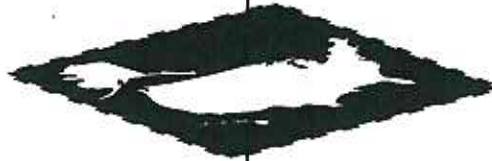


How Judicial Conduct Commissions Work



How Judicial Conduct Commissions Work

Each of the 50 states and the District of Columbia has established a judicial conduct organization charged with investigating complaints against judicial officers.

- ◆ In most states, the judicial conduct organization has been established by a provision in the state constitution.
- ◆ In some states, the judicial conduct organization has been established by a court rule.
- ◆ In some states, the judicial conduct organization has been established by statute.

Depending on the state, the judicial conduct organization may be called a commission, board, council, court, or committee, and described by terms such as inquiry, discipline, qualifications, disability, performance, review, tenure, retirement, removal, responsibility, standards, advisory, fitness, investigation, or supervisory.

This discussion of how commissions work will use the general term "judicial conduct commission" to describe all 51 organizations. Note that, although all the commissions have some features in common, each is different, and the following description unavoidably depends on generalizations that do not necessarily apply to every state.

Judicial conduct commissions have jurisdiction over (in other words, authority to investigate) supreme court justices, trial and appellate judges, and other judicial officers, such as, depending on the state court structure, court commissioners, referees, magistrates, masters, part-time judges, retired judges subject to

recall or available for assignment, and temporary judges. In some states, the judicial conduct commissions also have jurisdiction over employees of the state court system and administrative law judges. Depending on the state, the conduct commission is either an independent state agency or part of the judicial branch.

Membership

Judicial conduct commission membership ranges from 28 members (Ohio) to 5 (Montana). (See Appendix C). Most states have some members that are judges, some that are lawyers, and some that are neither judges nor attorneys (called public members, lay members, or citizen members).

- ◆ All commissions have public members; in seven states, a majority of the members are neither lawyers nor judges.
- ◆ All commissions have attorney members, except the West Virginia's Judicial Investigation Commission and Judicial Hearing Board.
- ◆ All commissions have judge members, except the Hawaii Commission on Judicial Conduct and the New Jersey Advisory Committee on Judicial Conduct. (The New Jersey Committee has members who are retired judges.)
- ◆ In some states, the types of judges to be appointed are designated (for example, the Arizona Commission on Judicial Conduct has two court of appeals judges, two superior court judges, one justice of the peace, and one municipal court judge, in addition to two attorney members and three public members).

In 10 states, all members are chosen by the supreme court. In most other states, the public members are appointed by the governor, the attorney members are appointed by the state bar, and the judge members are appointed by the supreme court; in some states, the legislature must approve appointments. Other appointing authorities involved in some states include judges' groups and legislators.

- ◆ In some states, each member has an alternate who is appointed in the same manner as the member and who sits if the member is disqualified or unable to serve on a case.
- ◆ In some states, if a member is disqualified or unavailable, the authority who appointed that member appoints a temporary alternate.
- ◆ In some states, there is no provision made for alternates.

Commission members elect a chair and vice chair. The chair presides over meetings and performs other duties as delegated by the commission, such as consulting with staff on urgent matters that arise between meetings and dealing with the budget. The vice chair presides when the chair cannot.

The purpose of judicial conduct commissions

Most simply put, judicial conduct commissions have been established:

- to investigate complaints about judges' conduct,
- to determine whether a judge has committed misconduct or is disabled,

- to assist judges who have committed minor ethical violations to change their behavior,
- to impose or recommend discipline if appropriate against a judge who violates ethical standards, and
- when necessary, to secure the removal of a judge from office.

In addition, some commissions issue advisory opinions, make recommendations for appointments to judicial vacancies, or review judges' applications for disability retirement.

More generally, the purpose of judicial conduct commissions is to maintain and restore public confidence in the integrity, independence, and impartiality of judges and the judicial system by:

- enforcing rigorous standards of judicial conduct on and off the bench,
- assisting the judiciary in maintaining the necessary balance between independence and accountability,
- reassuring the public that the judiciary neither permits nor condones misconduct,
- providing a forum for citizens' complaints against judges,
- creating a greater public awareness of what constitutes proper and improper judicial conduct, and
- protecting judges from false, unfounded, and inaccurate accusations that can damage their reputations.

How the judicial discipline process begins

In most instances, judicial discipline proceedings are initiated by a written complaint

filed with the commission. Some states require that a complaint be in writing, under oath, and notarized or verified. Many states have complaint forms that individuals are encouraged to use. All complaints are acknowledged by the commission. In addition, most commissions can initiate inquiries based on information from any source, including anonymous complaints, news reports, referrals from other agencies (such as the office of court administrator or the attorney discipline agency), or information received during an investigation of another matter.

Most complaints about judicial conduct come from litigants (in other words, criminal defendants or parties to a civil case). For example, in 1997, 81% of the complaints filed with the California Commission on Judicial Performance came from a litigant or the family or friend of a litigant. Other complainants include attorneys, other judges, and court staff.

