

Judicial Conduct Commissions

HOW JUDICIAL CONDUCT COMMISSIONS WORK

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This article describes how the judicial conduct organizations established in all fifty states investigate, prosecute, and adjudicate complaints about judicial misconduct. Noting the general rules and exceptions, the article covers commission membership, grounds for discipline, bifurcated systems, and supreme court review. Jurisdictional issues are discussed in light of the high dismissal rate for complaints and consideration of pre-bench conduct and continuing jurisdiction over former judges. Major sections of the article are devoted to confidentiality at all phases of the proceedings (during investigation, after dismissal, and for formal proceedings) and the variety of available formal and informal sanctions.

To maintain and restore public confidence in the integrity, independence, and impartiality of their judiciary, each of the fifty states, beginning with California in 1960, has established a judicial conduct organization charged with investigating and prosecuting complaints against judicial officers. Although punishment plays an “undeniable role” in judicial discipline (Johnstone, 2000, at 1234), protecting the public, not sanctioning judges, is the primary purpose of the judicial conduct commissions.

One way to protect the public is to remove the offending judge from office. . . . [A]nother way to protect the public is to keep it informed of judicial transgressions and their consequences, so that it knows that its government actively investigates allegations of judicial misconduct and takes appropriate action when these allegations are proved. Judicial discipline thus protects the public by fostering public confidence in the integrity of a self-policing judicial system (Johnstone, at 1234).

In addition, sanctions deter further misconduct by the disciplined judge and other judges.

Judicial conduct organizations (called judicial conduct commissions in this article) have different names in different states—commission, board, council, court, or committee—and they are described by terms such as conduct, inquiry, discipline, qualifications, disability, performance, review, tenure, retirement, removal, responsibility, standards, advisory, fitness, and investigation. All the commissions have some features in common, but each is different, and the following description contains generalizations that do not necessarily apply to every state. (Complaints against federal judges under the Judicial Improvements Act of 2002 will not be discussed in this article [see Hellman, in this issue].)

MEMBERSHIP

The judicial conduct commission has been established by a provision in the state constitution in twenty-eight states, by a statute in sixteen states, and by court rule in seven (see Table 1). Judicial conduct commission membership ranges from twenty-eight members (Ohio) to five (Montana), although most commissions have between seven and eleven members. Most commissions have some members who are judges, some who are lawyers, and some called public members, lay members, or citizen members who are neither judges nor attorneys. A majority of the members are neither lawyers nor judges in eight states (California, Hawaii, Iowa, New Jersey, New Mexico, North Dakota, Washington, and Wisconsin). Five states have a majority of judge members (Arizona, Michigan, Mississippi, Tennessee, and West Virginia). In some states, the judge members are appointed based on the court in which they sit. For example, the Arizona Constitution specifies that the Judicial Conduct Commission shall include “two judges of the court of appeals, two judges of the superior court, one justice of the peace and one municipal court judge” in addition to two attorneys and three citizen members (Art. 6.1, § 1A).

In many states, the public members are appointed by the governor, the attorney members by the state bar, and the judge members by the supreme court; in some states, the legislature must approve appointments. All members are chosen by the supreme court in six states (Kansas, New Jersey, Ohio, South Carolina, Vermont, and West Virginia). Other appointing authorities involved in some states include judges’ organizations and legislators.¹

GROUNDINGS FOR DISCIPLINE

The enabling provisions that create the commissions specify the grounds on which a judge may be investigated and disciplined. These grounds frequently include willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, persistent failure to perform judicial duties, habitual intemperance, and conviction of a crime. In some states, a significant violation of the code of judicial conduct, adopted by each state’s high court, is automatically considered misconduct in office or conduct prejudicial to the administration of justice. However, in some states, a finding of a violation of the code is only the starting point, and whether the violation constitutes willful misconduct or conduct prejudicial to the administration of justice requires additional analysis because prejudicial conduct is considered less serious than willful misconduct.

