

# RECOMMENDATIONS FOR JUDICIAL DISCIPLINE SYSTEMS



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### **IAALS—Institute for the Advancement of the American Legal System**

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# TABLE OF CONTENTS

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Preface . . . . .	1
Introduction: Mission & Overview of Judicial Disciplinary Systems . . . . .	2
Protecting Impartial Judicial Decision-Making . . . . .	4
Promoting Commission Independence, Impartiality, and Integrity . . . . .	5
Creating Commissions in Constitutions, Not Statutes or Court Orders . . . . .	5
Appointment and Removal of Commissioners . . . . .	5
Funding Sources and Methods . . . . .	6
Structure that Separates Investigation from Adjudication . . . . .	6
Recusal . . . . .	7
Written and Thorough Procedural Rules and Codes of Conduct . . . . .	7
Orientation and Continuing Education for Commissioners and Staff . . . . .	8
Sanctions . . . . .	9
Private Dispositions . . . . .	9
Suspensions Without Pay . . . . .	10
Allocating Costs . . . . .	10
Informal Measures and Remedial Steps . . . . .	10
Judicial Performance Evaluations . . . . .	11
Fairness and Efficiency in Commission Operations . . . . .	12
Jurisdiction . . . . .	12
Initiating Complaints . . . . .	12
Ombudsmen . . . . .	13
Staff Screening . . . . .	14
Transparency and Confidentiality of Proceedings . . . . .	14
Orders . . . . .	15
Advisory Opinions . . . . .	16
Education and Dissemination . . . . .	17
Describing and Explaining Commission Activities . . . . .	17
Summary Statistics . . . . .	17
Educating Judges, Others about Commission Work . . . . .	18
Concluding Considerations . . . . .	18
Recommendations . . . . .	19
Appendix A: Convening Participants . . . . .	21
Appendix B: Convening Agenda . . . . .	22



# PREFACE

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Until the 1960s, the formal methods for addressing allegations of state judges' misconduct, such as legislative impeachment or recall elections, were cumbersome and time-consuming. These shortcomings were highlighted when scandals rocked several state judiciaries,<sup>1</sup> revealing a need for more efficient disciplinary procedures. Starting in 1960, California and eventually all states established variously named bodies (this Report uses the generic term "commission") to investigate allegations of judicial misconduct or disability and—where appropriate—prosecute, adjudicate, and either recommend discipline to the state's highest court or impose it, subject to appellate review.<sup>2</sup>

Effective judicial discipline is an important part of a trusted and trustworthy court system. The public must know that judicial ethics and violations of the Code of Judicial Conduct are taken seriously. Absent that assurance, the system appears self-serving, protectionist, and even potentially corrupt. And it is not just the reality of the existence of effective systems that matters; it is also the appearance. A wholly effective system with no transparency and no public confidence will not suffice.

To explore the functioning of judicial conduct commissions, in March 2018, IAALS convened a 21-person group of commissioners, commission staff, judges, lawyers, and scholars (identified in Appendix A). They, along with IAALS Executive Director Rebecca Kourlis and a small number of IAALS staff, worked through the agenda in Appendix B. This Report draws on that Convening.

IAALS is grateful to Colorado's El Pomar Foundation and to the Sturm Family Foundation for the financial support that enabled this Convening to occur and to reach its full potential.

Although the Convening participants reached at least general consensus on several matters, IAALS, not the participants or their organizations, is solely responsible for this report and its recommendations. Opinions and recommendations are those of IAALS. This Report nevertheless draws from the wide-ranging comments during the Convening and on the extensive literature and organizational models offered by the American Bar Association and others. Observations attributed in the Report to Convening participants are paraphrases drawn from notes that two IAALS staffers compiled. The Report cites secondary sources lightly, but the white paper prepared for the Convening (available on IAALS' website<sup>3</sup>) is rich with references to the literature. The Report does not try to describe the many nuanced differences that distinguish commissions from one another, although it offers some generalizations based in part on a May 2018 IAALS staff review of commission websites. Cynthia Gray, who directs the National Center for State Courts Center for Judicial Ethics, has highlighted some principal variations in her work.<sup>4</sup> And the Center publishes quarterly its very helpful *Judicial Conduct Reporter*, with summaries of commission activities and decisions, among other publications.<sup>5</sup>