In the complaint, the complainant describes the facts and states how the complainant believes the judge has committed misconduct. For example, the complaint form for the Kansas Commission on Judicial Qualifications asks the complainant to:

Please state all specific facts and circumstances which you believe constitute judicial misconduct or disability. Include any details, names, dates, places, addresses, and telephone numbers which will assist the commission in its evaluation and investigation of this complaint. Also include any documents, letters, or other materials related to the complaint. Identify the names and addresses of any witnesses.

If the complaint arises out of a case, complaint forms also ask for information about the case such as the name and number, the type of case, the complainant's relationship to the case

(for example, plaintiff, defendant, attorney for a party, or witness), and whether the case is still pending. If the complaint is vague, the commission may ask the complainant for more specific detail or additional documentation.

Jurisdiction—What commissions can and cannot do

Individuals

Commissions sometimes receive complaints about individuals over whom they have no jurisdiction, for example, attorneys, law enforcement officers, or federal judges. Those complaints are either dismissed or not docketed, with an appropriate referral when possible, for example, to the attorney discipline agency.

Matters

Most complaints filed with judicial conduct commissions—generally more than 90% each year—are dismissed. Some of these are dismissed because they do not allege a violation of the code of judicial conduct; for example, litigants sometimes complain that a judge did not respond to phone calls or letters because they do not understand that a judge is required to ignore such *ex parte* communications.

Moreover, many complaints are dismissed every year as beyond the jurisdiction of the commission because, in effect, they are asking the commission to act as an appellate court and review the merits of a judge's decision, 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 divorce or custody cases, contested probate cases, or criminal trials. Examples of typical complaints that are dismissed by commissions as outside their authority include complaints that a judge:

- improperly admitted or excluded certain evidence,
- believed perjured testimony,
- was too hard or too soft in sentencing,
- set bond too high or too low,
- should have made a larger or smaller award of child support, or
- awarded custody of a child to the wrong person.

Making an error, however, is not unethical judicial conduct in most cases; it simply reflects the fallibility of judges, and judicial conduct commissions were not established to punish such mistakes. Correcting errors is the role of the appellate courts, not the judicial conduct commissions. 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.

Finally, 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 prove to be unpopular with the public or cause the losing party to become hostile without fearing that he or she will be disciplined by the commission.

In addition, commissions do not have the authority to:

- provide individual legal assistance,
- intervene in litigation on behalf of a party,

- interfere in pending litigation,
- order a judge to step down from a particular case, or
- order anyone released from jail.

Distinguishing between legal error and judicial misconduct

Although review of a judge's decision is left to the appellate court in most cases, occasionally, a conduct commission may review a judge's actions to determine if the decision or exercise of discretion (such as determining sentence or bail) was motivated by an improper motive (such as bias or revenge), the legal error was egregious, or there was a pattern or practice of legal error.

To determine whether a decision was made in bad faith, in other words, committed for any purpose other than the faithful performance of judicial duties, commissions ask:

- Was the decision based on a demonstrated bias or prejudice?
- Was the purpose of the action to teach someone a lesson or send someone a message extraneous to the enforcement of the law?
- Did the judge display intemperate conduct?
- Did the judge's rulings evidence a consistent pattern of abuse of lawyers and/or others appearing before the judge?
- Did the judge have a conflict of interest?
- Did the judge abuse the judicial power?
- Did the judge abandon his or her role as a neutral and detached magistrate?
- Was there fraud?
- Did the judge have a corrupt motive?

To determine whether a legal error or abuse of discretion was egregious enough to constitute misconduct, commissions ask:

- Was the decision contrary to clear and determined law about which there is no confusion or unsettled question?
- Did the judge flagrantly disregard important procedural requirements?
- Did the judge deny fundamental rights, for example, a criminal defendant's constitutional right to counsel?
- Were the parties denied a full and fair hearing?
- Did the judge abdicate the duty to exercise judgement?
- Did the judge demonstrate a lack of understanding of the law?
- Did the judge demonstrate an unwillingness to apply the law?

To illustrate:

Ordinarily, a complaint about a judge's refusal to release a defendant on bail or about the amount of bail set would be dismissed by a judicial conduct commission as a complaint about the exercise of judicial discretion, not misconduct. However, sanctionable misconduct has been found:

- when a judge refused to release a defendant on bail because the judge had been required to get out of bed to conduct the arraignment (New York).
- when a judge set unusually high bail for four black defendants after learning that a large number of black voters in Boston had voted for his brother's opponent in the gubernatorial primary (Massachusetts).

Ordinarily, a complaint about a judge's sentence would be dismissed by a judicial conduct commission as a complaint about the exercise of judicial discretion, not misconduct. However, sanctionable misconduct has been found:

- when a judge imposed a higher than usual sentence on her former supervisor in order to retaliate for being fired (New York).
- when a judge reduced the minimum fine for those wishing to plead guilty to traffic citations to \$1 to send a message to the county commissioners who had informed judges that they were falling behind "current revenue estimates" (Texas).
- when a judge had a policy for sentencing persons convicted of DUI that allowed for no exceptions (California).

Ordinarily, a complaint about a judge's issuance of a warrant would be dismissed by a judicial conduct commission as a complaint about the exercise of judicial discretion, not misconduct. However, sanctionable misconduct has been found:

- when a judge issued warrants for the arrest of the chief of police motivated by personal bias and animosity (Texas).
- when a judge issued a bench warrant against a process server who had served a summons and complaint on the judge who had been named as a defendant in a civil action (South Carolina).