A judge commits willful misconduct if the judge violates the code of judicial conduct while acting in a judicial capacity and with malice or in bad faith—in other words, when the judge knew or should have known the act was beyond his or her power or when the judge was acting for a purpose other than faithful discharge of judicial duties. Prejudicial conduct may be committed by a judge while acting either in a judicial capacity or in other than a judicial capacity and does not require bad faith

¹ For more information on commission composition and membership, see the commission Web sites (http://ajs.org/ethics/eh_conduct-orgs.asp) or <http://www.ajs.org/ethics/pdfs/Commission%20membership.pdf>.

Table 1
Establishment of State Judicial Conduct Commissions

By State Constitution	By State Statute	By State Court Rule
Alabama Constitution, Article VI, §§ 157, 158	Connecticut General Statutes, § 5151k	Hawaii Supreme Court Rules, Rule 8
Alaska Constitution, Article IV, § 10	Idaho Code, Chapter 21, § 12101	Kansas Supreme Court Rules, Rules 602-627
Arizona Constitution, Article VI.I, § 1	Iowa Code, Title XV, Subtitle 2, Chapter 602, Article 2, Part 1	New Hampshire Supreme Court Rules, Rule 38-A
Arkansas Constitution, Amendment 66	Maine Statutes, Title 4, § 9 B	New Jersey Supreme Court Rules, Rule 2:15
California Constitution, Article VI, §§ 8, 18, 18.1, and 18.5	Massachusetts General Laws, Chapter 211C	South Carolina Appellate Court Rules, Rule 502
Colorado Constitution, Article VI, § 23	Minnesota Statutes, § 490.15	Vermont Supreme Court Rules for Disciplinary Control of Judges
Delaware Constitution, Article IV, § 37	North Carolina Statutes, Article 30, § 7A-374.1	West Virginia Rules of the Judicial Disciplinary Procedure, Rule 1
Florida Constitution, Article V, § 12(b)	North Dakota Code, 27-23-01	
Georgia Constitution, Article VI, § 7, ¶ VI	Ohio Code, § 2701.11	
Illinois Constitution, Article VI, § 15	Oklahoma Statutes, Title 20, § 1651	
Indiana Constitution, Article 7, § 9	Oregon Revised Statutes, §§ 1.410 through 1.480	
Kentucky Constitution, § 121	Rhode Island General Laws, Title 8, Chapter 16	
Louisiana Constitution, Article V, § 25	Tennessee Statutes, § 17-5-101	
Maryland Constitution, Article IV, 4A	Utah Code, Title 78, Chapter 8	
Michigan Constitution, Article VI, § 30	Virginia Code, § 17.1-901	
Mississippi Constitution, § 177A	District of Columbia Code, § 11-1521.	
Missouri Constitution, Article V, § 24		
Montana Constitution, Article VII, § 11		
Nebraska Constitution, Article V, § 28		
Nevada Constitution, Article VI, § 21		
New Mexico Constitution, Article VI, § 32		
New York Constitution, Article VI, § 22		
Pennsylvania Constitution, Article V, § 18		
South Dakota Constitution, Article V, § 9		
Texas Constitution, Article 5, § 1-a		
Washington State Constitution, Article IV, § 31		
Wisconsin Constitution, Article VII, § 11		
Wyoming Constitution, Article 5, § 6.		

but only negligent conduct that to an objective observer would appear to be prejudicial to public esteem for the judicial office although actual notoriety is not required (see, e.g., Adams, 1995:547-48; *Commission v. Milling*, 1997, at 538).

Most commissions also have the ability to retire a judge involuntarily if there is proof of a mental or physical disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent. Eight commissions also issue judicial ethics opinions on request from judges wanting advice on prospective conduct.

