

# IDAHO JUDICIAL COUNCIL



*REPORT TO THE  
GOVERNOR, AND*

*LEGISLATURE,  
SUPREME COURT*

**(YEAR 2011)**

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I.

**OVERVIEW OF SIGNIFICANT EVENTS OF 2011**

A. **Council Budget.** The Judicial Council accomplished all of its statutory duties without salaried employees, and with a budget of \$105,400.00 . (See page 3)

B. **Judicial Vacancies.** There were two judicial vacancies in the 2011 calendar year. (See page 7)

C. **Discipline.** In calendar year 2011, there were 116 complaints against Idaho judges. (See page 11)

D. **Judicial Performance Evaluation.** The Judicial council has continued the voluntary Judicial Performance Evaluation Program. (See page 16)

E. **Ethics Opinions.** The Judicial Council provided 63 ethics opinions to judges. (See page 17)

**COUNCIL ACTIVITIES FOR 2011**

Number of Meetings	2
Number of Telephone Conference Call Meetings	2
Number of Applicant Interviews	19
Number of Formal Adversarial Hearings	0
Number of Complaints	116

## II.

### INTRODUCTION TO THE IDAHO JUDICIAL COUNCIL

The concept of a Judicial Council, consisting of a small reform committee, was introduced at Massachusetts in 1919. The Massachusetts Judicature Commission was directed by the state legislature "to investigate the judicature of the commonwealth with a view to ascertaining whether any and what changes...would insure a more prompt, economical and just dispatch of judicial business." In 1929, a similar council was created, and was shortly thereafter allowed to lapse, in Idaho.

Idaho rejoined the reform movement and created the present Judicial Council, by enactment of Title I, Chapter 21, of the Idaho Code, in 1967. Drawing from the experiences of other states, the legislature provided in Idaho Code Section 1-2102 a broad range of functions.

Today the Judicial Council is charged to:

- (1) Conduct studies for the improvement of the administration of justice.
- (2) Make reports to the Supreme Court and Legislature at intervals of not more than two years.
- (3) Submit to the Governor the names of not less than two nor more than four qualified persons for each vacancy in the office of Justice of the Supreme Court, Judge of the Court of Appeals, or District Judge, one of whom shall be appointed by the Governor.
- (4) Recommend the removal, discipline and retirement of judicial officers (including members of the Industrial Commission).
- (5) Perform such other duties as might be assigned by law.

To better enable the Judicial Council to perform its functions effectively, and to enhance public confidence in the Council, the legislature created a geographically and politically balanced structure. Idaho Code Section 1-2101 provides as follows:

1-2101. Judicial council - Creation - Membership -Appointments - Vacancies. - (1) There is hereby created a judicial council which shall consist of seven (7) permanent members, and one (1) adjunct member. Three (3) permanent attorney members, one (1) of whom shall be a district judge, shall be appointed by the board of commissioners of the Idaho state bar with the consent of the senate. Three (3) permanent non-attorney members shall be appointed by the governor with the consent of the senate. If any of the above appointments be made during a recess of the senate, they shall be subject to consent of the senate at its next session. The term of office for a permanent appointed member of the judicial

council shall be six (6) years. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration for area representation and not more than three of the permanent appointed members shall be from one (1) political party. The chief justice of the Supreme Court shall be the seventh member and chairman of the judicial council. No permanent member of the judicial council, except a judge or justice, may hold any other office or position of profit under the United States or the state. The judicial council shall act by concurrence of four (4) or more members and according to rules which it adopts.

(2) In addition to the permanent members of the judicial council, whenever there is an issue before the council which involves the removal, discipline or recommendation for retirement of a district court magistrate, the chief justice shall appoint an adjunct member of the judicial council, who shall be a district court magistrate. For all purposes for which the adjunct appointment is made, the adjunct member shall be a full voting member of the judicial council.

Today, the Judicial Council consists of a non-partisan Chief Justice, a non-partisan district judge, an Independent lawyer, a Republican lawyer, a Democratic business woman, a Republican businessman, a Republican educator, and the adjunct member is a magistrate judge. Three of the members reside in Boise, one in Burley, one in Rexburg, one in Coeur d'Alene and one in Jerome.

Members of the Judicial Council serve without salaried compensation for their services. Members, other than judges, receive only a daily honorarium for each day the Council meets and reimbursement for their actual expenses, pursuant to Idaho Code Section 1-2104. The Judicial Council utilizes the services of a part-time Executive Director and a legal assistant.

Ordinarily, the Council meets approximately three to four times per year or, as needs arise. In an effort to operate within the Council's budgetary allowance, many matters are disposed of by telephone conference call or by mail and meetings scheduled in conjunction with interviews for judicial vacancies. The Judicial Council now holds interviews for judicial vacancies in Boise in order to meet budget hold-backs instead of traveling to the county where the chambers for the vacant position are located.

**BIOGRAPHIES OF COUNCIL MEMBERS  
AND EXECUTIVE DIRECTOR**

**JUDICIAL MEMBERS:**

CHIEF JUSTICE ROGER S. BURDICK, is the Ex-Officio Chairman of the Idaho Judicial Council. Justice Burdick received his Bachelor's of Science degree in Finance from the University of Colorado in 1970 and graduated from the University of Idaho School of Law with a Juris Doctorate in 1974. From 1970 to 1971, he worked as a bank examiner with the Idaho Department of Finance. From 1974 to 1980, he worked with the law firm of Webb, Pike, Burton & Carlson in Twin Falls, Idaho, then as Deputy Prosecuting Attorney in Ada County, and finally as a partner with the law firm of Hart and Burdick, in Jerome, Idaho.

While with Hart and Burdick from 1976 to 1980, he served as a Public Defender in Camas, Lincoln, Jerome and Gooding Counties, as well as a general practice. In November 1980, he was elected as Prosecuting Attorney for Jerome County. From September 1981 to September 1993, he served as Magistrate Judge in Jerome County. During that time, he was appointed the first Magistrate member of the Idaho Judicial Council, President of Idaho Magistrate Association and Chairman of Juvenile Rules Committee, as well as numerous other committees.

In September 1993, he was appointed District Judge in Twin Falls County and has served on various Idaho Supreme Court advisory committees, including Chairman of I.A.R. 32 Rules Committee. He again served on the Idaho Judicial Council from 1995 to 2001 as the District Court member. He served as President of the District Judges Association from 2001 to 2003. In 2001, he was assigned to preside over the Snake River Basin Adjudication. In January 2001, he was appointed the Administrative Judge for the Fifth Judicial District.

In August, 2003 he was appointed to be the fifty-third Justice of the Idaho Supreme Court by Governor Dirk Kempthorne. He was retained by popular election in 2004 and won a state-wide contested election in 2010. He now serves as chair of the Criminal Rules and Criminal Jury Instruction Committees. He was appointed Vice Chief Justice of the Idaho Supreme Court in 2007 and in August 2011 he was elected to be the Chief Justice by his peers.

HONORABLE RONALD J. WILPER, is a graduate of Boise State University and the University of Idaho College of Law. He was engaged in the private practice of law from 1988 to 1995 with the firm of Gigray, Miller, Downen & Wilper in Caldwell. He received the Court Appointed Special Advocate (C.A.S.A.) Award for Outstanding Child Advocate of the year in 1990, and the Equal Access to Justice Award in 1993. He served as a Commissioner of the Idaho State Bar Association from 1993 to 1996, and was President of the Bar Association in 1996. From 1995 through 1998 he was the Chief Criminal Deputy Prosecuting Attorney for Canyon County. He was appointed by Governor Phil Batt to serve as a District Judge in Boise on January 1, 1999. He was re-elected in 2002, 2006 and 2010. He received the Jefferson Award for public service in April 2006. In 2008, Judge Wilper was the recipient of the Granata Award for professionalism as a trial judge. Judge Wilper presides over criminal and civil cases in Boise and served as the Presiding Judge in the Ada County Felony Drug Court from 2001

through 2008. Judge Wilper has served as a member of the Idaho Judicial Council since March, 2007.