Finally, we recognize that many of the practices that we endorse in this Report are already in place in many or even most states. In short, the system is already doing a good job in many areas. We also recognize that commission structure, jurisdiction, and operations may be beyond a commission's authority to change, based as they are in constitutions, statutes, and court rules. In this Report, we seek to identify some better practices that commissions, state supreme courts, and legislatures can review and identify as doable and advisable—or not. We also seek to identify concrete ways to improve the trustworthiness of the judiciary. This Report is a companion document to IAALS' report on its 2017 Judicial Recusal Convening,<sup>6</sup> and both reports seek to identify concrete ways to improve public confidence in the judiciary.

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1 See, e.g., Note, *Court Scandal in Oklahoma Supreme Court*, 20 OKLA. L. REV. 417 (1967); Kenneth Manastar, *Illinois Justice, The Scandal of 1969 and the Rise of John Paul Stevens* (U. Chi. Press, 2001).

2 National Center for State Courts, State Court Organization, §1.9, *Judicial Discipline: Investigating and Adjudicating Bodies*, available at <http://www.ncsc.org/microsites/sco/home/List-Of-Tables.aspx>.

3 Keith Swisher, *Judicial Discipline in the States, IAALS Judicial Discipline Pre-Convening Whitepaper* (2018).

4 See, e.g., Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007).

5 National Center for State Courts, State Court Organization, *Judicial Conduct Reporter*, available at <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics/Judicial-Conduct-Reporter.aspx>; see also National Center for State Courts, State Court Organization, *Center for Judicial Ethics Publications*, available at <http://www.ncsc.org/topics/judicial-officers/ethics/center-for-judicial-ethics/cje-publications.aspx>.

6 See Russell Wheeler & Malia Reddick, *Judicial Recusal Procedures, A Report on the IAALS Convening* (June 2017).

# INTRODUCTION: MISSION & OVERVIEW OF JUDICIAL DISCIPLINARY SYSTEMS

Today's disciplinary systems seek to protect the public and the integrity of judicial proceedings, deter future misconduct, and promote public confidence in the judicial system.<sup>7</sup> The Texas State Commission on Judicial Conduct accordingly says its mission is “to protect the public, promote public confidence in the integrity, independence, competence, and impartiality of the judiciary, and encourage judges to maintain high standards of conduct both on and off the bench.” It does so “through its investigation of allegations of judicial misconduct or incapacity” and, pursuant to the Texas constitution, takes “appropriate disciplinary action, including issuing sanctions, censures, suspensions, or recommendations for removal from office.”<sup>8</sup>

As an additional example, the California Supreme Court says its state disciplinary system's purpose is “not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.”<sup>9</sup> Although some other states articulate their systems' purpose with more particularity—e.g., “[r]eassuring the public that judicial misconduct is not tolerated or condoned” and “[f]ostering public confidence in the self-policing system”—their aims are generally consistent.<sup>10</sup>

The American Bar Association's 1994 Model Rules for Judicial Disciplinary Enforcement state in essence that the primary grounds on which to discipline a judge are: violating the state judicial conduct code or other applicable codes and violating a valid order of the state's highest court or the commission.<sup>11</sup> Not every such violation warrants discipline, however. Instead, the commission (and perhaps later the supreme court) must consider the violation in the context of the system's purposes, including the seriousness of the violation, the presence of a pattern of improper activity, and “the effect of the improper activity on others or on the judicial system.”<sup>12</sup> (For a full breakdown of the investigative, prosecutorial, and adjudicatory process leading to dismissal or discipline, see Prof. Swisher's accompanying whitepaper.<sup>13</sup>)

