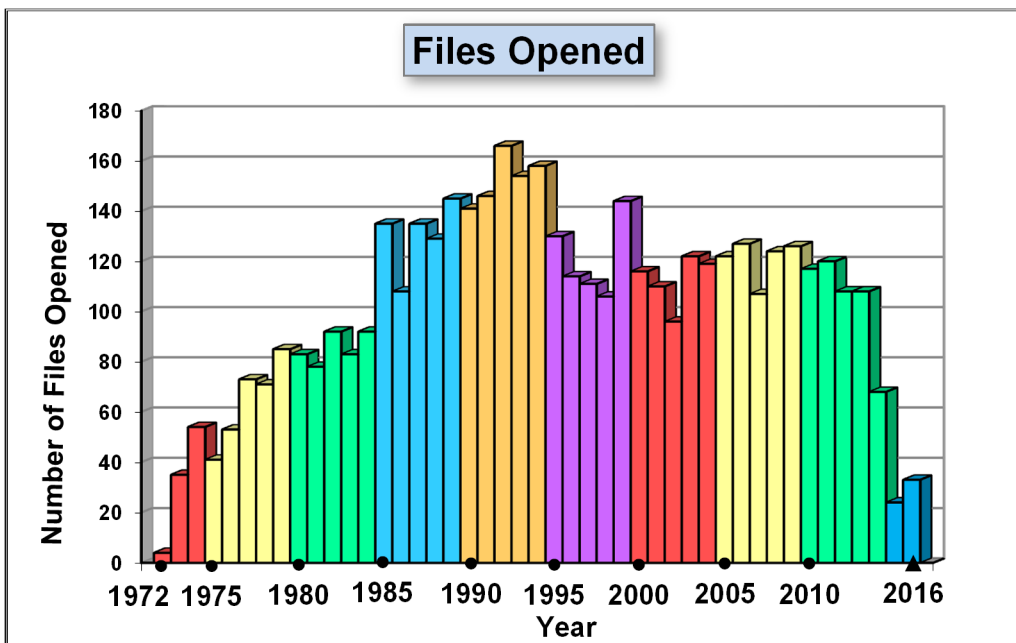
The Board does not have jurisdiction over complaints that concern the following persons:

- Court administrators or personnel, court reporters, law enforcement personnel, and other non-judicial persons.
- Federal judges. Complaints against federal judges may be filed with the Eighth Circuit Court of Appeals.
- Lawyers (except, in some circumstances, those who become judges or who were judges). Complaints against lawyers may be filed with the Office of Lawyers Professional Responsibility.

* See Rule 2, Rules of Board on Judicial Standards; Code of Judicial Conduct, “Application”; Minn. Stat. §§ 14.48, subs. 2 and 3(d), 175A.01, subd. 4, 271.01, subd. 1, 490A.03.

2016 COMPLAINT STATISTICS

During 2016, the Board received 30 written complaints alleging matters within the Board’s jurisdiction. In addition, the Board initiated investigations in three matters based on a judge’s self-report or on a report the Board received, for example, from the chief judge of the judge’s district. This brings the total files opened in 2016 to 33. The number of files opened annually by the Board since 1972 is set forth below:



This chart shows a decline in the number of files opened beginning in 2014. The decline appears to be due to at least two factors.

First, in 2014, the Legislature transferred primary responsibility for enforcing the “90-day rule” from the Board to the chief judges of the judicial districts. The 90-day rule generally requires a judge to rule within 90 days after a case is submitted. Minn. Stat. § 546.27. Judicial Branch case tracking reports of possible violations are now sent to the chief judges rather than to the Board.

Second, the chart reflects only matters that were reviewed by the full Board and does not reflect complaints that were summarily dismissed. If a complaint does not fall within the Board’s jurisdiction, the complaint may be summarily dismissed by the Executive Secretary, subject to the approval of a single Board member. This procedure avoids the inefficiency of requiring the full Board to review complaints that are not within its jurisdiction. For example, complaints that merely express dissatisfaction with a judge’s decision are summarily dismissed under Board Rule 4(c). In recent years, larger numbers of nonjurisdictional complaints have been summarily dismissed, as shown in the next table:

SUMMARY DISMISSALS
(BY YEAR)

2009	76
2010	83
2011	56
2012	78
2013	60
2014	99
2015	102
2016	112

As reflected below, most complaints were filed by litigants against district court judges:

SOURCES OF COMPLAINTS
AND REPORTS – 2016

Litigants	19
Attorneys	6
Citizen	3
Prosecutor	2
Judge	2
Self-Report	<u>1</u>
TOTAL	33

JUDGES SUBJECT TO COMPLAINTS
AND REPORTS – 2016

District Court Judges	30
Court of Appeals Judges	0
Supreme Court Justices	0
Referees/Magistrates/Judicial Officers	1
Retired Judges on Active Duty	<u>2</u>
TOTAL	33

The types of allegations are set forth below. The total exceeds 33 because many complaints contained more than one allegation.