HONORABLE THOMAS BORRESEN earned his Bachelor of Science in Accounting from the University of Idaho in 1972 and graduated from the University of Idaho Law School in 1977. He was a member of the Idaho Law Review. He served as law clerk for the Honorable J. Blaine Anderson in both the U.S. District Court and the Ninth Circuit Court of Appeals. He engaged in the private practice of law from 1978 to 1993 when he was appointed to the Jerome County Magistrate Court. Judge Borresen has served as an adjunct member of the Idaho Judicial Council since July 2000.

#### PUBLIC MEMBERS:

J. PHILIP REBERGER, is a resident of Boise, Idaho. He graduated from Caldwell High School and the University of Idaho where he earned a Bachelors of Science in Business and received the President's Top Senior Award. He is currently a partner in one of Idaho's leading governmental affairs firms, Sullivan & Reberger. As a U.S. Navy Viet Nam veteran, he served on active duty as Staff Pilot to Admiral John McCain, Commander in Chief, Pacific. In 2002, he retired as a Captain, last serving as Chief of Staff to the Commander, Navy Reserve Security Group. Early in his career, he served on the executive staff of the Republican National Committee under the leadership of Former President George Bush and U.S. Senator Bob Dole. He served for twelve years as Chief of Staff to Idaho Senator Steve Symms. He retired in 2002 as Governor Dirk Kempthorne's Chief of Staff, a position he held since 1992 when he joined Kempthorne to manage his successful campaign for election to the United States Senate. He is a former Presidential appointee to the USO World Board of Governors and has served on various state and local government committees. Mr. Reberger has been a member of the Idaho Judicial Council since September 2003.

RONALD M. NATE, Ph.D., is a professor of Economics at the Brigham Young University-Idaho in Rexburg, Idaho. He received his Bachelor of Science in Economics from the University of Utah, his Masters Degree from the University of Connecticut and his Ph.D. from the University of Connecticut in 1998. He has taught at BYU-Idaho since 2001 and was Assistant Professor Of Economics at Ohio University Eastern for two years before coming to the Rexburg. He is active in local community service including a volunteer leader with the Boy Scouts of America and has chaired numerous political committees. Mr. Nate joined the Idaho Judicial Council as a member in July 2007.

One position on the Judicial Council is vacant and awaiting appointment by the Governor.

#### ATTORNEY MEMBERS:

STEVEN A TUFT, is a resident of Burley, Idaho. He received a Bachelor of Arts from Brigham Young University in German Literature and his Juris Doctorate from the University of Utah Law School. He is involved in his church and several community activities including the Boy Scouts of America, serving first as a board member for 20 years and then as

president of the Snake River Council. Mr. Tuft also sits on the board of three charitable foundations. His law practice focuses on real estate, commercial transactions and estate planning. He represents the Fifth Judicial District CASA program in child protection cases in Cassia and Minidoka Counties. For over 30 years, he has served as a part-time city attorney for Heyburn. He is a founding member of the Idaho Municipal Attorneys Association. In 2006 he received both the Idaho State Bar's Service Award and the Professionalism Award. Mr. Tuft joined the Idaho Judicial Council as a member in July 2009.

JOEL P. HAZEL is resident and a lawyer in private practice in Coeur d'Alene, Idaho. He is a shareholder the firm Witherspoon Kelley. He received his Bachelor of Arts degree from Gonzaga University and his Juris Doctor degree from the University of Idaho College of Law in 1994. Mr. Hazel was a deputy prosecuting attorney in Kootenai County from 1994 to 1999 when he joined his current firm. His current practice focuses on civil litigation. He has served on the Idaho State Bar Character and Fitness Committee and the Professional Conduct Board. He received the Idaho State Bar Service Award in 2010. Mr. Hazel has been active in Kootenai County's Specialty Courts and served as a Pro Temp Judge for Kootenai County's DUI court for approximately ten years. Mr. Hazel joined the Idaho Judicial Council as a member in July, 2011.

#### EXECUTIVE DIRECTOR:

JAMES D. CARLSON, is an Idaho native and resides in Boise, Idaho. The Idaho Judicial Council selected Mr. Carlson as its new executive director, effective January 1, 2011. Mr. Carlson has a distinguished legal career as a trial attorney beginning in 1982 with the Ada County Prosecutors Office, in private practice, as a Deputy Attorney General in the Civil Litigation Division of the Idaho Attorney General's Office and most recently Of Counsel with the law firm of Naylor & Hales, P.C. He has tried more than 160 jury trials in the state and federal courts and has handled over 20 cases on appeal before the Idaho Supreme Court, the Ninth Circuit Court of Appeals and the U.S. Supreme court. Mr. Carlson served on behalf of the Idaho State Bar in handling fee arbitration and professional discipline matters. His law related activities include POST academy instruction and instruction at the college level as an adjunct professor.

### **III.**

#### **SELECTION OF JUDGES**

Justice is administered by people, not by systems. The quality of justice turns, in full measure, upon the competence, fairness, and diligence of the human beings in the black robe. Because the judicial system depends heavily on a quality judiciary, we need the best available method for judicial selection. While there is no perfect method, a broad national consensus suggests that the best judges are identified through a merit selection process. Merit selection envisions a commission, composed of judges, lawyers, and laymen, submitting nominations to the Governor for appointment. Idaho law provides such a process. Idaho Code Section 1-2102 provides that the Judicial Council shall:

Submit to the Governor the names of not less than two (2) nor more than four (4) qualified persons for each vacancy in the office of justice of the Supreme Court or district judge, one (1) of whom shall be appointed by the Governor...

This process is followed whenever new positions are created or vacancies occur prior to the expiration of a term. However, once selected, all Idaho judges are subject to a non-partisan competitive election or retention process.

### ***THE SELECTION PROCESS IN DETAIL***

The Idaho Judicial Council has a detailed and careful selection procedure. The Council uses a comprehensive application form to elicit detailed information concerning each applicant's professional background and achievements. During personal interviews, which are open to the public, partisan political questions are strictly avoided. Applicants are asked for their thoughtful comments on issues of substantive law and problems of judicial administration. A standard questionnaire is distributed throughout the judicial district or the state, depending on whether the vacancy is on the district bench, the Court of Appeals, or the Supreme Court, asking those members of the practicing bar and of the general public who know the applicant to evaluate the judicial candidate upon the standards recommended by the American Judicature Society. These standards include the following:

1. Integrity and moral courage.
2. Legal ability and experience.
3. Intelligence and wisdom.
4. Capacity to be fair-minded and deliberate.
5. Industriousness and promptness in performing duties.
6. Compatibility of personal habits and outside activities with judicial office.
7. Capacity to be courteous and considerate on the bench.

When all of this information has been received and digested, the Judicial Council analyzes each applicant's mental and physical fitness to perform the duties of judicial office, superior self-discipline, moral courage, sound judgment, ability to weigh impartially the views of others, ability to be decisive when required, capacity for logical reasoning, adequacy of educational background, and excellence of professional achievement. For trial court positions, the Judicial Council also considers knowledge of procedure and evidence and experience as an advocate. For appellate positions, the Council looks for clarity of written and spoken expression. The Council also obtains information from the State Tax Commission, the Idaho State Bar, a credit bureau, the Idaho Supreme Court and the Idaho Department of Law Enforcement in order to verify the integrity and background of each applicant.

The Judicial Council's process of judicial selection is now being emulated by several district magistrates commissions, the federal bench, and, has been the subject of inquiries from other states.

***NOMINATIONS BY THE JUDICIAL COUNCIL FOR 2011***

Judicial vacancies usually fill a large part of the Council's activities. There were two vacancies in the 2011 calendar year.