There is a general sense that these bodies are functioning well, although some pervasive, if not always well-grounded, concerns persist. For example, discipline commissions frequently face conflicting charges of unreasonably high dismissal rates and of a reticence about impeding judges' independence or privacy. In 2017, a court watchdog group in Pennsylvania critically detailed events leading to the conviction of a state supreme court justice for campaign irregularities, justices' involvement in a “porngate” scandal, and an unusual attempt to settle, outside the disciplinary process, serious misconduct charges against another justice. The incidents, said the report, “shed light on our judicial disciplinary culture.”<sup>14</sup> In 2015, another watchdog group charged that “[i]t commonly takes years [for the Illinois Judicial Inquiry Board] to act against judges who violate the Illinois Code of Judicial Conduct, and the punishment seldom is more than a public reprimand.”<sup>15</sup> In late 2017, the California Supreme Court refused to intervene in a case in which critics charged that state's commission with a conflict of interest as to an oft-reprimanded judge.<sup>16</sup> The same commission was the subject of heated pro and con debate after it declined to discipline a judge for what many decried was a too-lenient sentence for a student convicted of sexual assault<sup>17</sup>; voters later recalled the judge for his decision, making him “the first

7 See, e.g., Cynthia Gray, *A Study of State Judicial Discipline Sanctions* 3 (2002); Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007).

8 TEX. ST. COMM'N ON JUDICIAL CONDUCT, MISSION STATEMENT, available at <http://www.scjc.texas.gov/about/mission-statement/>.

9 *Adams v. Comm'n on Judicial Performance*, 897 P.2d 544 (Cal. 1995).

10 Cynthia Gray, *A Study of State Judicial Discipline Sanctions* 3 (2002).

11 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 (1994).

12 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994).

13 See Keith Swisher, *Judicial Discipline in the States*, IALS Judicial Discipline Pre-Convening Whitepaper 11-17 (2018).

14 Pennsylvanians for Modern Courts, *Report and Recommendations for Improving Pennsylvania's Judicial Discipline System*, April 2017, at 2, available at [https://www.pmconline.org/uploads/1/0/8/8/108820081/2017\\_pmcreport\\_errata.pdf](https://www.pmconline.org/uploads/1/0/8/8/108820081/2017_pmcreport_errata.pdf).

15 Emily Hoerner & Zoe Rosenbaum, *In Illinois, punishment is slow and lenient for errant judges*, Injustice Watch, Dec. 4, 2015, available at <https://www.injusticewatch.org/projects/2015/illinois-court-commission-judge-punishment/>.

16 Bob Egelko, *State high court will let commission consider judge's discipline*, SFGate, Dec. 20, 2017, available at <https://www.sfgate.com/bayarea/article/State-high-court-will-let-commission-consider-12445882.php>.

17 Rebecca Hersher, *Calif. Judge Cleared of Misconduct After Sentence in Stanford Assault Case*, NPR, Dec. 19, 2016, available at <https://www.npr.org/sections/thetwo-way/2016/12/19/506183605/calif-judge-cleared-of-misconduct-after-sentence-in-stanford-sexual-assault-case>.

judge recalled in California in more than 80 years.”<sup>18</sup> And in 2016, John Grisham published a fanciful but not completely unrealistic novel about a fictitious Florida disciplinary body.<sup>19</sup>

In short, the trustworthiness of judicial disciplinary systems is a subject that matters and continues to generate controversy. Most recently, but not a subject of this Report, the federal judiciary has reacted to law clerk and court employees’ charges of judges’ sexual misconduct—and to legitimate concerns that the system’s disciplinary system is inadequate in addressing such misconduct—by establishing a Working Group on Workplace Conduct.<sup>20</sup>