<u>ALLEGATIONS REPORTED – 2016</u>	
Bias, discrimination, or partiality	15
General demeanor and decorum	15
Failure to follow law or procedure	10
Delay in handling court business	6
Ex parte communication	3
Conflict of interest	2
Profanity or offensive language	1
Public comment on a pending case	1
Reputation of judicial office	1
Willful misconduct in office	1
Other	1

Of the 33 files opened in 2016, the Board determined that 13 of the matters warranted formal investigation. A formal investigation includes asking the judge to submit a written response to the Board. In addition, a formal investigation typically includes review of court records and interviews with court participants, and may include reviewing audios of the hearings.

The majority of complaints and Board-initiated investigations (19) were dismissed. Many complaints are dismissed because they concern a judge's rulings or other discretionary decisions that are generally outside the Board's purview. The reasons for dismissal are set forth below. The total exceeds the number of dismissals in 2016 because some complaints were dismissed for more than one reason.

DISMISSAL REASONS – 2016

Insufficient evidence	13
No misconduct; no violation	13
Frivolous or no grounds	9
Within discretion of judge	8
Legal or appellate issues	5
Lack of jurisdiction	2
Corrective action by judge	1
No issue left to resolve	1
Unsubstantiated after investigation	1

As indicated below, in 2016, five matters resulted in discipline and three matters were resolved with a letter of caution to the judge.

DISPOSITIONS – BY YEAR ISSUED

Year	Letter of Caution	Admonition	Deferred Disposition Agreement	Public Reprimand	Supreme Court Discipline
2009	0	4	2	1	1
2010	1	11	0	2	0
2011	0	2	0	1	1
2012	2	5	0	1	0
2013	4	2	0	1	0
2014	2	5	0	2	1
2015	1	2	1	1	1
2016	3	1	3	1	0

PUBLIC DISPOSITIONS

Public dispositions are posted on the Board's website at <http://bjs.state.mn.us/board-and-panel-public-reprimands>. In 2016, the Board issued one public reprimand, described below.

Judge Rex Stacey

In July 2016, the Board publicly reprimanded First District Judge Rex Stacey for accusatory, hostile, and discourteous comments to parties who appeared before him. The comments did not serve any legitimate purpose and caused the parties to believe that Judge Stacey was biased against them.

PRIVATE DISPOSITIONS

In 2016, the Board issued one private admonition, entered into three private deferred disposition agreements, and issued three letters of caution. A letter of caution is a non-disciplinary disposition. The admonition is summarized below.

Summaries of the 31 private admonitions the Board has issued since 2009 are available on the Board's website at <http://www.bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>. The purpose of providing summaries of the private dispositions is to educate the public and to help judges avoid improper conduct.

Private Admonition

A judge failed to properly supervise two employees: a court reporter and paralegal. Contrary to judicial branch policy, the judge allowed one employee to take comp time and allowed the other employee to work from home without a written agreement. A judicial branch auditor found that the two employees were paid for hours not worked. The employees' annual leave balances were reduced in order to repay the judicial branch. The Board found a violation of Rules 1.2, 2.5(A), and 2.12(A).

PUBLIC INQUIRIES

The staff receives frequent inquiries about judges' conduct. The inquiries are often from parties involved in court proceedings. Callers are given information about the Board and told how to file a complaint.

The staff often receives requests for information, complaints that concern persons over whom the Board has no jurisdiction, and complaints that do not allege judicial misconduct. Callers are given appropriate referrals when other resources are available.

ADVISORY OPINIONS

The Board is authorized to issue advisory opinions on proper judicial conduct with respect to the provisions of the Code. The Board encourages judges who have ethical questions to seek its guidance. The Board provides three types of advisory opinions:

- The Board issues *formal opinions* on issues that frequently arise. These opinions are of general applicability to judges.
- A *Board opinion letter* is given to an individual judge on an issue that requires consideration by the full Board.
- The Board's Executive Secretary issues *informal opinions* to judges as delegated by the Board pursuant to Board Rule 1(e)(11). Judges regularly contact the Executive Secretary for informal opinions on ethics questions. Depending on the nature of the request, the Executive Secretary may consult the Board Chair or another Board member.

The Board began issuing formal opinions in 2013. The Board's current practice is to ask for public comments on its proposed formal opinions before the opinions are made final. Formal opinions are sent to the chief judges of the Minnesota courts and are posted on the Board's website at <http://www.bjs.state.mn.us/formal-opinions>.

The Board issued two formal opinions in 2016:

- Participation in Charitable, Educational, or Civic Organizations and Activities (2016-1). This opinion discusses the Judicial Code's restrictions on fundraising and other extra-judicial activities.
- Judicial Notice of Electronic Court Records in OFP Proceedings (2016-2). This opinion discusses when a judge, when presiding over an order for protection (OFP) proceeding, must notify the parties that the judge has considered electronic court records of other cases to determine whether there are outstanding orders involving the parties.