***NOMINATIONS BY THE JUDICIAL COUNCIL FOR THE PAST FIVE YEARS***

The following table summarizes the screening process for judicial vacancies for the last five years (2011-2007).

<b>Vacancy</b>	<b>No. of Applicants</b>	<b>No. of Nominees</b>	<b>Individual Appointed</b>
	<b><u>2011</u></b>		
District Judge Fourth District Darla Williamson	9	4	Lynn G. Norton
District Judge Third District Gregory W. Culet	10	4	Molly J. Huskey
	<b><u>2010</u></b>		
No Vacancies			
	<b><u>2009</u></b>		
District Judge Third District Stephen W. Drescher	4	3	Susan E. Wiebe
District Judge Sixth District Peter D. McDermott	8	4	Robert C. Naftz
Court of Appeals Darrel R. Perry	12	4	John M. Melanson
District Judge First District Charles W. Hosack	7	3	Benjamin R. Simpson
District Judge Fifth District R. Barry Wood	7	2	Eric J. Wildman

<b>Vacancy</b>	<b>No. of Applicants</b>	<b>No. of Nominees</b>	<b>Individual Appointed</b>
District Judge Fifth District John M. Melanson	6	2	Jonathan P. Brody
	<b><u>2008</u></b>		
District Judge Sixth District Donald L. Harding	6	3	Mitchell W. Brown
District Judge Sixth District Ronald E. Bush	7	3	Stephen S. Dunn
Court of Appeals New Position	9	4	David W. Gratton
District Judge Fourth District Kathryn A. Sticklen	3	2	Richard D. Greenwood
District Judge Seventh District Brent J. Moss	5	2	Gregory W. Moeller
District Judge Third District Gordon W. Petrie	8	3	Bradly S. Ford
	<b><u>2007</u></b>		
District Judge Fifth District John Hohnhorst	7	2	Randy J. Stoker
District Judge Third District James C. Morfitt	5	2	Thomas J. Ryan
District Judge Sixth District N. Randy Smith	7	3	David C. Nye
District Judge Fourth District New Position	10	4	Patrick H. Owen

<b>Vacancy</b>	<b>No. of Applicants</b>	<b>No. of Nominees</b>	<b>Individual Appointed</b>
District Judge Seventh District Richard T. St.Clair	6	4	Joel E. Tingey
Justice Supreme Court Gerald F. Schroeder	19	4	Warren E. Jones
Justice Supreme Court Linda Copple Trout	12	4	Joel D. Horton
District Judge Fifth District Monte B. Carlson	5	2	Michael R. Crabtree
District Judge Fourth District Joel D. Horton	5	3	Timothy L. Hansen

#### IV.

#### **DISCIPLINARY ACTIVITIES OF THE JUDICIAL COUNCIL**

Judges can and should meet rigorous standards of personal and professional conduct. The role of judicial conduct agencies throughout the country is to help enforce the standards of judicial conduct. These agencies, established by the fifty states and the District of Columbia, play a vital role in maintaining public confidence in the judiciary and preserving the integrity of the judicial process. As a forum for citizens with complaints against judges, the Idaho Judicial Council helps maintain the balance between judicial independence and public accountability. It also serves to improve and strengthen the judiciary by creating a greater awareness of proper judicial conduct on the part of judges themselves, both on and off the bench.

The Idaho Judicial Council generally acts only on verified complaints involving judicial misconduct and disability. Accordingly, it does not address complaints involving a judge's legal decisions or rulings unless there is an accompanying allegation of fraud, corrupt motive, or other misconduct.

Judicial misconduct, or the inability of a judge to perform judicial functions, represents a greater threat to the public interest than do personnel problems among public officers in general. Most elected officers are subject to the constitutional remedy of recall, but Article 6, Section 6, of the Idaho Constitution specifically exempts judicial officers. Experience in other states has shown that the alternative remedy of impeachment is ineffective except in cases of gross scandal. In any event, as noted by the American Bar Association, the

impeachment method can be activated only by preliminary proceedings that approach prejudging the case, and involve methods of determination that are easily politicized.

The problem is underscored by the special role that courts play in our system of government. The courts, in the last analysis, are the protectors of the individual rights which give our society its distinct character. Because the public quite understandably views justice as being no better than the person who dispenses it, the judge who misbehaves or who is unable to perform adequately brings discredit to the entire system. The fact that relatively few judges manifest such problems is small consolation to the public or to the other judges whose images are indirectly tarnished by the acts of a few.

Conversely, the clear need for effective judicial discipline must not obscure the equally important public interest in an independent judiciary. The judge who is different is not for that reason alone, unfit. Nor is a judge incompetent, merely because of the issuance of controversial decisions. The need for balance between judicial accountability and judicial independence puts a premium upon the fairness of disciplinary procedures.

### ***THE JUDICIAL DISCIPLINARY PROCESS IN IDAHO***

Idaho Code Section 1-1202 authorizes the Judicial Council to recommend the removal, discipline, and retirement of judicial officers. Section 1-2103, which prescribes the procedures by which this power shall be exercised, refers only to the removal, discipline, or retirement of district judges, court of appeals judges or justices of the Supreme Court. However, Idaho Code Section 1-2103A was added by the 1990 legislature and requires the Judicial Council to investigate and make recommendations to the Supreme Court on the discipline, removal, or retirement of magistrates. The statutory change was effective on July 1, 1990. It did not affect the magistrate selection process or the right of the district magistrate commission to remove a magistrate in the first eighteen (18) months after appointment. All judges are subject to the Idaho Code of Judicial Conduct promulgated by the Supreme Court.

Section 1-2103 provides that the Judicial Council may investigate a complaint against a judge or justice and may order a formal hearing before it, after such investigation has been conducted. A copy of the complaint form may be found in the Appendix. Following this hearing, the Council may recommend to the Supreme Court the removal, discipline, or retirement of the accused judge or justice. Final disciplinary authority rests with the Supreme Court. Section 1-2103 further provides that all papers filed with, and proceedings conducted before, the Judicial Council are confidential. These papers and proceedings do not lose their confidential nature unless or until the matter is forwarded to the Supreme Court upon recommendation of the Council. At that point, the proceedings become public.

The rules adopted by the Judicial Council pursuant to this statutory authority provide that when a complaint is received, the Council initially determines whether or not the complaint (a) states facts which constitute possible grounds for removal, discipline or retirement, and (b) is not obviously unfounded or frivolous. This is accomplished through an initial inquiry wherein the Executive Director informally obtains sufficient additional information to allow the Council to determine whether to proceed to a preliminary investigation. The judge is usually notified of the complaint at this stage of the proceedings. If the complaint passes these tests,

then a preliminary investigation will be conducted, and the judge or justice involved must be formally notified. Ordinarily, this investigation is conducted by the Council's Executive Director. The judge or justice is invited to make such statements or submit such materials as may be helpful to the investigation.

When the preliminary investigation has been completed, the Judicial Council determines whether or not the investigation has disclosed sufficient cause to warrant further proceedings. If not, or if the investigation itself has resolved the alleged problem, then the complaint is dismissed with notice to the complainant and the judge or justice. However, if further proceedings are warranted, the judge or justice is then served notice of formal proceedings and given an opportunity to answer.

The hearing may be conducted by the Judicial Council itself, or it may request that the Supreme Court appoint a panel of three special masters to hear and take evidence in such a proceeding and report their findings to the Judicial Council. During the hearing, and at all other stages of the proceeding, the judge or justice is entitled to be represented by counsel. The rules governing evidence and the requirements of due process are observed during the hearing in the same manner as in a civil court case.