In reviewing state discipline commissions, it is clear that there often is no one-size-fits-all organizational arrangement and set of procedures for commissions. Small states with relatively few judges and misconduct complaints may go about their work differently than will commissions with many more judges, complaints, and actions in response to them. But all commissions face multiple objectives, some of them with inherent tensions, including:

- Describing the commission’s work transparently and publicly without unduly invading judges’ and complainants’ privacy and expectations of confidentiality;
- Rejecting complaints that are end-run appeals of judicial decisions while being receptive to claims of biased behavior, chronic delay, and other on-bench misconduct;
- Making the public aware of the complaint process and avoiding barriers to filing complaints without encouraging frivolous or otherwise unmeritorious complaints;
- Promoting objectivity within the often single body that investigates, prosecutes, and adjudicates complaints without creating large and slow-moving bureaucracies;
- Processing complaints promptly but with the thoroughness they deserve;
- Maintaining commissions’ structural and operational independence from the other branches of government and from, at times, state supreme court overreaching, without eliminating commission accountability;
- Memorializing commission procedures and conduct codes and holding commissioners and staff to them and providing commissioners continuing education about their work, without imposing unduly on the time of busy commissioners who volunteer to serve on the commission; and
- Using a range of informal ways to deal with errant behavior, including voluntary resignation, without letting judges who have committed serious misconduct avoid their just deserts by walking away from the bench.

This report offers basic recommendations and a range of options in six areas:

- Promoting impartial judicial decision-making
- Promoting commission impartiality
- Sanctions
- Fairness and efficiency in commission operations
- Advisory opinions
- Education and dissemination

A final section summarizes the key recommendations that commissions and creating and appointing authorities may wish to consider.

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18 Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a Six-Month Sentence for Sexual Assault*, N.Y. TIMES, June 6, 2018, <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>.

19 JOHN GRISHAM, *THE WHISTLER* (2016).

20 Joan Biskupic, *Chief Justice Roberts Calls for Review of Procedures for Protecting Court Employees from Misconduct*, CNN, Dec. 20, 2017, available at <https://www.cnn.com/2017/12/20/politics/roberts-judicial-misconduct/index.html>; [www.uscourts.gov](http://www.uscourts.gov), *Judicial Conference Receives Status Report on Workplace Conduct Review*, March 13, 2018, available at <http://www.uscourts.gov/news/2018/03/13/judicial-conference-receives-status-report-workplace-conduct-review>; Andrew Hamm, *Report on judiciary procedures to address workplace misconduct*, SCOTUSBLOG (Jun. 8, 2018), <http://www.scotusblog.com/2018/06/report-on-judiciary-procedures-to-address-workplace-misconduct/>.



# PROTECTING IMPARTIAL JUDICIAL DECISION-MAKING

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The discipline process is not—and cannot be—another means of appealing an outcome in a case. Judges need to be able to make judicial decisions without fear of administrative or substantive interference, and the appellate process is in place to correct legal errors. Nevertheless, allegations of judges’ adjudicative legal errors clog the disciplinary systems and pressure commission members and staff to review high numbers of non-cognizable complaints.<sup>21</sup> It is a problematic area in part because, as one Convening participant said, judicial independence does not have a “good connotation with the public,” especially, said another, in some minority communities in which “judicial independence” is code for “judges can do whatever they want—put people in jail for ten years for stealing bread—and be answerable to no one.” Convening participants cited several examples of commissions’ recruiting bar groups to try to explain commission decisions involving judges’ proper but unpopular merits decisions. Commissions must not become another appellate body, but that is a difficult concept to communicate and implement.