Ordinarily, a judge's decision to hold someone in contempt of court would be dismissed by a judicial conduct commission as raising a question for appeal. However, sanctionable misconduct has been found:



- when an experienced judge did not strictly adhere to proper procedures for holding someone in contempt and ignored binding precedent reversing his contempt rulings (Nevada).
- when a judge had a woman arrested for failing to appear for jury duty and confined her for approximately 40 days without holding a hearing at which she could be confronted with an accusation of contempt, without determining that she was in contempt, and without imposing a sentence (Kansas).
- when a judge held a litigant in direct contempt for personal criticism of the judge voiced in the hallway of the courthouse (Texas).
- when a judge held a defendant in contempt to teach him a lesson after he mailed a check for \$11 in payment of a parking fine with a note reading, "You people are crazy. I hope you choke on it!" (New Jersey).

Ordinarily, a judge's decisions are not subject to review by the conduct commission. However, sanctionable misconduct or incompetence has been found:

- when a judge made a number of rulings that were so far contrary to established law as to demonstrate a lack of understanding of the law or an unwillingness to apply it (Missouri).
- when the judge's rulings, statements, and conduct on the bench evidenced habitual abuse of counsel and others (U.S. Judicial Conference Committee).
- when a judge entered a judgement in a case without holding a trial or administering an oath to the witnesses, without

any evidence supporting his judgment, and knowing that the defendant had no legal obligation to pay the amount claimed and the decision was contrary to law (New York).

Investigation of judicial conduct complaints

If a complaint does state facts that, if true and not otherwise explained, would be misconduct (in other words, within the commission's jurisdiction), the commission begins an investigation.

- ◆ In some states, commission staff can begin an investigation without authorization by the commission.
- ◆ In other states, staff must wait until the commission reviews the complaint and authorizes an investigation.

An investigation typically involves interviewing, personally or over the telephone, the complainant, attorneys, court reporters, court employees, other witnesses, and lawyers who practice before the judge. Relevant transcripts and other documents are also examined.

Sometimes the judge's courtroom is monitored or a sample of transcripts is reviewed. Some commissions occasionally request investigative assistance from agencies such as the state police, district attorney's office, or other law enforcement agencies. An investigation sometimes uncovers matters in addition to the initial complaint and may be expanded to include those matters.

During the investigation, the judge is advised by letter about the allegations of the complaint, and the judge is given the opportunity to present information and explain the



actions under investigation to the commission in writing and/or, in some states, in person. The judge may be represented by counsel.

Confidentiality during an investigation

During an investigation, in all states, commission proceedings are confidential, and the commission cannot confirm or deny that a complaint has been filed against a judge or that the commission is investigating the judge. 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, although they cannot be prohibited from discussing the facts underlying a complaint. (For example, a complainant may say to a newspaper, "Judge Smith called me a name," but cannot say, "I filed a complaint with the commission after Judge Smith called me a name, and they are investigating the matter.") In some states, any person violating confidentiality is subject to contempt proceedings.

Confidentiality is intended:

- to encourage complainants and witnesses to come forward without fear that the judge will retaliate;
- to encourage complainants and witnesses to come forward without fear that the media or others will pursue them;
- to prevent unscrupulous complainants from engaging in a campaign of harassment that may overburden the commission, threaten to intimidate judges, and detract from the state's ability to attract qualified judges;

- to allow commissions to encourage infirm or incompetent judges to resign before charges become public; and
- to protect a judge's reputation from allegations that may prove to be baseless.

There are several common exceptions to the confidentiality requirement. In many, but not all, states:

- The judge may waive confidentiality.
- If the public has learned of the judge's conduct independent of the commission investigation, the commission may confirm there is an investigation, clarify how commission proceedings work, explain the right of the judge to a fair hearing, or state that the judge denies the allegations.

After the investigation

After considering the judge's response and other evidence gathered during the investigation, the commission may:

- dismiss the complaint if the facts discovered during the investigation do not support a showing that the judge committed misconduct warranting public discipline;
- file a formal statement of charges; or
- in some states, dispose of the matter with a private sanction or informal resolution.

The code of judicial conduct notes that, "It is not intended...that every transaction will result in disciplinary action."

Private and informal dispositions

Many judicial conduct organizations have the authority to resolve complaints through

private, informal means. (Not all commissions have this authority.) These resolutions are variously called dismissals with caution, concern, or warning; letters of admonition; advisory letters; private reprimands; private admonitions; adjustments; informal dispositions; or deferred discipline agreements.

Informal dispositions are used if:

- the misconduct is a single, isolated mistake that is not likely to be repeated;
- the misconduct is relatively minor;
- the judge has acknowledged the mistake and agrees to take steps to improve such as counseling or treatment;
- the judge has not previously been disciplined for the same conduct; and
- the judge has not recently been disciplined for other misconduct.

A minor violation is one that:

- did not involve the misappropriation of funds;
- did not result in substantial prejudice to a litigant or other person;
- did not involve dishonesty, deceit, fraud, or misrepresentation;
- did not constitute a crime that adversely reflects on the judge's honesty, trustworthiness, or fitness; or
- was not an actual impropriety but created the appearance of impropriety.