Following the hearing, or upon receiving the report of findings by the special masters, the Judicial Council determines whether good cause exists to recommend to the Supreme Court that the judge or justice be removed, disciplined or retired. If the decision is in the affirmative, the record of proceedings is transmitted to the Supreme Court together with the Judicial Council's recommendation. The Court may order the judge or justice removed from office, involuntarily retired from office, or disciplined. Pursuant to Section 1-2103 and the Judicial Council's rules, no judge or justice who is a member of the Council or Supreme Court may participate in any proceedings involving himself or herself, or any district judge in his or her own judicial district.

Two especially significant features of the foregoing process are the confidentiality of proceedings before the Judicial Council and the undertaking of a preliminary investigation prior to any formal hearing. The confidentiality provisions serves two purposes: (1) the complainant is not deterred by fear of public embarrassment from bringing a personal grievance to the attention of the Judicial Council; and (2) the reputation of the judge or justice is protected during the period of time when the truth of the complaint is undetermined. Furthermore, confidentiality allows a judge or justice to recognize a mistake, if one has been committed, and rectify it to the satisfaction of the complainant before publicity "freezes" the case into an adversary mold. Similarly, the preliminary investigation provides a framework in which issues can be defined, and in many cases resolved, before formal proceedings are commenced.

In many cases, the Judicial Council finds that the judge or justice has not engaged in misconduct or failed to perform judicial duties. Even in such cases, the disciplinary process accomplishes a constructive purpose. As noted by the Texas Judicial Qualifications Commission, in its 1974 report:

"Many complainants do not understand law, how the courts operate, the jurisdiction of the judge, their right of appeal, and

other aspects of the judicial system. They know only that they are unhappy with the system and want someone to hear their complaint. . . . The tremendous caseload of the court and the demand upon the time of a judge...[do] not permit him to give these people the time they feel they deserve. To the individual, his case is the only one; to the judge it is one among hundreds of similar nature. By serving as an intermediary, taking remedial action when necessary, the Commission feels that it negates much of the animosity toward the judicial system, and provides the lay person a better understanding of the judiciary."

***DISCIPLINARY ACTIVITIES BY THE JUDICIAL COUNCIL IN 2011***

In calendar year 2011, there were one hundred sixteen (116) complaints or inquiries concerning Idaho judges. Those complaints were made against judges as follows:

TYPE OF JUDGE	NO. OF COMPLAINTS **
Idaho District Judges	24
Idaho Magistrate Judges	52
Idaho Appellate Judges	0
Idaho Supreme Court Justices	1
Retired/Senior Judges	6
Judicial Candidates	0
Judges Not Identified or Other Entities Not Under Judicial Council Jurisdiction	49

\*\* Some complaints have more than one judge named.

Of the 116 complaints received in 2011, sixty-five (65) were not verified as required by Idaho law. When a complaint is not verified, the Judicial Council contacts the complainant to explain verification and offers to assist in the verification process. Of the fifty-one (51) verified complaints, twenty nine (29) complaints were dismissed after having been

reviewed and discussed by the Judicial Council and a determination made that there was no factual basis for the complaint or the facts did not constitute a violation of the Code of Judicial Conduct. There were eighteen (18) initial inquiries conducted and four (4) preliminary investigations. An initial inquiry consists of obtaining more facts on the complaint and receiving a response from the judge. A preliminary investigation is a full investigation, which includes a review of the court record or transcripts and interviewing witnesses.

In the eighteen (18) cases in which there were initial inquiries, the Judicial Council took remedial action in one (1) case pursuant to Judicial Council Rule 28(c), which permits the Judicial Council to remedy issues with a judge without filing formal charges. In that case, the judge met with the Council and received instruction regarding the disqualification process and the ethical responsibilities of recusal. Two (2) cases are still pending.

In the four (4) cases in which there were preliminary investigations, a judge retired from the judiciary during the investigation in one case. The Judicial Council took remedial action in the remaining three (3) cases pursuant to Judicial Council Rule 28(c). In those cases, one judge was issued a private reprimand for his off-the-bench conduct with respect to facebook, one judge was issued a private reprimand regarding writing a letter on judicial stationary (using the prestige of the judicial office to advance non-judicial interests). This judge was also required to attend an educational program designed to identify and prevent ethical lapses. The remaining two judges were issued private reprimands for their off-the-bench conduct that was alleged to have brought the judicial office into disrepute.

The primary allegations contained in the complaints against judges were as follows:

<b>**NATURE OF COMPLAINT</b>	<b>OCCURRENCES</b>
Abuse of Power	0
Appearance of impropriety	17
Bias/prejudice/discrimination	18
Conduct prejudicial to administration of justice/Failure to perform duties	13
Conflict of interest	4
Conspiracy	0
Erroneous decision/error of law	43
Ex parte communication	4
Excessive use of alcohol/drugs	2
Failure to disqualify	6
Improper/Unreasonable delay	0
Improper Conduct	4
Improper sentence	0
Improper campaign/Political activity	1
Lack of impartiality	0
Rude and discourteous treatment/lack of judicial temperament	18
Unknown or general dissatisfaction	49

\*\* Many complaints have more than one allegation made against the judge or judges.

In all cases, the judges against whom complaints had been filed were cooperative with the Judicial Council in performing its statutory duties.

## V.

### **JUDICIAL PERFORMANCE EVALUATIONS**

The Judicial Council has found that when individuals are appointed to the bench, they become somewhat isolated and do not receive feedback on their performance as a judge.

Judicial Performance Evaluations provide the opportunity to receive feedback on the way judges perform their judicial duties. That information is provided to the judges in order to assist them in improving their judicial skills and abilities.

The Judicial Council began a Volunteer Pilot Judicial Performance Evaluation Project in June 2000. The questionnaires are distributed to attorneys and court clerks once a year.

As of December, 2011 there are seventeen (17) District Judges, thirty-one (31) Magistrate Judges from the Counties of: Ada, Bannock, Boise, Bonner, Bonneville, Boundary, Canyon, Caribou, Cassia, Elmore, Jerome, Kootenai, Latah, Madison, Minidoka, Nez Perce, Owyhee, Payette, Power, Twin Falls and Washington, along with one (1) Court of Appeal judge who have volunteered to be evaluated. This was a substantial increase over 2010 where twenty-four (24) judges participated in the program.

## VI.

### **ETHICS OPINONS**

The Judicial Council encourages judges to solicit advice on ethics issues that arise. In 2011, the Judicial Council provided sixty-three (63) informal ethics opinions to judges.

**APPENDIX A**

**STATE OF IDAHO**  
**IDAHO JUDICIAL COUNCIL**

P.O. Box 1397

Boise, Idaho 83701

(208) 334-5213

Website: [www.judicialcouncil.idaho.gov](http://www.judicialcouncil.idaho.gov)

**COMPLAINT FORM**

No. \_\_\_\_\_

This form is designed to provide the Judicial Council with information required to make an initial evaluation of your complaint, and to begin an investigation of the allegations you make. Please read the accompanying materials on the Judicial Council's function and procedures before you complete this form.

**PLEASE TYPE OR LEGIBLY PRINT ALL INFORMATION**

Name: \_\_\_\_\_  
(Please type or print)

Address: \_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_ Day ( ) \_\_\_\_\_ Evening ( ) \_\_\_\_\_

I have information of possible misconduct or disability on the part of

\_\_\_\_\_, of the \_\_\_\_\_ Court in  
(name of Judge or Industrial Commissioner)

\_\_\_\_\_, Idaho.  
(City) (County)

**STATEMENT OF FACTS**

1. When and where did this happen?  
Date(s): \_\_\_\_\_ Time: \_\_\_\_\_ Location: \_\_\_\_\_

2. If your information arises out of a court case, please answer these questions:

a) What is the name and number of the case?