JURISDICTION

Most complaints filed with judicial conduct commissions—generally more than 90 percent each year—are dismissed. For example, the *Annual Report* of the Texas State Commission on Judicial Conduct (2006) indicates that, of the 985 complaints disposed of by the commission in fiscal year 2006, 950 were dismissed after an investigation revealed that the claims were gratuitous and unsupported by any facts or evidence or that the allegations were about a judge's discretionary ruling that may only be resolved on appeal.

Many complaints are dismissed as beyond the jurisdiction of the commission because, in effect, the complainant is asking the commission to act as an appellate court and review the merits of a judge's decision by claiming that the judge made an incorrect finding of fact, misapplied the law, or abused his or her discretion. These complaints are frequently filed by disappointed litigants, particularly in emotionally charged litigation such as child-custody or criminal cases. Disappointed litigants are not allowed to circumvent the appellate process established in the constitution by filing a complaint with the commission as a substitute for appeal. Moreover, the power of conduct commissions is limited to protect the independence of the judiciary: a judge must feel free to make a decision that may provoke complaints without fearing that he or she will be disciplined by the commission.

However, there are exceptions to the legal-error rule. A conduct commission may review a judge's actions to determine if there is a pattern of legal error or if a decision was motivated by an improper motive, such as bias, revenge, or anger; was contrary to clear and determined law; disregarded important procedural requirements; or violated fundamental rights (Gray, 2004).

Some commissions have been expressly granted jurisdiction over conduct by judges before they became judges. For example, under its rules, the Minnesota Board on Judicial Standards has jurisdiction over "conduct that occurred prior to a judge assuming judicial office." The Nebraska Supreme Court held that the Commission on Judicial Qualifications was authorized to discipline a sitting judge for conduct that occurred before the judge took office that had a "pertinent bearing or impact" on the question of the judge's present fitness, including "a present rational relation" to the judge's character (*State of Nebraska ex rel. State Bar Association v. Krepela*, 2000). The court added that, to avoid compromising the independence of the judiciary, the

Counsel for Discipline of the State Bar Association could not investigate a judge for pre-bench conduct. In that case, the judge, while serving as a county attorney, had altered a copy of a police report in a criminal case, provided the altered report to defense counsel, and asked the police officer who made the report to either alter his original report or alter his testimony to conform to the changes.

In contrast, the Missouri Supreme Court held in *In re Burrell* (1999) that the Commission on Retirement, Removal and Discipline did not have jurisdiction over a new judge for conduct during his campaign for office. The Missouri Constitution provided that “the commission shall receive and investigate . . . all complaints concerning misconduct of all judges” (Art. V, § 24). Stating that the section is addressed solely to the misconduct of sitting judges, the court held that because the judge’s alleged misconduct occurred while he was not yet a judge, the commission could not prosecute him, and only the attorney-discipline authorities had jurisdiction.

Although in some states, after a judge leaves office, the commission loses jurisdiction or the proceedings are considered moot, in most states, the judicial conduct commission or supreme court retains authority to impose a sanction for judicial misconduct even after a judge has resigned, retired, or failed to be reelected or reappointed (Gray, 2006). Sometimes, the jurisdiction is expressly granted by a statute or rule; sometimes, the supreme court has construed the jurisdiction from relevant provisions. In some states, that authority includes the ability to remove a former judge; in other states, a former judge cannot be removed but can receive a reprimand or similar sanction.

Courts cite several policy reasons for continuing disciplinary proceedings even after a judge has left office. Even if a judge is no longer presiding over cases, a sanction may still “be essential to ‘the preservation of the integrity of the judicial system’, especially if that integrity has been critically undermined, because the alternative, silence, may be construed by the public as an act of condonation” (*Probert*, 1981, at 776). As another court observed, the integrity of the judicial system may be “fostered, not just by the removal or suspension of a judge, but also by the commission’s investigation, a public hearing, and sanctions other than removal from office, such as public censure (*Thayer*, 2000, at 1005). “[E]ven after leaving office, an exjudge retains the status of the judicial office on his resume. The public is entitled to know if the record is tarnished” (*In re Steady*, 1994, at 118). Moreover, “judicial conduct is a matter of great public interest,” and even cases involving former judges “serve as a guide for the entire judiciary” and establish needed precedent (*Commission v. Dodds*, 1996, at 182).