In an informal disposition, the commission:

- reminds the judge of ethical responsibilities;
- gives authoritative advice;
- expresses disapproval of the behavior;

- suggests that other actions would have been a more appropriate response to a particular situation;
- cautions the judge not to engage in specific behavior in the future;
- warns that further complaints may lead to more serious consequences; or
- recommends that the judge change specific behaviors or obtain counseling or education.

Sometimes, the informal disposition is done by letter and sometimes in a face-to-face meeting with the judge, either by the entire commission when the judge attends a meeting or by a delegation of one or more commission members who personally visit the judge to talk about the commission's concerns. Informal dispositions can usually be used in subsequent proceedings to increase the level of sanction, particularly if the judge repeats the conduct about which he or she was cautioned.

Some commissions can also agree with the judge at this stage to defer or suspend the proceedings if the judge agrees to undergo treatment (for example, for alcoholism), participate in education programs, or take other corrective action. The commission then monitors the judge's compliance with the agreement, reopening the discipline proceeding if the judge fails to complete the recommended program.

Although informal dispositions and private sanctions are confidential, some commissions include in their annual reports brief descriptions of private sanctions, without revealing the judge's name, to give guidance to the judiciary and to explain to the public the remedial work done by the commission.



Formal proceedings

A commission files a formal statement of charges (known as a formal complaint in some states) if it finds that there is probable cause that the judge has engaged in misconduct warranting public discipline. "Probable cause" means there are reasonable grounds for believing that the judge has violated the code of judicial conduct. According to *Black's Law Dictionary*, reasonable grounds are a "set of probabilities grounded in the factual and practical considerations that govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required" for a finding of misconduct.

- ◆ In some states, the decision whether to file formal charges is made by the entire commission.
- ◆ In the five states with a two-panel system, the decision whether to file formal charges is made by an investigative panel comprised of a subset of the entire commission, and the charges are filed with the hearing panel, comprised of the remaining members of the commission. See description at page 18.
- ◆ In the eight states with a two-tiered system, the decision whether to file formal charges is made by the first tier and the charges are filed with a completely separate organization. See description at page 18.

The statement of formal charges describes the facts underlying the specific charges against the judge in plain and concise language. There may be more than one incident of misconduct alleged in a single statement of charges; each incident or type of misconduct is called a "count." The statement of charges

also identifies the provisions of the code of judicial conduct alleged to have been violated, any relevant statutes, and court rules.

The charges are served on (in other words, delivered to, usually by mail) the judge, and the judge has an opportunity to answer. In his or her answer, the judge (often referred to as the "respondent") either admits or denies the facts and conclusions alleged in the complaint; the judge can admit some facts and conclusions and deny others.

After the judge's answer is filed, there is discovery.

- ◆ In some states, there is the same discovery as in civil cases—each side answers interrogatories (written questions), supplies all documents requested, and deposes witnesses (in other words, asks oral questions under oath and with a verbatim record made).
- ◆ In other states, discovery is more limited; for example, the commission and the judge may only be required to exchange the names, addresses, and statements of all witnesses they intend to call at the hearing, non-privileged evidence related to the charges, and documents to be presented at the hearing.

Confidentiality after formal charges are filed

- ◆ In 33 states, after formal charges are filed, confidentiality ceases, and the formal charges, the judge's answer, and subsequent proceedings, including the hearing and the commission's decision, are public.
- ◆ In 2 states, confidentiality ceases when the fact-finding hearing begins.

- ◆ In 13 states, judicial discipline proceedings remain confidential through the hearing, and confidentiality ceases only if the commission files a recommendation for public discipline with the supreme court.
- ◆ In two states (Delaware and Hawaii), judicial discipline proceedings remain confidential unless and until the supreme court orders that the judge be publicly disciplined.

See Appendix D.

Disposition pursuant to consent or stipulation

At any stage in the proceedings, a judge may agree with the commission to admit he or she committed misconduct in exchange for a stated sanction. As part of an agreement, the judge consents to the sanction, admits the truth of the charges, and waives a public hearing. If the charges are serious enough, the agreement may be 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, supreme court approval of an agreement in a judicial discipline case is required. In other states, as part of the agreement, a judge may waive review by the supreme court.

The hearing

After the judge's answer is filed, the case is set for a hearing, which is public in 35 states.

- ◆ In some states, the hearing is held before the entire commission.

- ◆ In some states, the hearing is held before a special master or masters who are not members of the commission.
- ◆ In some states, the hearing is held before a panel consisting of less than all the members of the commission.
- ◆ In the five states with two-panel systems, the hearing is held before the hearing panel of the commission, which is a subset of commission members that does not include any members that were on the investigative panel that voted to file the formal charges against the judge. *See* description at page 18.
- ◆ In the eight states with two-tiered systems, the hearing is held before a separate adjudicative body. *See* description at page 18.

The hearing is conducted like a civil trial, following, with some exceptions, the rules of evidence and civil procedure. The judge is entitled to be represented by an attorney. Counsel for the commission and the judge or the judge's counsel make opening statements. Counsel for the commission calls witnesses, asks them questions, and presents other evidence such as documents and transcripts. The judge or the judge's attorney may cross-examine the witnesses. The judge is then given an opportunity to testify, call witnesses, and offer evidence. Counsel for the commission and the judge or the judge's attorney make closing arguments. The proceedings are recorded on tape or by a court reporter.