Case Name: \_\_\_\_\_ Case No: \_\_\_\_\_

b) What kind of case is it?

criminal       domestic relations       small claims       probate

civil       juvenile       other (specify) \_\_\_\_\_

---

c) What is your relationship to the case?

plaintiff/petitioner       defendant/respondent

attorney for \_\_\_\_\_

witness for \_\_\_\_\_

other (specify): \_\_\_\_\_

d) If you were represented by an attorney in this matter at the time of the conduct of the judge or industrial commissioner, please identify the attorney:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (    ) \_\_\_\_\_

e) Identify any other attorney(s) who represented you or any person involved in the case:

Name of attorney: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (    ) \_\_\_\_\_

Represented: \_\_\_\_\_

f) If this complaint relates to a trial or other court proceeding, has it been or will it be appealed?





# APPENDIX B

## Idaho Judicial Council

P. O. Box 1397, Boise, Idaho 83701-1397 ■ Phone: (208) 334-5213 ■ Fax: (208) 334-2253

■ E-mail: [ijc@idcourts.net](mailto:ijc@idcourts.net) ■ Website: [www.judicialcouncil.idaho.gov](http://www.judicialcouncil.idaho.gov)

*Ex-Officio Chairman:* Chief Justice Roger S. Burdick ■ *Executive Director:* James D. Carlson

### *Members:*

- J. Philip Reberger ■ Hon. Ronald J. Wilper ■ Ronald M. Nate, Ph.D. ■ Steven A. Tuft
- Joel P. Hazel ■ Hon. Thomas H. Borresen, *Adjunct Member*

## Rules of the Idaho Judicial Council General Rules of Procedure

### **RULE 1. Oath of Office.**

Before entering upon the duties of the Judicial Council, each member shall take and subscribe to an oath or affirmation to support the Constitution of the United States and the Constitution and laws of the State of Idaho, and to faithfully discharge all the duties of such office.

### **RULE 2. Duties of Council.**

The Judicial Council shall:

- (a) Conduct studies for the improvement of the administration of justice;
- (b) Make reports to the Supreme Court and Legislature at intervals of not more than two (2) years;
- (c) Submit to the Governor the names of not less than two (2) nor more than four (4) qualified persons for each vacancy in the office of justice of the Supreme Court, Court of Appeals judge, or district judge, one (1) of whom shall be appointed by the Governor;
- (d) Recommend the removal, discipline, and retirement of judicial officers; and,
- (e) Such other duties as may be assigned by law. (I.C. §1-2102).

### **RULE 3. Honoraria and Expenses.**

Each member of the Council, except a judge or justice, shall receive an honorarium of fifty dollars (\$50.00) per day for each day spent in actual attendance at meetings of the Council. Members of the Council shall be reimbursed for actual expenses necessarily incurred in attending meetings and in the performance of official duties. (I.C. §1-2104)

The Secretary is authorized to procure necessary supplies, stationery and postage, and copies of papers and documents for the Secretary's use, and use of the members of the Council, and to submit for approval by the Chairman proper vouchers for payment thereof.

### **RULE 4. Officers and Their Duties.**

The officers of the Council shall be:

**Chairman**, who shall be the Chief Justice of the Supreme Court of the State of Idaho. (I.C. §1-2101). The Chairman's duties, inter alia, shall be: (1) to act as chairman of all meetings of the Council; (2) to cause studies to be made and reports to be submitted as required by I.C. §1-2102; and (3) approve all honoraria and expenses of travel necessarily incurred by members of the Council in attending Council meetings and in the performance of official duties.

**Vice-Chairman**, who shall be elected by the Council annually, on a calendar year basis, and who shall act in the place of and perform the duties of the Chairman in the Chairman's absence.

**Secretary/Treasurer**, who shall be appointed by the Council, annually, on a calendar year basis, and who shall attend all Council meetings and keep minutes thereof, communicate with Council members from time to time as the Chairman may direct, and assist in the formulation of the studies and reports required by I.C. §1-2102.

### **RULE 5. Meetings.**

Meetings of the Council shall be held at the call of the Chairman or at the request of any two (2) members. The Secretary shall cause timely notice of a meeting to be given in advance of the time designated for the meeting. The presence of any member at any meeting shall constitute that member's waiver of notice. The Secretary or an assistant under the Secretary's direction shall maintain minutes of such meetings, and shall within three (3) working days following each such meeting send to every member of the Council by first class mail the proposed minutes of such meeting. If no written objection to such proposed minutes is received from any member of the Council within one (1) week from the date of such mailing, said proposed minutes shall be deemed approved. If any written objection is received, review of the proposed minutes shall be included on the agenda of the next duly-called meeting of the Council. Immediately following approval of the minutes of a meeting, the Chairman or an assistant under the Chairman's direction shall cause to be distributed to members of the Supreme Court and shall cause to be made available to the general public said minutes; provided, however, that the copies of said minutes so distributed or made available shall reflect

deletions of any material subject to a confidentiality requirement prescribed by law or by rules of the Council.

**RULE 6. Types and Locations of Meetings.**

The notice calling a meeting shall specify whether the meeting is by assembly of Judicial Council members or by telephone conference. All meetings by assembly of members shall be held at the conference room adjoining the chambers of the Chief Justice of the Supreme Court, unless another meeting location is designated in the notice. If the notice specifies a meeting by telephone conference, such meeting will be conducted by long distance conference call; provided, that no telephone conference shall be held if any member expresses a written or oral objection, and provided further that any telephone conference shall be terminated upon demand by any member for a secret ballot on a matter subject to vote.

**RULE 7. Quorum.**

The Council shall act by concurrence of four (4) or more members. (I.C. §1-2101)

**RULE 8. Voting.**

All voting shall be viva-voce, provided that the vote on any particular issue, on request of any member, shall be by roll call or by secret ballot.

**RULE 9. Committees.**

Committees may be appointed to perform specified duties. The Chairman shall appoint all committees unless otherwise provided in a motion or resolution authorizing a particular committee.

**RULE 10. Assistants and Assistance.**

The Council may employ such assistants and clerical assistance as may be deemed necessary to perform the duties and responsibilities imposed by Idaho Code, Title 1, Chapter 21.

The Council may solicit the view and assistance of professionals and other groups and of the general public concerning qualifications of candidates to fill Supreme Court, Court of Appeals, or district court vacancies; also, inter alia, concerning the improvement of the science of jurisprudence, and of the administration of justice.

**RULE 11. Intentionally Left Blank.**

**RULE 12. Notice of Vacancy.**

Upon receiving notice of a judicial vacancy, notice of the vacancy shall be sent to members of the Idaho State Bar and disseminated to the public. After the deadline for submission of applications has expired, the Council shall conduct a background check into the qualifications of the applicants, which may include, but not be limited to, criminal records check, bar disciplinary activities check, Magistrate Commission disciplinary activities check, State Tax Commission check, and credit bureau

check. The Council may also solicit input from members of the public concerning each of the applicants.

**RULE 13. Attorney Questionnaires.**

Following the expiration of the deadline for submission of applications, the Judicial Council shall mail to all attorneys in the applicants' judicial districts if for a district position, and to all attorneys in the state for statewide judicial offices, a questionnaire on the qualifications of the applicants. After the results of the questionnaires are tabulated, the Council may disclose to each applicant, the results of the applicant's score. However, the results of the surveys shall not be disclosed to any other person or entity except the Governor. Any written comments shall be confidential and shall not be disclosed to the applicant or any other person except the Governor.

**RULE 14. Interviews.**

The Council shall interview the applicants for the judicial position, which interviews shall be open to the public. Interviews will ordinarily be held in the judicial district for vacancies within that district, and in Boise, Idaho, for statewide judicial positions.

**RULE 15. Confidentiality and Disclosure in Relation to Candidates for Judicial Vacancies.**

The deliberations of the Council relating to candidates, their names and their deemed qualifications shall be considered confidential and shall not be disclosed to anyone except the Governor. The names of the candidates may be disclosed when the deadline for submitting applications for the judicial vacancy in question has expired; the names of such candidates may be used in any questionnaire or investigation of their qualifications for judicial office; and the names of the candidates submitted to the Governor may be further released for publication by the Council in its discretion.