CONFIDENTIALITY DURING INVESTIGATION

During an investigation, in all states, commission proceedings are confidential, and the commission cannot disclose or confirm that a complaint has been filed against a judge or that the commission is investigating a judge unless an exception applies. The United States Supreme Court has stated that confidential investigations “encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination” (*Landmark*

Communications, Inc. v. Virginia, 1978, at 835). Moreover, because “frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants,” confidentiality protects judges from the publication of unexamined and unwarranted complaints and maintains confidence in the judiciary as an institution “by avoiding premature announcement of groundless claims of judicial misconduct or disability” (*Landmark Communications*, at 835).

In addition, confidentiality may encourage judges who have engaged in misconduct or have a disability to resign or retire “quietly” before the complaint becomes public with the commencement of formal proceedings (*Kamasinski*, 1991, at 1093). Finally, confidential investigations allow commissions to respond privately or informally to minor misconduct that should be called to the judge’s attention but may not necessarily justify formal proceedings.

In some states, confidentiality binds only commission members and staff. In most states, however, the complainant and anyone contacted by the commission during its investigation are also prohibited from revealing that a complaint has been filed or that there is an investigation. That restriction has been challenged in several cases and was held unconstitutional at least insofar as it prescribes criminal punishment for strangers to the inquiry, including news media, who divulge or publish truthful information regarding confidential proceedings (*Landmark Communications* at 835).

There is disagreement about whether, consistent with the First Amendment, a state may prohibit a complainant, before a finding of probable cause, from disclosing that he or she has filed a complaint. A federal district court held that the Connecticut Judicial Review Council may, before a probable-cause determination, prohibit a complainant or witness from disclosing that he or she filed a complaint or testified but may not prohibit a complainant or a witness from disclosing the information contained in his or her complaint or testimony to the council (*Kamasinski*, 1991). In other words, the court stated, the state may not prohibit a complainant from publishing his view that “Judge Jones is abusive,” but could prohibit a complainant from stating “I have just filed a complaint about Judge Jones with the council.”

In contrast, another federal court held that the confidentiality rules of the Florida Judicial Qualifications Commission violated the First Amendment insofar as they prohibited complainants from revealing that they had filed a complaint (*Doe*, 1990). The court found that the restriction was overbroad because it applied to meritorious as well as false complaints. The court also concluded that the danger that publication of the complaint would necessarily result in overvaluation of its merits was largely illusory. Finally, the court found that the commission had not cited any evidence that confidentiality facilitates the effective investigation of complaints.

Some states have adopted an exception to the requirement of confidentiality that allows or even requires the judicial conduct commission to disclose otherwise confidential information under certain circumstances. Exceptions in some states allow commissions to disclose to bar authorities information about possible violations of the code of professional responsibility for lawyers or to disclose information about

possible criminal violations to law-enforcement authorities. Similarly, commission rules may allow disclosure to authorities investigating whether a judge should be reappointed or appointed to a new judicial office or another government position. Some commissions may release a statement of clarification and correction if a complaint against a judge has become public despite the confidentiality provisions. Finally, in most states, a judge may waive confidentiality.

CONFIDENTIALITY OF DISMISSALS

Following an investigation, a commission may dismiss the complaint if there is no probable cause to find that the judge committed misconduct. In all but three states, the commission does not disclose its decision to dismiss a complaint except to the judge and the complainant. However, some federal courts have held that complainants have a First Amendment right to disclose the disposition, because, after the commission has found that there is no probable cause, the state's interest in encouraging the filing of complaints and cooperation with the investigation has expired (*Kamasinski*, 1991; *Doe*, 1990).