Burden of proof

- ◆ In most states, judicial misconduct must be proven by **clear and convincing evidence**, which is a lower burden of proof than the



beyond a reasonable doubt standard required to convict someone of a crime.

- ◆ In some states, misconduct must be proven by a **preponderance of the evidence**, which requires less convincing proof than the clear and convincing standard.

Clear and convincing evidence

The clear and convincing evidence standard means that the evidence must be of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability that the facts for which it is offered as proof are true, in other words, a high probability that the judge has committed acts that constitute misconduct. To be clear and convincing:

- Evidence must be cogent, strong, definite, weighty, and direct.
- The witnesses must be found to be credible.
- The facts to which they testify must be distinctly remembered.
- The details narrated must be exact and in due order.

However, the clear and convincing standard does **not** require:

- Evidence that is uncontradicted, unanswerable, or conclusive.
- Evidence that eliminates all possible conclusions except one.
- Resolution of every reasonable doubt in the judge's favor.
- Acceptance of any theory in the judge's favor that is consistent with the evidence.
- Acceptance of all facts in the judge's favor if they are reasonably supported.

Preponderance of the evidence

"Preponderance of the evidence" means the greater weight of the evidence. In judicial discipline proceedings, this means that the existence of a fact indicating that the judge committed judicial misconduct is more probable than its nonexistence.

Grounds for discipline

- ◆ In some states, a **violation of the code of judicial conduct** alone is sufficient grounds for judicial discipline (although not all minor violations result in public sanction).
- ◆ In other states, proof of **willful misconduct** or **conduct prejudicial to the administration of justice that brings the judicial office into disrepute** is also necessary, although whether a judge violated the code is the first step in determining whether he or she committed willful misconduct or prejudicial conduct.

Other grounds for judicial discipline include:

- persistent failure to perform the duties of the office,
- habitual intemperance,
- conviction of a felony, or
- a physical or mental disability that seriously interferes with the performance of judicial duties and that is or may become permanent.

Willful misconduct

A judge commits willful misconduct if the judge:

- intentionally violates the code of judicial conduct,

- while acting in a judicial capacity, in other words, while performing an adjudicative or administrative function generally associated with the position of judge, **and**
- in bad faith.

An act is committed in bad faith if:

- the act was within the judge's lawful power but was committed for any purpose other than the faithful performance of judicial duties, **or**
- the act was beyond the judge's lawful power and the judge knew that the act was beyond the judge's lawful power, **or**
- the act was beyond the judge's lawful power and the judge consciously disregarded the limits of the judge's authority by failing or refusing to take reasonably available steps or make a good faith effort to determine the extent of his or her authority.

Conduct prejudicial to the administration of justice

Conduct prejudicial to the administration of justice that brings the judicial office into disrepute is less serious than willful misconduct. A judge commits conduct prejudicial to the administration of justice if the judge either:

- commits willful misconduct while acting in other than a judicial capacity, **or**
- violates the code of judicial conduct while acting in a judicial capacity but without bad faith.

The requirement that the conduct bring the judicial office into disrepute does not require notoriety, but only that the conduct be dam-

aging to the esteem for the judiciary held by members of the public who observed the conduct.

The decision

After the hearing, the members of the commission vote on whether the evidence supports the allegations in the complaint. In most states, a decision that a judge committed misconduct requires the concurrence of a majority of the members of the commission.

The commission's decision includes findings of fact (for example, whether, as alleged, the judge called a court reporter "baby" when they passed each other in the courthouse hallway) and conclusions of law (for example, whether calling a court reporter "baby" is judicial misconduct). In the findings, the commission resolves questions of facts and describes why it reached a conclusion (for example, the commission may state that it is accepting the testimony of the court reporter over the judge because the court reporter reported the incident immediately after it happened and the judge was evasive during his testimony). If the hearing was not held before the entire commission, the fact-finding panel or special master or masters submits a report with findings of fact to the entire commission, which can accept or reject it, in whole or in part.

If some members do not agree with the majority of the commission, they can file a dissenting opinion. The dissent can be about whether the judge has committed misconduct and/or what the sanction can be.

The sanction

Following are sanctions that may be imposed in judicial discipline cases, but not all are available in every state.

- ◆ Reprimand
- ◆ Admonishment
- ◆ Censure
- ◆ Fine
- ◆ Cease and desist order
- ◆ Suspension without pay
- ◆ Payment of the costs of proceedings
- ◆ Involuntary retirement
- ◆ Removal
- ◆ Discipline as a lawyer
- ◆ Imposition of conditions (such as counseling or education)

Aggravating and mitigating circumstances

To determine the appropriate sanction, commissions and courts consider:

- The extent of the misconduct.
 - ◊ Whether the misconduct is an isolated instance or a pattern of conduct.
 - ◊ Whether the judge committed multiple offenses.
- The nature of the misconduct.
 - ◊ Whether the misconduct occurred in the judge's official capacity or in the judge's private life.
 - ◊ Whether the misconduct occurred in or out of the courtroom.
 - ◊ Whether the judge exploited the judicial position to satisfy personal desires.