**RULE 16. Judicial Qualifications.**

The deemed qualifications of candidates selected by the Council to be considered for appointment to judicial office may be in accordance with the following ratings:

- (a) Exceptionally well qualified,
- (b) Well qualified, and
- (c) Qualified.

**RULE 17. Ex Parte Contact with Judicial Council Members.**

The members of the Judicial Council should not engage in ex parte communications concerning any applicant for a judicial position. They should encourage all interested attorneys and members of the public to communicate with the Council in writing concerning the applicants on which they have knowledge or information.

**RULE 18. Intentionally Left Blank.**

**RULE 19.** Intentionally Left Blank.

**RULE 20.** Intentionally Left Blank.

## **Rules for Removal, Discipline or Retirement of Judges**

### **RULE 21. Definitions.**

In these rules, unless the context or subject matter otherwise requires:

(a) "Council" means the Judicial Council of Idaho.

(b) "Judge" means a Justice of the Supreme Court, a Court of Appeals judge, a judge of a district court, a magistrate judge, or a member of the Industrial Commission.

(c) "Accused judge" or "defendant" means the judge against whom formal proceedings have been instituted pursuant to Rule 29.

(d) "Chairman" means the chairman of the Council or the acting chairman.

(e) "Masters" means special masters appointed by the Supreme Court upon request of the Council.

(f) "Presiding master" means the master so designated by the Supreme Court or, in the absence of such designation, the judge first named in the order appointing masters.

(g) "Examiner" means counsel designated by the Council to make a preliminary investigation, to gather evidence, and to present evidence before the Council or the masters, with respect to the charges against a judge.

(h) "Shall" is mandatory and "may" is permissive.

(i) The masculine gender includes the feminine gender.

### **RULE 22. Process - Witnesses - Hearings.**

(a) In the exercise of its powers and duties as provided by I.C. Title 1, Chapter 21, the Council or any member or master shall have the power to summon and examine witnesses under oath and to compel their attendance and the production of books, papers, documents and other writings necessary or material to the inquiry. Such summons or subpoena shall be issued under the hand of the Secretary of the Council or any member thereof, or any master appointed to conduct a hearing, and shall have the force and effect of a subpoena issued by a court of competent jurisdiction. Any witness or other person who shall refuse or neglect to appear in obedience thereto or who shall refuse to be sworn or testify or produce books, papers, documents or other writing demanded, or to comply with any lawful order of the Council or any member or master in the premises, shall be liable to attachment upon application to the Supreme Court, or to any court or a judge thereof, as in cases of contempt.

(b) The Council or masters shall conduct the hearing of such matter as shall best arrive at the truth and any member or master may interrogate witnesses. The following enumerated rules of the Idaho Rules of Civil Procedure, as adopted by the

Supreme Court, effective November 1, 1958, or as the same have been, or may hereafter be amended, shall govern and may be used in all proceedings and hearings conducted under these rules of discipline: Rules 6(a)(e), 15(b)(c)(d), 16, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 43(b)(c)(d), 44(a)(b)(c), 45(d)(1), 45(d)(2), 61 and 80; provided, that if the accused judge shall be in default for failure to answer, depositions and discovery procedures may be taken and used without notice to the accused, or affidavits of witnesses may be introduced and used in evidence. The Secretary, or any member of the Council, or master, may administer oaths to witnesses.

(c) Witnesses subpoenaed by the Council or any member thereof or by a master shall be allowed such fees and traveling expenses as are allowed in civil actions, to be paid by the party in whose interest such witnesses are subpoenaed.

### **RULE 23. Interested Party and Disqualification.**

(a) A judge who is a member of the Council or of the Supreme Court shall not participate as such in any proceedings involving the judge's own removal, discipline or retirement.

(b) A district judge serving on the Judicial Council may not participate in deliberations of the Judicial Council pertaining to a complaint filed against a district judge residing in the same judicial district as the district judge member of the Council, and that district judge member of the Council shall be disqualified from all proceedings involving that particular complaint.

(c) If a complaint is filed against a Supreme Court Justice, the Chief Justice shall not participate in deliberations of the Judicial Council pertaining to the complaint filed against the Justice of the Supreme Court, and the Chief Justice shall be disqualified from participating in deliberations of the Council pertaining to that complaint. The Vice-Chairman of the Council shall preside over any such deliberations and shall preside over any procedures involved in the investigation or processing of that complaint.

### **RULE 24. Confidentiality of Proceedings.**

All papers filed with and proceedings before the Council, or before the masters appointed by the Supreme Court pursuant to Rule 31, shall be confidential until a record is filed by the Council in the Supreme Court, provided, however, that if allegations against a judge are made public by the complainant, judge or third persons, the Judicial Council, and/or the judge may comment on the existence, nature, and status of any investigation and may correct any false or misleading information including false or misleading information on the actions taken by the Judicial Council.

### **RULE 25. Confidential and Privileged Defamatory Material.**

(a) Papers filed with the Council, and testimony given before the Council, or before the masters appointed by the Supreme Court pursuant to Rule 31, shall be privileged;

(b) The record filed by the Council in the Supreme Court continues privileged but on such filing loses its confidential character; and

(c) A writing which was privileged prior to its filing with the Council or the masters does not lose such privilege by such filing.

**RULE 26. Appointment of Examiner.**

The Council may appoint one or more examiners to assist the Council (a) in making preliminary investigation of the charges against a judge; (b) to gather evidence and to present evidence before the Council or the masters with respect to the charges against an accused judge.

**RULE 27. Service of Documents Upon Accused Judge.**

In proceedings for the discipline, removal or retirement of a judge, including preliminary investigations therefor, service of any document required to be served upon an accused judge shall be made by personal service upon the judge, or by mailing a copy of such document by prepaid registered or certified mail addressed to the judge at the judge's chambers or last known residence address, and by mailing a copy thereof to the judge's counsel of record if such there be unless the judge shall otherwise direct in writing filed with the Council.

**RULE 28. Grounds for Discipline, Removal or Retirement - Initial Inquiry - Preliminary Investigation.**

(a) The Council, upon receiving a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a judge is guilty of willful misconduct in office, willful and persistent failure to perform the duties of a judge, habitual intemperance, or of conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or a violation of the Code of Judicial Conduct, or that the judge has a disability that seriously interferes with the performance of the judge's duties which is or is likely to become of a permanent character, shall make an initial inquiry or investigation to determine whether formal proceedings should be instituted and a hearing held. The Council without receiving a verified statement may make such a preliminary investigation on its own motion and may in such cases, conduct a preliminary investigation without an initial inquiry.

(1) **Initial Inquiry.** After notifying the judge informally, the Council, or its representative, shall make an initial inquiry to determine whether or not the complaint contained in the verified statement is obviously unfounded or frivolous. In making that initial inquiry, the Council or its representative may obtain and consider any information it deems pertinent.

(2) **Preliminary Investigation.** If the Council concludes that the complaint set out in the verified statement is not obviously unfounded or frivolous, the Council shall conduct a preliminary investigation, after first notifying the judge in writing of the investigation and the nature of the charge, and shall afford reasonable opportunity in the course of such

preliminary investigation for the judge or the judge's counsel to present evidence on behalf of the judge. In conducting the investigation, the Council may consider any information obtained during the course of the initial inquiry. If the Council determines that the physical or mental health of the judge is in issue, it may order physical and/or mental examinations of the judge by independent examiners. Service of such written notice shall be in accordance with Rule 27.

(b) If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge, complainant and other parties in the discretion of the Council shall be so notified.

