

1 **Overture 2021-19 (48th GA)** from Pacific Northwest Presbytery (to 49th OC)

2 "Amend *BCO* 38-1 & 42-2 to Allow Appealing a Censure in a
3 Case without Process"

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5 **[Editorial Note: This overture was originally submitted to the 48th General
6 Assembly (2021), which referred it to the 49th GA Overtures Committee.]**

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8 **Be it resolved** that *BCO* 38-1 be amended as follows, affording a person the right to appeal a
9 censure after a confession in a case without process, instead of just filing a complaint.

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11 **Be it also resolved** that *BCO* 42-2 also be amended to correspond with the revision of *BCO*
12 38-1, and to also include a reference to the right of appeal provided in *BCO* 34-10
13 regarding divestiture. (Strike-through for deletions, underlining for new wording.)

14
15 ***BCO* 38-1.** When any person shall come forward and make his offense known to the
16 court, a full statement of the facts shall be recorded, and judgment rendered
17 without process. In handling a confession of guilt, it is essential that the person
18 intends to confess and permit the court to render judgment without process.
19 Statements made by him in the presence of the court must not be taken as a
20 basis of a judgment without process except by his consent. In the event a
21 confession is intended, a full statement of the facts should be approved by the
22 accused and by the court, before the court proceeds to a judgment. ~~The accused~~
23 ~~has the right of complaint against the judgment.~~ A censured person has the right
24 to appeal (*BCO* 42).

25
26 ***BCO* 42-2.** ~~Only~~ The only parties entitled to an appeal are those who have submitted
27 to a regular trial ~~are entitled to an appeal.~~ those appealing a censure in a *BCO*
28 38-1 case without process, and those appealing a *BCO* 34-10 divestiture without
29 censure

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31 **Rationale:**

32 This past year, the SJC received complaints alleging three presbyteries violated *BCO* 38-1.
33 Thus, some clarification is warranted.¹ These Cases have resulted in the expenditure
34 of hundreds of manhours.

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36 In addition to this Overture, our Presbytery has filed three others pertaining to *BCO* 38-1,
37 which seek to:

- 38
39 - clarify procedures for the confession document on which censure is based;
40 - clarify when a confession can be handled as a case without process; and
41 - explicitly allow the right to counsel in a case without process.

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¹ Case 2019-10 *TE Evans v. Arizona*. SJC sustained the Complaint on 7/20/20 by a vote of 18-3.
Case 2019-04 *TE Williams v. Chesapeake*. SJC sustained the Complaint on 8/24/20 by a vote of 13-5.
Cases 2020-07 *TE Wilbourne v. Pacific*; combined with Case 2020-08 *TEs Gendall, Hightower, & Lien v. Pacific*, and Case 2020-09 *REs Ozbolt & Barr v. Pacific*. (Pending)

1 Each of these four revisions is needed and *BCO* 38-1 will be much improved if all four are
2 adopted. They're filed separately so each can be considered individually because (a)
3 each is important in and of itself and (2) none of them affect, or rest on, the adoption
4 of any of the others.

5 Now, to the explicit rationale for why appeals should be allowed in *BCO* 38-1 matters.

6
7 1. The *BCO* allows a person convicted at trial to appeal his censure, so it's fair to give the
8 same right to a person who confessed his offense, but seeks higher court review of the
9 censure. An appeal results in much quicker adjudication by the higher court(s) because a
10 complaint must first be filed with the original court. (Ten of our presbyteries only meet
11 twice a year.) And if the complaint is assigned to a presbytery commission, it would delay
12 even further the date on which the SJC could render a final decision.

13
14 2. There's also an important difference between the remedies available to the higher court
15 when it sustains a complaint vs. when it sustains an appeal. This alone is a compelling
16 reason why *BCO* 38-1 should be revised to allow an appeal in a case without process.

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18 Complaint: *BCO* 43-10. The higher court has power, in its discretion, to annul the
19 whole or any part of the action of a lower court against which complaint has been
20 made, or to send the matter back to the lower court with instructions for a new hearing.
21 ... (Emphasis added here and below.)