- ◊ Whether the misconduct involved criminal or dishonest acts.
- The judge's conduct in response to the commission's inquiry and disciplinary proceedings.
 - ◊ Whether the judge showed remorse and made an effort to change his or her conduct.
 - ◊ Whether the judge was candid and cooperated with the commission.
- The judge's discipline record and reputation.
- The effect the misconduct had upon the integrity of and respect for the judiciary.

Those factors suggest that the following are **mitigating circumstances**, in other words, a less severe sanction may be appropriate if one or more are present in a case:

- The misconduct:
 - ◊ was an isolated instance.
 - ◊ involved only one offense.
 - ◊ occurred in the judge's private life.
 - ◊ occurred outside the courtroom.
 - ◊ affected few persons.
 - ◊ did not involve misuse of the judicial power to satisfy the judge's personal desires.
 - ◊ did not involve criminal or dishonest acts.
- The judge:
 - ◊ responded candidly, cooperatively, and in good faith to the commission's inquiry and disciplinary proceedings.
 - ◊ acknowledged the misconduct.
 - ◊ showed remorse.
 - ◊ improved his or her conduct.

- ◊ agreed to appropriate remedial acts such as education or treatment.
- The judge:
 - ◊ was relatively new to the bench.
 - ◊ did not have a prior disciplinary record.
 - ◊ has made positive contributions to the courts and the community.
 - ◊ is generally well regarded among the bench, bar, and court staff as hard working and thoughtful.

The following are **aggravating circumstances**, in other words, a more severe sanction may be appropriate if one or more are present in a case:

- The misconduct:
 - ◊ constituted a pattern of violations.
 - ◊ involved multiple offenses.
 - ◊ occurred in the courtroom.
 - ◊ occurred in the judge's official capacity.
 - ◊ harmed many persons and/or the persons harmed were vulnerable.
 - ◊ involved misuse of the judicial power to satisfy the judge's personal desires.
 - ◊ involved criminal violations, dishonesty, or moral turpitude
- The judge:
 - ◊ intentionally failed to comply with rules or orders of the commission and/or submitted false evidence, made false statements, or engaged in other deceptive practices during the disciplinary process.
 - ◊ refused to acknowledge the wrongful nature of his or her conduct.

- ◊ did not show remorse.
- ◊ had not changed his or her conduct.

- The judge:
 - ◊ was an experienced judge who should have known better.
 - ◊ had a prior disciplinary record (particularly if it involved similar misconduct).

Interim suspension

- ◆ In many states, a judge may be suspended **with** pay if the judge is charged with a felony, pending the outcome of the criminal case.
- ◆ In other states, a judge may be suspended **with** pay if the commission recommends to the supreme court that a judge be removed or retired, pending final action by the supreme court.
- ◆ In some states, a judge may be suspended **with** pay if the commission petitions the supreme court for suspension and demonstrates that the continued service of the judge is causing immediate and substantial public harm.

In most states, a judge is suspended **without** pay if he or she pleads guilty to or is found guilty of a felony or other serious crime, pending the outcome of any appeal. If the conviction is reversed on appeal, the suspension is lifted. If a judge's conviction of a felony or other serious crime is affirmed on appeal:

- ◆ In some states, the judge is automatically removed from office.



- ◆ In some states, action by the commission and/or the supreme court is necessary to remove the judge from office.

Review

- ◆ In some states, the commission's decision that a judge committed misconduct and should be sanctioned is final, but the judge can ask the supreme court to review a decision and overturn it.
- ◆ In some states, the commission's decision that a judge committed misconduct and should be sanctioned is only a recommendation that the supreme court must consider, and it only becomes effective if adopted by the court.
- ◆ In some states, sanctions such as reprimands or censures can be imposed by the commission itself, subject to review, but removal and suspension can only be imposed by the supreme court.

The supreme court reviews:

- the commission's findings of fact to see if they are supported by the evidence,
- its conclusions of law to see if they are correct, and
- its sanction decision or recommendation to see if it is justified.

The court may:

- adopt the commission's findings, conclusions, and sanction;
- reject them;
- adopt some and reject others; and
- adopt the findings and conclusions but impose a different sanction.

The supreme court engages in an independent review of the record to determine if the commission's factual findings are supported by the evidence; although the court is not bound by the commission's findings, it will usually defer to the factual findings of whoever—the commission, master, or panel—had an opportunity to evaluate the credibility of witnesses at the hearing. The court accords less deference in reviewing the commission's conclusions of law and recommendations as to sanction, although in some states special weight is given to commission conclusions because of the commission's expertise in judicial discipline. In some states, the supreme court applies a *de novo* review standard (in other words, as if the commission had not already rendered a decision), although even then deference is given to the findings of the person or persons in the best position to judge the credibility of witnesses.

Immunity and privilege

In most states, members of judicial conduct commissions and commission staff are absolutely immune from suit for all conduct in the course of their official duties; in other words, if they are sued for any act taken as a member or employee of the commission, the suit will be dismissed.

Moreover, in most states, complaints or statements made to the commission during an investigation or proceeding by complainants, witnesses, and other participants are privileged; in other words, if the participant is sued based on the statement (for example, for defamation of character), the suit will be dismissed.