Some states have an exception that allows a commission to disclose the otherwise confidential dismissal of a complaint when the allegations against the judge are already public. For example, the rules of the Minnesota Board on Judicial Standards provide that "if the inquiry was initiated as a result of notoriety or because of conduct that is a matter of public record, information concerning the lack of cause to proceed may be released by the board" (Rule 5(d)(2)). The board relied on this rule in 2006 when it publicly announced that it had found no evidence that any of the seven state-supreme-court justices had talked with a state senator about a law to define marriage. The statement of then-state Senate Majority Leader Dean Johnson to a group of pastors that the justices had assured him that they would not overturn the law had been widely reported in the media and resulted in two complaints to the board. Following its investigation, the board publicly released its letter to the complainants stating, "There is no evidence that any promises, commitments or predictions were made to anyone by any justice of the Minnesota Supreme Court concerning how any court might rule on any issue relating to the Defense of Marriage Act or any of the issues raised in Sen. Johnson's remarks." The letter noted that the board's investigation had involved sworn testimony from fourteen people, including the seven justices and Johnson (Paull Letter, 2006).

In three states, the commission's decision to dismiss a complaint is subject to public disclosure. In 1990, the Arkansas Supreme Court amended the rules of the Commission on Judicial Discipline and Disability to require that any action taken by the commission after an investigation—dismissal, admonishment, recommendation of a change in conduct, or imposition of conditions upon future conduct—would be communicated to the judge by a letter, and the letter would be public (*In the Matter of Rules 7 and 9*, 1990).

Effective April 1, 2000, the New Hampshire Supreme Court (Rule 40, §3) required the Committee on Judicial Conduct to make available for public inspection

a complaint, a judge's reply, and the committee's disposition after a complaint has been dismissed or informally resolved or adjusted. The rules also make public those grievances the committee does not docket as complaints because they do not allege facts that would establish a violation or are related to a judge's rulings. No materials are disclosed until after the judge has been given the opportunity to provide a reply that will be filed in the public record. The rules allow the committee to issue a protective order at the request of any person or entity or on its own initiative. Although the court did not explain why it changed the rules, the opening up of the process came after almost a decade of public controversy over judicial decisions, allegations of misconduct by justices on the court, and accusations that the committee was ineffectual and was covering up judicial misconduct (Gray, 2001a).

In adopting new confidentiality rules for the Commission on Judicial Conduct that went into effect on January 1, 2006, the Arizona Supreme Court was responding to a petition filed by a disgruntled complainant (a county attorney), who, after his complaint about a judge only led to a private reprimand, asked that all complaints against judges and all forms of judicial discipline be made public (Stott, 2006). The county attorney's petition noted that some of the conduct for which judges had received private reprimands appeared quite significant and that Arizona citizens could learn if their doctors or lawyers were suspected of misconduct. The petition argued that, because judges in Arizona are elected, the public has a right to know about even isolated acts of misconduct or the appearance of impropriety and which complaints the commission has dismissed. In opposition, the commission argued that dismissed complaints should remain confidential and noted that the majority of complaints are dismissed because there is no evidence of misconduct or the complaints involve legal issues outside its jurisdiction.

Under the amended rules, if the commission dismisses a complaint, it makes the complaint and the dismissal order public, but it first redacts the names of the complainant and the judge and other personal information. Redacted complaints and orders of dismissal are posted on the commission's Web site after the deadlines for motions for reconsideration have passed. In informal proceedings in which the commission issues a public reprimand, the complaint, the judge's response, and the commission's decision are released at the conclusion of the case with the names intact.