22
23 Appeal: *BCO* 42-9. The decision of the higher court may be to affirm in whole or in
24 part; to reverse in whole or in part; to render the decision that should have been
25 rendered; or to remand the case to the lower court for a new trial. In every case a
26 written opinion shall be prepared, and a copy of the opinion and judgment entered will
27 be delivered personally or mailed to the lower court and the appellant, with a written
28 receipt required.

29
30 It would be wiser to allow the higher court to render the decision that should have been
31 rendered (as in an appeal) rather than limiting its power to annulling or remanding for new
32 hearing. Here is an example. This year, three cases came to the SJC from different
33 presbyteries, each which essentially alleged that inadmissible evidence or statements were
34 presented when the presbyteries were considering censure (in addition to the agreed-upon
35 "full statement of the facts"). The SJC sustained two, and the third is pending. In such
36 cases, it would be wiser and fairer to allow an appeal, so the higher court could "render
37 the decision that should have been rendered."

38
39 It doesn't seem prudent to "annul" a censure when the person has confessed to an offense
40 warranting censure. And it doesn't seem prudent to "send the matter back" when the
41 lower court has probably jeopardized the fairness of any future hearing by already having
42 received inadmissible evidence. It would be wiser in many instances to allow the higher
43 court to "render the decision that should have been rendered" by having it consider only
44 the confession document, as it was mutually approved by the confessor and the lower
45 court.

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- 1 3. Some of the grounds for appeal listed in *BCO* 42-3 (below) could also occur in a *BCO* 38-1
2 case.
3

4 *BCO* 42-3. The grounds of appeal are such as the following: *any*
5 *irregularity in the proceedings of the lower court*; refusal of reasonable
6 indulgence to a party on trial; receiving improper or declining to receive
7
8 proper evidence; hurrying to a decision before all the testimony is taken;
9 manifestation of prejudice in the case; and mistake or injustice in the
10 judgment and censure. (Emphasis added.)
11

- 12 4. Problems with Multiple Complaints - Unless *BCO* 38-1 is revised to allow an appeal, we
13 could continue to have multiple, simultaneous complaints filed against the same censure.
14 It happened twice this year.² This complicates higher court review in several ways. For
15 example, the *BCO* doesn't stipulate whose complaint takes precedence. If this amendment
16 is adopted, a censured person could appeal a *BCO* 38-1 censure and his appeal would
17 ordinarily be considered before any complaint against the same action, per the principle
18 in the final clause of *BCO* 43-1.
19

20 *BCO* 43-1. ... It is the right of any communing member of the Church in
21 good standing to make complaint against any action of a court to whose
22 jurisdiction he is subject, except that *no complaint is allowable in a*
23 *judicial case in which an appeal is pending*. (Emphasis added.)
24

- 25 5. Suspension of Censure - In appeals, the censure is suspended until the higher courts have
26 rendered a decision. But censure isn't suspended in a complaint. For example, if a person
27 is disciplined after improper procedures in a *BCO* 38-1 case, or if the censure is clearly
28 unjust, he can presently only file a *BCO* 43 complaint. And if it is a minister, that improper
29 or unjust censure would remain in effect throughout the course of presbytery and SJC review
30 of his complaint, which could easily take more than a year for a final decision. And even if
31 the SJC eventually sustained his complaint, the minister would have been disciplinarily
32 suspended from office for the entire time, and if so, he would probably have lost his job, and
33 his church would probably have needed to call another pastor (or at least an interim).³
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35 Even if the Overture is adopted and an appeal becomes allowable, the original court still
36 has the option of enacting the *non-disciplinary* suspension provided in *BCO* 42-6:
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38 *BCO* 42-6. Notice of appeal shall have the effect of suspending the judgment
39 of the lower court until the case has been finally decided in the higher court.
40 However, the court of original jurisdiction may, for sufficient reasons duly
41 recorded, prevent the appellant from approaching the Lord's Table, and if an
42 officer, prevent him from exercising some or all his official functions, until the
43 case is finally decided (cf. *BCO* 31-10; 33-4). This shall never be done in the
44 way of censure.