Bifurcated systems—two tiers and two panels

Judges frequently argue that the judicial discipline systems in most states violate their constitutional due process rights because the commission both investigates and prosecutes complaints and makes the decisions—the commission, they claim, is acting as both prosecutor and jury. Their argument is that it is unfair for a commission that has decided to file formal charges to also decide whether the charges were proven, in effect, reviewing whether its original decision was correct. They are also concerned that evidence gathered during the investigative phase that is not admitted at the hearing phase (because it violates one of the rules of evidence, for example) will nonetheless taint the members' view of the judge. That argument has been rejected by every state supreme court that has considered it because the decisions of the commission are reviewed by the supreme court.

However, although bifurcation or separation of the prosecutorial and adjudicative roles is not required by the constitution, some states have adopted it as a matter of policy. Those states fall into two categories: the eight traditional two-tier states and the five states that have recently adopted a two-panel system.

Traditional two-tier states

There are eight two-tier states—Alabama, Delaware, Illinois, Ohio, Oklahoma, Pennsylvania, West Virginia, and Wisconsin. In those states, complaints against judges are investigated by one body (usually referred to as the first tier), which decides whether to file formal charges; the formal charges are heard and

decided by a second body that has a different name, different membership, different offices, and different staff (usually referred to as the second tier). In all states but Illinois and Oklahoma, the decision by the second tier may be reviewed by the supreme court. The exact procedures vary considerably from state-to-state among those eight states. For example, in Alabama, the nine-member Judicial Inquiry Commission investigates complaints and files charges that are heard and decided by the nine-member Court of the Judiciary. Decisions of the Court may be appealed to the Alabama Supreme Court.

Two-panel states

Florida, Kansas, South Carolina, Tennessee, and Wyoming have bifurcated commission functions so that investigative and adjudicative roles are handled by different panels with separate counsel. The use of two panels is based on the *American Bar Association Model Rules for Judicial Disciplinary Enforcement* (1994), although no state has adopted the precise structure suggested by the *Model Rules*. This "two-panel" structure differs from that of the traditional two-tier structure because different panels of commission members rotate between the two roles, although no member who sits on an investigative panel that decides to file formal charges against a judge may subsequently sit on the adjudicative panel that holds the hearing and makes a decision on the charges. The decision of the hearing panel is reviewed by the supreme court.



Ethical guidelines for commission members

To satisfy the public that the judicial discipline system is effective and to assure the judiciary that the system is fair, commission members themselves recognize that they hold positions of public trust and avoid any conduct that would erode confidence in the commission. The rules of the South Dakota Judicial Qualifications Commission emphasize that a commission member "shall carry out the duties of a commission member impartially, discreetly, and objectively."

A few conduct commissions have adopted ethical guidelines for their members. (Those from Pennsylvania and Washington are the most comprehensive.) Rules include:

- A requirement that members maintain confidentiality and instruct their staff about the requirement of confidentiality (Arkansas, Washington).
- A prohibition on a member discussing a pending matter ex parte with the judge, the judge's attorney, the judge's family or friends, the complainant, or any witness (Arkansas, South Carolina, Texas, Washington).
- A prohibition on a member communicating with the press regarding commission business (Alaska, Arkansas, Washington).
- A prohibition on a member publicly commenting on the qualifications of any sitting judge (Alaska).
- A prohibition on a member testifying voluntarily as a character witness in a commission proceeding (Washington).

- A prohibition on a member representing a judge in a matter before the commission during the member's term or within two years after the member's term has expired (Alaska, Washington).
- A requirement that a member be present for at least 80% of the scheduled meetings and not miss three consecutive meetings without appropriate reason (Pennsylvania, Washington).
- A requirement that a member vote in favor of or in opposition to each motion brought to a vote during a meeting, unless grounds exist for the member's recusal. (Pennsylvania, Washington).

Some rules govern a commission member's **political activities**. Under the rules in some states, a commission member **shall not**:

- participate in any judicial campaign, although a judge-member may campaign for judicial office (Arkansas, Washington);
- endorse or contribute to campaigns for judicial office or judicial appointment (Arkansas, Washington);
- participate in an organization's process of endorsing or rating judicial candidates (Arkansas, Washington);
- make reference to the member's affiliation with the commission or act in any way that may suggest that the commission supports a candidate for non-judicial office (Pennsylvania, Washington); or
- run for office for two years (Mississippi).

Other rules deal with members' **financial dealings**. Under these rules, a commission member **should**:

- refrain from financial and business dealings that directly or indirectly reflect adversely on the member's impartiality, interfere with the proper performance of commission duties, or exploit the person's position as a commission member (Pennsylvania, Washington);
- use or disclose information acquired while serving as a commission member in financial dealings or for any other purpose not related to the member's duties (Pennsylvania); or
- financially profit as a result of any confidential information submitted to the commission (Pennsylvania).

Disqualification of commission members

Most judicial conduct commissions have rules that specify when a commission member may not participate in the commission's consideration of a complaint against a judge. The most common rule provides that a member may not participate as a member in proceedings involving any charge against himself or herself.