(c) If the preliminary investigation does disclose sufficient cause to warrant further proceedings, the Council may:

- (1) continue the case for further action, investigation or review;
- (2) require a personal appearance of the judge before the Council;
- (3) recommend a remedial course of conduct to the judge and require the judge's written acquiescence thereto;
- (4) issue a public reprimand with the judge's consent;
- (5) institute formal proceedings; or
- (6) take or direct such other action as the Council may determine will reasonably curtail or eliminate the conduct of the judge which involves any matter within the jurisdiction of the Council.

**RULE 29. Notice of Formal Proceedings.**

(a) After the preliminary investigation has been completed, if the Council concludes that formal proceedings should be instituted, the Council shall without delay issue a written notice to the accused judge advising of the institution of formal proceedings to inquire into the charges against the judge. Such proceedings shall be entitled:

BEFORE THE JUDICIAL COUNCIL STATE OF IDAHO

Inquiry Concerning     )  
   )  
   )  
 \_\_\_\_\_ )                                 No. \_\_\_\_\_  
 (Name of Judge)                                 NOTICE

(b) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of the right to file a written answer to the charges within fifteen (15) days after service of the notice upon them.

(c) The notice shall be served in accordance with Rule 27.

**RULE 30. Answer.**

Within fifteen (15) days after service of the notice of formal proceedings, the accused judge may file with the Council an original and seven (7) legible copies of a verified answer.

**RULE 31. Setting for Hearing Before Council or Masters.**

(a) Upon the filing of an answer or upon expiration of the time for its filing, the Council shall order a hearing to be held before it concerning the removal, discipline or retirement of the accused judge, or the Council may request the Supreme Court to appoint three (3) special masters to hear and take evidence in such proceeding and to report thereon to the Council. The Council shall set a time and place for hearing before itself or before the masters and shall give written notice of such hearing in accordance with Rule 27.

(b) In the event the judge and the special examiner agree to a stipulated set of facts, such stipulated facts may be presented to the Council in a written stipulation. The stipulation shall include:

- (1) A statement of the agreed facts, (which statement does not limit the Supreme Court);
- (2) A statement that the Council may rely upon the agreed facts without the necessity of further proof;
- (3) A waiver by the judge of the judge's right to a hearing; and
- (4) Whether a mitigation/aggravation hearing is requested.

**RULE 32. Hearing.**

(a) At the time and place set for hearing, the Council or the masters when the hearing is before masters, shall proceed with the hearing whether or not the accused judge has filed an answer or appears at the hearing. The examiner shall present the case in support of the charges set forth in the notice of formal proceedings.

(b) The failure of the judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for removal, discipline or retirement. The failure of the judge to testify in the judge's own behalf or to submit to a medical examination requested by the Council or by the masters may be considered unless it appears that such failure was due to circumstances beyond the judge's control.

(c) The proceedings at the hearing shall be reported by such method as the Council may prescribe.

(d) The Council shall appoint either the Chief Justice, the District Judge member, or a retired or senior judge as the presiding judge for the hearing.

**RULE 33. Evidence.**

At a hearing before the Council or masters only evidence as is admissible in civil cases shall be received; provided, however, that the Council may review and consider previous proceedings against the accused judge.

**RULE 34. Procedural Rights of Judge.**

(a) An accused judge shall have the right and reasonable opportunity to defend against the charges, to be represented by counsel and to examine and cross-examine witnesses. The judge shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers or other evidentiary matter.

(b) When a transcript of the testimony has been prepared at the Council's expense, a copy thereof shall be available upon request for use by the judge and the judge's counsel in connection with the proceedings. The judge shall have the right to have a transcribed copy of all or any portion of the testimony in the proceedings at the expense of the judge.

(c) If the judge is adjudged insane or incompetent, or if it appears to the Council at any time during the proceedings that the judge is not competent to act, the Council shall appoint a guardian ad litem unless the judge has a guardian who will represent the judge. In the appointment of a guardian ad litem preference shall be given, whenever possible, to members of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right or privilege and make any defense for the judge with the same force and effect as if claimed, exercised or made by the judge, if competent, and whenever these rules provide for serving or giving notice or sending any document to the judge such notice or document shall be served, given or sent to the guardian or guardian ad litem.

**RULE 35. Amendments to Notice or Answer.**

The masters at any time prior to the filing of their report with the Council or the Council at any time prior to the filing of its determination with the Clerk of the Supreme Court, may allow or require amendments to the answer or other pleadings. The statement or charge may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the accused judge shall be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged thereby.

**RULE 36. Report of Masters.**

(a) After the conclusion of the hearing before masters, they shall promptly prepare and transmit to the Council a report which shall contain a brief statement of the proceedings had and their findings of fact and conclusions of law with respect to the issues presented by the pleadings. When the findings and conclusions supported removal, discipline, or retirement, the report shall be accompanied by an original and four (4) copies of a transcript of the proceedings.

(b) Upon receiving the report of the masters, the Council shall promptly deliver or mail a copy thereof to the examiner and shall promptly serve a copy thereof upon the accused judge in accordance with Rule 27.

**RULE 37. Objections to Report of Masters.**

Within thirty (30) days after service of the copy of the masters' reports upon the accused judge in accordance with Rule 27, the examiner or the judge may file with the Council an original and seven (7) legible copies of a statement of objections to the report of the masters, setting forth all objections and when filed by the examiner a copy thereof shall be served upon the judge in accordance with Rule 27.

**RULE 38. Appearance Before Council.**

If no statement of objections to the report of the masters is filed within the time provided, the Council may adopt the findings and conclusions of the masters without a hearing. If such statement is filed, or if the Council in the absence of such statement proposes to adopt findings or conclusions inconsistent with, or to reject any of the findings or conclusions of the masters, the Council shall give the accused judge and the examiner an opportunity to be heard orally before the Council, and written notice of the time and place of such hearing shall be served upon the judge at least ten (10) days prior thereto in accordance with Rule 27.

**RULE 39. Extension of Time.**

The Chairman of the Council may extend for periods not to exceed thirty (30) days in the aggregate the time for filing an answer, for commencement of a hearing before the Council and for filing a statement of objections to the report of the masters and the presiding master may similarly extend the time for the commencement of a hearing before masters.

**RULE 40. Hearing Additional Evidence.**

(a) The Council may order a hearing in conformance with the provisions of Rule 31 through 40, inclusive, for the taking of additional evidence at any time while the cause is pending before it. The order shall state the time and place of hearing and the issues on which the evidence is to be taken. A copy of such order shall be served upon the accused judge at least ten (10) days prior to the date of hearing in accordance with Rule 27.

(b) In any case in which masters have been appointed the hearing of additional evidence shall be before such masters and the proceedings therein shall be in conformance with the provisions of Rules 31 through 40, inclusive.

**RULE 41. Council Vote.**

If the Council finds good cause, it shall recommend to the Supreme Court the removal, discipline or retirement of the accused judge. The affirmative vote of four (4) members of the Council shall be required for a recommendation of removal, discipline, or retirement of the judge or for dismissal of the proceedings.

**RULE 42. Record of Council Proceedings.**

The Council shall preserve the record of all proceedings concerning an accused judge. The Council's determination shall

be entered in the record and notice thereof shall be served upon the judge in accordance with Rule 27. In all proceedings resulting in a recommendation to the Supreme Court for removal, discipline, or retirement the Council shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law of the masters, with respect to the issues of fact and law in the proceedings.

**RULE 43. Certification of Council's Recommendation to Supreme Court.**

Upon making a determination recommending the removal, discipline, or retirement of an accused judge, the Council shall promptly file a copy of the determination certified by the Chairman or Secretary of the Council together with the transcript and the findings and conclusions with the Clerk of the Supreme Court and shall immediately serve notice of such filing together with a copy of such determination, findings and conclusions upon the judge in accordance with Rule 27. The Council's determination shall be subject to review by the Supreme Court as provided by Rule 44.