INFORMAL DISPOSITIONS OR PRIVATE SANCTIONS

Many judicial conduct commissions have the authority to resolve complaints through a private sanction or informal means (see Gray, 2002: Table I, Appendix I). These resolutions are variously called dismissals with caution, concern, or warning; letters of admonition; advisory letters; private reprimands, admonitions, or warnings; adjustments; informal dispositions; or deferred-discipline agreements. They are used if the misconduct is a relatively minor, isolated mistake that is not likely to be repeated and the judge has acknowledged the mistake and agrees to take steps to improve, has not previously been disciplined for the same conduct, and has not recently been disci-

plined for any misconduct. In an informal disposition, the commission warns that further complaints may lead to more serious consequences or recommends that the judge change specific behaviors or obtain counseling or education. Informal dispositions can usually be used in subsequent proceedings to increase the level of sanction, particularly if the judge repeats the conduct about which the caution was issued.

The California Supreme Court rejected a judge's argument that before the commission could issue an advisory letter, due process entitled him to a hearing; to the right to review the evidence the commission had reviewed and confront adverse witnesses or evidence; and to judicial review (*Oberholzer*, 1999). The court held that, balancing the judge's private interest in a judicial career free of disciplinary measures and the commission's interest in effectively and efficiently safeguarding the public from aberrant action by judicial officers, due process of law does not require the additional protections urged by the judge and that the commission's procedures sufficiently protect a judge from the unreasonable issuance of an advisory letter.

Although informal dispositions and private sanctions are confidential, some commissions include brief descriptions of private sanctions in their annual reports, without revealing the judge's name, to give guidance to the judiciary and to explain to the public the commission's remedial work. For example, in its 2005 annual report, the California Commission on Judicial Performance summarized the six private admonishments and twelve advisory letters it had issued that year, with details omitted or obscured.

FORMAL PROCEEDINGS

In thirty-four states, if the commission finds probable cause to believe that a judge has committed misconduct justifying a formal disciplinary proceeding, confidentiality ceases, and the formal charges, the judge's answer, and subsequent proceedings, including the hearing and the commission's decision, are public. In one state, confidentiality ceases when the fact-finding hearing begins.² In thirteen states, the hearing remains confidential, and confidentiality ceases only if the commission files a recommendation for public discipline with the supreme court.³ In three jurisdictions, judicial discipline proceedings remain confidential unless and until the supreme court orders that the judge be publicly disciplined.⁴

New York is one of the states in which discipline hearings are closed to the public, but the State Commission on Judicial Conduct has urged for years that the legislature adopt changes that would open up proceedings; those efforts have been supported by Chief Judge Judith Kaye since at least 2003. In its 2006 annual report, for example, the commission argued that "if the charges and hearing portion of a

² Oregon.

³ Colorado, Idaho, Iowa, Louisiana, Maine, Mississippi, Missouri, New Mexico, New York, South Dakota, Utah, Virginia, and Wyoming.

⁴ Delaware, Hawaii, and the District of Columbia.

Commission matter were open, the public would have a better understanding of the entire disciplinary process,” which may be lengthy. Moreover, the commission stated that “maintaining confidentiality is often beyond the Commission’s control” as subpoenas are issued, witnesses are interviewed and prepared to testify, and judges consult with judicial colleagues, staff, and others and word spreads. “As more ‘insiders’ learn of the proceedings,” the commission notes, “the chances for ‘leaks’ to the press increase, often resulting in published misinformation and suspicious accusations as to the source of the ‘leaks.’”

At any stage in the proceedings, a judge may agree with the commission to admit the misconduct in exchange for a stated sanction. Approximately 50 percent of the public sanctions every year are imposed pursuant to an agreement. If the charges are sufficiently serious, the agreement may provide that the judge will resign and agree never to serve as a judge again in return for the commission taking no further action against the judge. In some states, high-court approval of an agreement in a judicial discipline case is required.