In addition, some states have more general rules that require a member to disqualify if, for example, he or she cannot impartially consider the charges against a judge (Washington) or if a judge would be disqualified from a court proceeding under analogous circumstances (Arkansas, Hawaii, Louisiana, New Mexico, Oklahoma, South Dakota, Vermont, West Virginia, Wisconsin, Wyoming). Some rules give specific examples of circumstances under which a commission member's impartiality might reasonably be questioned.

For example, some states require disqualification if the member:

- is the complainant (Maryland, Pennsylvania);
- has personal knowledge or information of disputed evidentiary matters relating to the complaint (Connecticut, Mississippi, Pennsylvania, Washington);
- will be a material witness (Alaska, Pennsylvania, Washington);
- is involved in a case that is a subject of the charges (Pennsylvania);
- has a direct personal or financial interest in the matter (Connecticut); or
- is involved in the charge (Alabama, South Carolina, Virginia).

Other grounds for disqualification apply if the judge who is the subject of the complaint:

- is a judge of a court within the member's judicial district (Mississippi, Oklahoma), or
- lives in the member's county (Mississippi).

Involvement in a judicial campaign may also result in disqualification. In some states, a member is disqualified if the member:

- publicly supported or opposed the judge who is the subject of a complaint in a judicial campaign in the last five years (Arkansas);
- while serving on the commission, made a financial contribution to the campaign of the judge who is the subject of a complaint (Wisconsin);
- while serving on the commission, made a financial contribution to the campaign of an opponent of the judge who is the subject of a complaint (Wisconsin);



- while serving on the commission, signed or circulated nomination papers for the judge who is the subject of a complaint (Wisconsin);
- while serving on the commission, signed or circulated nomination papers for a campaign opponent of the judge who is the subject of a complaint (Wisconsin);
- while serving on the commission, solicited campaign contributions for the judge who is the subject of a complaint (Wisconsin);
- while serving on the commission, solicited campaign contributions for a campaign opponent of the judge who is the subject of a complaint (Wisconsin); or
- while serving on the commission, openly endorsed or opposed the judge who is the subject of a complaint (Wisconsin).

Family relationships may also require disqualification. For example, in some states, rules require disqualification if a relative of the member:

- is the judge who is the subject of the complaint (West Virginia);
- is the complainant (Connecticut, Mississippi, Pennsylvania, Rhode Island);
- is a witness (Connecticut);
- has direct personal knowledge of disputed evidentiary matters (Connecticut); or
- has a financial interest in any events relating to the matter, individually or as a fiduciary (Pennsylvania, Washington).

Other relationships may also require disqualification. For example, disqualification is required in some states:

- if a business associate of the member has direct personal knowledge of disputed evidentiary matters (Connecticut);
- if a close personal associate of the member is the subject of the complaint (Colorado); or
- if the member has a business, personal, or financial relationship with the complainant, witness, or judge (Connecticut).

Rules for judge members

Some disqualification rules apply only to the judge-members of the commission. For example, disqualification may be required if the judge-member:

- served as a judge in a matter relating to the complaint (Washington),
- exercises supervisory authority over the judge who is the subject of the complaint (West Virginia),
- sits as a judge in the same judicial district as the respondent-judge (Colorado, Idaho, Iowa, Nevada, Oklahoma), or
- was the subject of a complaint previously made by the same complainant (Connecticut).

Rules for attorney members

Some of the disqualification rules affect only the lawyer-members of a commission. For example, disqualification may be appropriate if the lawyer-member:

- has been retained by the judge who is the subject of the complaint (Alaska);
- has counseled the judge in any matter within two years (Alaska);

- personally appears before the judge (New Hampshire, Vermont);
- has reason to believe that he or she will appear before the judge (New Hampshire);
- practices as an attorney (Colorado) or maintains an office for the practice of law (Oklahoma) in the judicial district in which the judge sits;
- served as a lawyer in connection with any events relating to the matter that is the subject of the complaint (Pennsylvania);
- practiced law with a lawyer who served during such association as a lawyer concerning the matter or who has been a material witness concerning it (Pennsylvania);
- has a present or past association with the lawyer who is representing a party (Washington); or
- is an attorney in a matter involving the judge against whom a complaint has been made (Connecticut).

In Pennsylvania, if a lawyer-member is appearing in a case before a judge who is the subject of a complaint or investigation by the commission, the lawyer-member must refrain from voting on any action regarding the judge although the lawyer-member is allowed to participate in discussions regarding the complaint because he or she may have pertinent information concerning the judge. If the commission files formal charges against the judge, the lawyer-member must ask the judge to recuse from the case, and, if the judge refuses, the member cannot participate in the hearing and decision on the charges (Pennsylvania).

Procedures

In many states, if a judge challenges a member's impartiality, the commission determines whether recusal of the member is warranted. In Florida, however, a member is disqualified if the judge files an affidavit stating facts and reasons supporting the judge's belief that he or she "will not receive a fair hearing on the charges because of the prejudice of one or more members" and supported by the affidavits of at least two reputable citizens of the state who are not related to the judge or the judge's attorney. In Washington, a judge "may file a peremptory challenge against one member of the commission" within seven days of notice of a fact-finding hearing. Similarly, in Nevada, a judge or the counsel appointed to present charges against the judge "may exercise a single peremptory challenge."