The Executive Secretary gave 140 informal opinions to judges in 2016. This represents an increase of more than 50% over prior years, reflecting the increased assistance the Board is providing to judges who are faced with ethics issues. The opinions cover a wide range of subjects, including disqualification standards and permissible extrajudicial activities. In most cases, the judge requests the opinion by telephone and the opinion is given orally. Since 2014, opinions are usually confirmed by e-mail and include analysis and citation to legal authority.

BUDGET

The Board's current base budget is \$361,000 per year, which is used to pay staff salaries, rent, and other expenses. The staff consists of the Executive Secretary, a half-time staff attorney, and an executive assistant.

In addition, a special account funded at \$125,000 per year is potentially available to the Board to pay the expenses of major cases which often require the Board to retain private counsel, resulting in significant expenditures for attorney fees. In 2016, the Board was not required to make any expenditures from this fund.

FURTHER INFORMATION

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

Dated: February 6, 2017

Respectfully submitted,

/s/ Timothy Gephart

Timothy Gephart

Chair, Minnesota Board on Judicial
Standards

/s/ Thomas C. Vasaly

Thomas C. Vasaly

Executive Secretary, Minnesota
Board on Judicial Standards

BOARD AND STAFF BIOGRAPHIES

Carol E. Cummins, M.B.A.

Public member. Ms. Cummins, now retired, has more than 30 years of experience in law firm management. She worked in-house in senior management roles and more recently as an independent consultant. Ms. Cummins served as a public member of the Lawyers Professional Responsibility Board from 2009 to 2015. She is a graduate of Hamline University and holds an MBA from the University of Minnesota. Appointed to the Board on Judicial Standards in 2015.

Timothy Gephart

Board Chair and public member. Vice President of Claims at Minnesota Lawyers Mutual Insurance Company since 1985. Mr. Gephart is an adjunct professor at the University of Minnesota Law School, where he teaches a course on legal malpractice. He previously served on the Lawyers Professional Responsibility Board and the Board of Legal Certification. Appointed to the Board on Judicial Standards in 2012.

Honorable Jill Flaskamp Halbrooks

Judge of Minnesota Court of Appeals. Appointed to Court of Appeals in 1998. Private practice of law from 1985 to 1998. Appointed to the Board on Judicial Standards in 2009; reappointed in 2013.

Gerald T. Kaplan, M.A., L.P.

Public member. Licensed psychologist since 1977. Mr. Kaplan is the Executive Director of Alpha Human Services and Alpha Service Industries, which offer inpatient and outpatient programs for sex offenders. He is also a member of the Board of Medical Practice. Previously he served on the Board of Psychology, including two years as Board Chair. Appointed to the Board on Judicial Standards in 2013.

Honorable David L. Knutson

Vice-Chair. Judge of District Court (First District). Appointed to the bench in 2004. Private practice of law from 1986 to 2004. Minnesota State Senator for twelve years serving Apple Valley, Burnsville, Lakeville, and Rosemount, MN. Appointed to the Board on Judicial Standards in 2012; reappointed in 2016.

Honorable Ellen L. Maas

Judge of District Court (Tenth District). Appointed to the bench in 1995. Law clerk for Minnesota Supreme Court Justice Glenn E. Kelley 1981-1982. Private practice of law from 1982 to 1995. Appointed to the Board on Judicial Standards in 2013; reappointed in 2014.

Honorable Kurt J. Marben

Judge of District Court (Ninth District). Appointed to the bench in 2000. Served as Chief Judge of the Ninth Judicial District from 2011 to 2015. Private practice of law from 1977 to 2000. Appointed to the Board on Judicial Standards in 2016.

Terry Saario, Ph.D.

Public member. Former foundation executive and community volunteer. Dr. Saario has more than 26 years of philanthropic experience and extensive nonprofit and corporate board experience. Appointed to the Board on Judicial Standards in 2011; reappointed in 2015.

Cindy K. Telstad

Attorney member. Member of Board Executive Committee. Private practice of law in Winona since 1987, primarily in the areas of real estate law, employment law, probate and trust administration, estate planning, and business law. Appointed to the Board on Judicial Standards in 2014.

William J. Wernz

Attorney member. Retired ethics partner, Dorsey & Whitney. Director of the Minnesota Office of Lawyers Professional Responsibility from 1985-1992 and author of *Minnesota Legal Ethics: A Treatise*. Appointed to the Board on Judicial Standards in 2011; reappointed in 2015.

Thomas C. Vasaly

Executive Secretary. Admitted to practice in 1974. Mr. Vasaly has worked in legal services programs, the Office of Lawyers Professional Responsibility, and the Minnesota Attorney General's Office.

Sara P. Boeshans

Staff Attorney. Admitted to practice in 2007. Ms. Boeshans clerked for Judge Marybeth Dorn, Second Judicial District, after which she was employed as an Assistant Attorney General in the public safety and health licensing divisions of the Minnesota Attorney General's Office.