Unless there is an agreement or the judge resigns, a hearing is held after formal charges are filed in judicial discipline proceedings, following the judge’s answer and discovery. Who conducts the hearing and takes the evidence varies from state-to-state (Gray, 2001b). In some states, the hearing is conducted before the entire commission (or at least a quorum) or before a subcommittee of the commission. In other states, the hearing is usually before a master or masters appointed by the state high court or commission solely for that purpose. The masters then file for the commission’s review a report containing nonbinding findings of fact and conclusions of law.

BIFURCATED SYSTEMS

Judges frequently argue that the judicial discipline systems violate their constitutional due-process rights if the commission not only investigates and prosecutes complaints but also makes the decisions. They are also concerned that evidence gathered during the investigative phase that is not admitted at the hearing phase (for example, because it violates one of the rules of evidence) will nonetheless taint the members’ view of the judge. These arguments have been rejected by all of the more than twenty state high courts that have considered it because the decisions of the commission are reviewed by the supreme court.

However, although separation of the prosecutorial and adjudicative roles is not required by due process, some states have adopted bifurcation as a matter of policy. Those states fall into two categories: the states with a two-tier structure and those with a two-panel structure.

There are eight two-tier states—Alabama, Delaware, Illinois, Ohio, Oklahoma, Pennsylvania, West Virginia, and Wisconsin—although the exact procedures vary considerably among those eight states. In those states, complaints against judges are investigated by one body (the first tier), which decides whether to file formal charges; the formal charges are heard and decided by a second body (the second tier) that has

a different name, different membership, different offices, and different staff. The second-tier decision is usually reviewed or reviewable by the state supreme court.

In Pennsylvania, for example, the Judicial Conduct Board receives and investigates complaints; if it finds probable cause, it files formal charges with the Court of Judicial Discipline, and presents the case in support of the charges (Pennsylvania Constitution, Art. IV, § 18). The Court of Judicial Discipline holds a public hearing on the charges filed by the board and renders a decision. The court may reprimand a judge, suspend the judge with or without pay, or remove the judge from office. A judge may appeal an adverse decision to the Pennsylvania Supreme Court. The board may appeal an order that dismisses a complaint, but its appeal is limited to questions of law.

The two-panel structure differs from the two-tier structure because there is only one body but commission members rotate between the investigative and adjudicative roles. No member who sat on an investigative panel that decided to file formal charges against a judge subsequently sits on the adjudicative panel that holds the hearing and makes a decision on the charges. The decision of the hearing panel may be reviewed by the supreme court. Arizona, Florida, Kansas, North Carolina, South Carolina, Tennessee, Vermont, and Wyoming have two-panel commissions. The use of two panels is based on the *ABA Model Rules for Judicial Disciplinary Enforcement* (1994), although no state has adopted the precise structure suggested by the Model Rules.

For example, in Florida (Florida Constitution, Article 5, § 12), the fifteen members of the Judicial Qualifications Commission are assigned to either a nine-member investigative panel or a six-member hearing panel. After receiving or initiating a complaint and conducting an investigation, the investigative panel either dismisses the complaint or submits formal charges to the hearing panel. The hearing panel holds a public hearing on the formal charges and makes a recommendation to the Florida Supreme Court.

In Kansas, under Rules 601 and 605A, the Commission on Judicial Qualifications is divided into two seven-member panels (designated Panel A and Panel B), which meet on alternate months. Complaints are assigned to either Panel A or Panel B for initial review and investigation. If Panel A, for example, concludes that formal proceedings should be instituted against a judge, it files a formal complaint, and Panel B conducts the formal hearing. The hearing panel may admonish a judge, issue an order of cease and desist, or recommend to the Kansas Supreme Court that the judge be censured, suspended, removed, or retired.