**RULE 44. Review of Determination.**

(a) The accused judge may request review by the Supreme Court of the Council's determination by the filing with the Clerk of the Supreme Court of a verified petition for review together with six (6) copies thereof within thirty (30) days after filing of the determination with such clerk; within five (5) days thereafter the judge shall file with the clerk a certificate showing service of the petition upon the Chairman or the Secretary of the Council.

(b) The petition for review shall specify in detail the grounds upon which the judge relies.

(c) Any answer, response or countershowning by the Council shall be signed and verified by the Secretary or other member of the Council or by the examiner, and shall be filed and served upon the judge within fifteen (15) days of the filing of the petition, such service to be in accordance with Rule 27.

(d) Any factual issue presented by the petition, answer, response or countershowning shall be resolved in such manner as may be prescribed by the court.

(e) Upon review, the court will determine the issues presented by the petition, answer, response, or countershowning and will notify the petitioner and the Council's secretary thereof.

(f) Failure to file a petition within the time provided shall be deemed a consent to the determination on the merits based upon the record filed by the Council.

(g) Appellate procedure relating to civil actions, as far as applicable, shall apply to proceedings for such review, except that no filing fees shall be exacted.

**RULE 45.** Intentionally Left Blank.

**RULE 46.** Intentionally Left Blank.

**RULE 47.** Intentionally Left Blank.

**RULE 48.** Intentionally Left Blank.

**RULE 49.** Intentionally Left Blank.

**RULE 50. Preservation, Destruction, or Disposition of Judicial Council Records.**

(a) **General Standards.** Except as provided in (b) below, all records and documents of the Idaho Judicial Council shall be preserved by the Executive Director or Secretary of the Council indefinitely, either in the form of the original document or a microfilm or other permanent copy.

(b) **Permissive Destruction of Records.** The following records and documents may be destroyed pursuant to the designated schedule: One year after the vacancy is filled.

1. Public comments on applicants for judicial positions.
2. Attorney questionnaires on applicants for judicial positions.

**RULE 51.** Intentionally Left Blank.

**RULE 52. Confidentiality of Judicial Performance Evaluations.**

All judicial Performance Evaluations, records, documents and reports relating to an individual judge shall be considered confidential records of the Idaho Judicial Council pursuant to Idaho Court Administrative Rule 32(d)(22), and shall not be disclosed by the judge or the Judicial Council to any third party. All judicial Performance Evaluations, records, documents and reports relating to an individual judge shall not be disclosed to the members of the Judicial Council by the Executive Director.

**RULE 53.** Intentionally Left Blank.

**RULE 54. Rules of Order.**

Roberts' Rule of Order shall govern the procedures of all meetings of the Council and of its committees unless otherwise directed.

**Rule 55. Amendments.**

These rules may be amended or supplemented at any meeting by affirmative vote of not less than four (4) members of the Council.

# In the Supreme Court of the State of Idaho

	)	
IN RE: IDAHO CODE OF JUDICIAL CONDUCT	)	ORDER AMENDING IDAHO
	)	CODE OF JUDICIAL CONDUCT
	)	

The Court having reviewed a recommendation to amend the Canons, and being fully informed;  
 NOW, THEREFORE, IT IS HEREBY ORDERED, that Canon 5A(4) of the Idaho Code of  
 Judicial Conduct be, and hereby is, amended as follows:

## CANON 5

### A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

#### A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2) and 5C(1), a judge or a candidate\* for election or appointment of judicial office shall not:

(a) act as a leader or hold an office in a political organizations;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization\*;

(d) publicly endorse or seek the endorsement of a political organization; or

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate.

(2) A judge may attend political gatherings as long as by doing so the judge is not endorsing or seeking the endorsement of a political organization. A judge may speak at political gatherings concerning matters of law, the legal system or the administration of justice.

## Commentary

The purpose of the Canon is to prohibit judges from engaging in conduct which promotes partisan political activities. The Canon allows judges to attend and observe significant historical events, to participate in patriotic events and to speak at political gatherings concerning matters of the law, the legal system or the administration of justice .

A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

**(3) A judge shall resign from judicial office upon becoming a candidate for a nonjudicial office either in a primary or in a general election.**

**(4) A candidate\* for a judicial office:**

**(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family\* to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;**

## Commentary

Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

**(b) shall prohibit employees and officials who serve at the pleasure of the candidate,\* and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;**

**(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly\* permit any other person to do for the candidate\* what the candidate is prohibited from doing under the Sections of this Canon;**

**(d) shall not:**

**(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;**

**(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or**

**(iii) knowingly\* misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.**

### **Commentary**

Section 5A(34)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to Judicial Council and Governor. See also Rule 8.2 of the Idaho Rules of Professional Conduct.

**(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(34)(d).**

**(f) or a judge may respond to false allegations regarding judges or the judicial system as long as the response does not violate Section 5A(4)(d)<sup>1</sup>.**

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<sup>1</sup> The 2009-2010 Desk Book incorrectly designates Canon 5A(4) as Canon 5A(3). The Desk Book version of Canon 5A incorrectly designates two subsections as "(2)".

**B. Candidates Seeking Appointment to Judicial Office.**

(1) A candidate\* for appointment to judicial office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate\* for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for appointment to the office, and from individuals; and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;

**Commentary**

Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

**C. Judges and Candidates Subject to Public Election.**

(1) A judge or a candidate\* subject to public election\* may, except as prohibited by law\*:

(a) when a candidate for election

(i) speak to gatherings on his or her own behalf;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy;

(iii) distribute pamphlets and other promotional campaign literature that do not otherwise violate the provisions of this code supporting his or her candidacy; and

**(iv) publicly advocate or publicly oppose the election of his or her opponent(s).**

**Commentary**

Section 5C(1) permits judges subject to election at any time to be involved in limited political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity.

**(2) A candidate\* shall not solicit campaign contributions in person. A candidate may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before election and no later than [90] days after the last election in which the candidate participates during the election year. Except as required by law, a candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors to the judicial campaign. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.**

**Commentary**

Section 5C(2) permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the circumstances. Campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

**D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, or (ii) on behalf of measures to improve the law,\* the legal system or the administration of justice.**

## Commentary

Neither Section 5D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

**E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates.\* A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2(b) of the Idaho Model Rules of Professional Conduct.**

### *APPLICATION OF THE CODE OF JUDICIAL CONDUCT*

Anyone who is an officer of the judicial system and who performs judicial functions, including Plan B Senior judges, and members of the Idaho Industrial Commission, are a judge within the meaning of this Code except judges "pro tempore" as appointed pursuant to Section 12, Article 5 of the Idaho Constitution and Idaho Administrative Rule (4). All judges shall comply with this Code except as provided below.

**(1) Judge Pro Tempore. Attorneys who are appointed to act temporarily as Judges.**

**(2) Retired Judges. Retired judges (Plan A Senior judges and Plan B Senior judges who have completed their five year commitment) and judges who have resigned, who are designated to act temporarily as judges should comply with all the provisions of their Code except Canons 4C(2) and (3), 4D, 4E and 4F, and they shall refrain from the practice of law. Persons who have been recalled to act temporarily as judges should not act as lawyers in proceedings in which they have served as judges or in any other proceeding related thereto.**

**F. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(3), 4F, 4G, 5C(1) and 5C(2) and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.**

**Commentary**

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.

IT IS FURTHER ORDERED, that these amendments shall be effective on the 22<sup>nd</sup> day of April, 2010.

DATED this 28 day of April, 2010.

By Order of the Supreme Court



Daniel T. Eismann  
Chief Justice

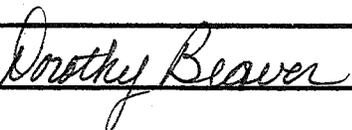
ATTEST:

  
Clerk

Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 4/28/10

**STEPHEN W. KENYON**

By:  Clerk  
Deputy