² Cases 2019-10 *Evans* and 2019-12 *Pitts, et al, v. Arizona*, and
Cases 2020-07 *Wilbourne*, 2020-8 *Gendall, Hightower, & Lien*, and 2020-9 *Ozbolt & Barr v. Pacific*.

³ In SJC Case 2019-04 *Williams v. Chesapeake*, over 17 months elapsed between when the minister filed his
complaint to Presbytery against his *BCO* 38-1 censure, and when the SJC finally sustained his Complaint. And
he was under suspended from office the entire time.

1 6. History - The first sentence of our *BCO* 38-1 dates back 140 years to the PCUS Book of
2 1879. The other four sentences were added in 2000 after being proposed the year prior in
3 Overture 11 from Pittsburgh Presbytery. That Overture originally proposed the right of
4 “appeal” but the 30-member Bills & Overtures Committee amended to “complaint.” No
5 grounds were offered in the B&O report, or in the *Minutes of the 27th GA*. (*M27GA*,
6 Louisville 1999, p. 163 and *M28GA*, Tampa 2000, p. 59) ⁴

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8 7. Regardless of whether *BCO* 38-1 is amended to allow appeals, an additional clause needs
9 to be added to *BCO* 42-2 because it doesn’t currently reference *BCO* 34-10, but it should.
10 The second paragraph of *BCO* 34-10 references the right to *appeal* a divestiture, but *BCO*
11 42-2 unexplainably omits reference to that appeal situation.
12

13 *BCO* 34-10. Whenever a minister of the Gospel shall habitually fail to be
14 engaged in the regular discharge of his official functions, ... In such a case,
15 the clerk shall under the order of the Presbytery forthwith deliver to the
16 minister concerned a written note that, at the next stated meeting, the question
17 of his being so dealt with is to be considered. This notice shall distinctly state
18 the grounds for this proceeding. The party thus notified shall be heard in his
19 own defense; and if the decision pass against him he may appeal, as if he had
20 been tried after the usual forms. This principle may apply, with any necessary
21 changes, to ruling elders and deacons. (Emphasis added.)
22

23 8. If *BCO* 38-1 is not revised to allow appeal, anyone considering a confession — especially
24 a minister — should know that unless he is confident of what censure will be imposed (or
25 at least what censure will be recommended by the investigative committee, prosecutor, or
26 commission), waiving his rights provided in *BCO* 35-1, 35-3, and 42-2 by making a
27 confession could result in a censure that will take effect immediately, and remain in effect
28 throughout a very lengthy complaint process, because he cannot appeal.
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30 Additionally, even if he prevails in a complaint before the SJC, the SJC can presently only
31 afford him the complaint remedies of *BCO* 43-10, which might include “sending the matter
32 back to the court with instructions for a new hearing” – i.e., back to the court which may
33 have already presented or heard inadmissible evidence.⁵
34

35 *First version adopted and filed by a Commission of Presbytery on April 8, 2020*
36 *Revision adopted and refiled by a Commission of Presbytery on March 26, 2021*
37 *Attested by TE Nathan Chambers, interim stated clerk*

⁴ It might be significant to note that no SJC members were on the 1999 B&O Committee. (*M27GA*, p. 181)

⁵ In Case 2019-10, *Evans v. Arizona*, the SJC ruled: “The Complaints are sustained, the action of AZP is annulled, and the matter is *remanded to AZP for further action* consistent with this Decision. ... Nothing in this Decision, however, affects the underlying matter before AZP with respect to [the minister]. AZP could adjudicate the underlying matter *as a case without process*, a case of process, or a case to be dismissed entirely.” (Emphasis added.)

In Case 2019-04, *Williams v. Chesapeake*, the SJC ruled: “The Complaint is sustained and the action of Presbytery approving the [Presbytery Judicial Commission] report is annulled, thereby *returning the matter* to the PJC. The PJC is free to dismiss the case, or to *adjudicate the case with process* according to the principles set forth herein.” (Emphasis added.)