THE SANCTION

The sanctions that may be imposed following a hearing vary from state to state, but range from private or public chastisements (variously called warnings, reprimands, admonishments, and censures) through fines and suspension without pay to removal (see Gray, 2002: Table I, Appendix I). In 2006, for example, as a result of state judicial discipline proceedings, twelve judges were removed from office; eleven judges

resigned (or retired) in lieu of discipline; one judge was required to retire; and four former judges were barred from serving in judicial office. One hundred and eleven additional judges were publicly sanctioned. Eighteen judges were suspended without pay from five days to two years; one suspension also included a \$5,000 fine. There were eighteen public censures, twenty-nine public admonishments, thirty-five public reprimands (one of which also included a \$1,500 fine), three cease-and-desist orders, two public warnings, and six other sanctions.

In all but five states (Maine, Massachusetts, Tennessee, Vermont, and West Virginia), judges may be removed from office as a result of judicial discipline proceedings (Gray, 2002:Table I, Appendix I). In addition, except in Hawaii, Ohio, Oregon, or Washington, impeachment is an often-threatened but seldom-used alternative for removing a judge. Some other states have alternative methods for removal, such as legislative address. There may be collateral consequences to removal from office that affect a former judge's ability to serve as a judge in the future or to practice law (Gray, 2002:27).

Choosing the proper sanction in judicial discipline proceedings "is an art, not a science, and turns on the facts of the case at bar" (Furey, 1987:930). Nevertheless commissions and courts have developed factors to assist in determining the appropriate sanction. Most often cited is the nonexclusive list compiled by the Washington Supreme Court (*In re Deming*, 1987, at 659):

- (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct;
- (b) the nature, extent and frequency of occurrence of the acts of misconduct;
- (c) whether the misconduct occurred in or out of the courtroom;
- (d) whether the misconduct occurred in the judge's official capacity or in his private life;
- (e) whether the judge has acknowledged or recognized that the acts occurred;
- (f) whether the judge has evidenced an effort to change or modify his conduct;
- (g) the length of service on the bench;
- (h) whether there have been prior complaints about this judge;
- (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and
- (j) the extent to which the judge exploited his position to satisfy his personal desires.

In addition to sanctions such as reprimand or suspension, some commissions or courts have required corrective action by judges in disciplinary proceedings (Gray, 2003). The types of conditions that have been imposed include taking remedial measures, making apologies, and undergoing education, counseling, or mentoring.

REVIEW

In some states, the commission's decision that a judge committed misconduct and should be sanctioned is a recommendation that becomes effective only if adopted by the state high court (see Gray, 2002:Table I, Appendix II). In other states, the commission's decision that a judge committed misconduct and should be sanctioned is final unless the judge asks the court to review the decision. In some states, sanctions

such as reprimands or censures can be imposed by the commission itself, subject to review, but removal and suspension can be imposed only by the supreme court.

The high court independently evaluates the record and reviews the recommendation or decision *de novo*, but the commission recommendation or decision regarding sanction is given deference. The reviewing court independently fashions an appropriate remedy and is not limited merely to approving or rejecting the commission's recommendation but may impose either a higher or lower sanction.

If a supreme court justice is the subject of a commission proceeding, the matter would come before that justice's colleagues for review. Therefore, several states have provisions that create a substitute supreme court when there is a finding of misconduct by a supreme court justice (Rosenbaum, 1994). Usually, the members of the substitute supreme court are chosen by lot or seniority from court of appeals judges.

CONCLUSION

Judicial conduct commissions hold an awkward position in the justice system. The public, pointing to the high complaint-dismissal rate, accuses them of white-washing judicial misconduct. The media generally discovers them only in the event of a scandal, accusing them of being secretive and obscure. Some judges accuse them of engaging in witch hunts and acting as kangaroo courts or Star Chambers or, at most, grudgingly accept them as a necessary evil. Despite being misunderstood and unwelcome, the commissions continue to review thousands of complaints a year, looking for the few judges who have acted contrary to the high ethical standards applied to the judiciary and responding with measures that will justify public confidence in the remainder and in the system. The procedures that the commissions use to investigate and adjudicate claims vary widely and are constantly evolving but reflect the experience of each state. **jsj**

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