Commissions risk discouraging meritorious complaints in their understandable efforts to deter complainants alleging pure legal errors—website postings or complaint instructions, for example, asserting that the commissions have “no power to review a judge’s decision” (even if, as one participant said, most would-be complainants ignore such admonitions). If, for instance, the judge ordered a defendant to drink “toxic sludge,” duct-taped shut a defendant’s mouth, or unlawfully jailed defendants (all actual examples<sup>22</sup>), the defendant likely has a cognizable misconduct complainant, even though the complaint centers on the judge’s decision or order. Similarly, while delay in one case may reflect a judge’s prioritizing the matters on her docket (perhaps due to speedy trial mandates), evidence of a judge’s chronic delay is often a meritorious basis for a complaint, as might be a pattern of decisions always finding for or against the claims of an identifiable category of litigants. Thus, commissions should review their online materials and their screening procedures to ensure that meritorious complaints are not being deterred or dismissed based on the misperception that judges’ decisions and orders are categorically untouchable. To assist in separating the wheat from the chaff, commissions could consider placing word count or page limits on complaints and directing complainants to identify the alleged judicial misconduct with as much particularity as possible.

In addition, several Convening participants encouraged commissions to intervene informally but proactively when they see—or receive from lawyers or bar surveys—evidence of a judge’s developing a pattern of problematic demeanor (such as visible exasperation with new lawyers), for example. Early and proactive intervention should be considered even when the problematic behavior does not yet warrant significant discipline.

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21 See, e.g., Keith Swisher, *The Judicial Ethics of Criminal Law Adjudication*, 41 ARIZ. ST. L.J. 755 (2009); Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004).

22 See *In re Benoit*, 487 A.2d 1158, 1165 (Me. 1985) (suspending a judge after he jailed three defendants either without any legal authority or without following necessary procedural protections against unwarranted incarceration); TEXAS PRACTICE SERIES, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 26.4 n.68 (2008) (citing discipline of Texas judge who sentenced one defendant to “jail with three days of bread and water” and another defendant “convicted of illegally dumping toxic torts to drink toxic sludge”); Brian Kumnick, *Judge Silences Defendant with Duct Tape*, Legal Grounds, Sept. 2, 2009, available at <https://blogs.findlaw.com/legalgrounds/2009/09/judge-silences-defendant-with-duct-tape.html>.

# PROMOTING COMMISSION INDEPENDENCE, IMPARTIALITY, AND INTEGRITY

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Judicial discipline commissions indisputably must strive to treat all complaints, complainants, and respondent judges impartially. Commission structure, membership, and procedures can influence that goal.

## CREATING COMMISSIONS IN CONSTITUTIONS, NOT STATUTES OR COURT ORDERS

Although most commissions are established in their state constitution, some still are not. We agree with the ABA model rules that constitutional creation is preferable—“essential” said one Convening participant—so as to lessen undue interference in commission activities.<sup>23</sup> Several Convening participants described requests by legislators to “go after” particular judges, with the implicit threats of legislative retribution toward the commission, and instances in which state supreme court justices or the court as a whole seemed to retaliate against a commission for attempting to discipline a top state judge.

## APPOINTMENT AND REMOVAL OF COMMISSIONERS

In 2018, commissions range in size from three (Oklahoma) to 28 (Ohio), and the median size is nine (not including alternate members).<sup>24</sup> In most commissions, no member category judge, lawyer, public member) maintains a majority.

Although the Convening reached no consensus, we agree with the ABA Model Rule recommendation for equal-tri-partite appointees—equal numbers of judges of various court types appointed by the courts, lawyers appointed by the state bar, and governor-appointed public members.<sup>25</sup> In particular, populating a commission with a majority or super-majority of judges (which still characterizes a handful of commissions) heightens the concern that judges are unlikely to deal impartially with complaints about fellow judges<sup>26</sup> and deprives commissions of an adequate representation of public members, who can provide the system with insight from the community and non-technical critiques and perspectives of judicial conduct and culture. For all commissioners, furthermore, institutional memory and independence come in part from staggered terms and rules permitting removal only by the appointing entity and only for cause, making it more difficult for an appointing authority to summarily remove all commissioners for whom that authority is responsible.

Finally, robust demographic, vocational, and geographic diversity will help assure the public that those who “judge the judges” fairly represent the community. The varied appointing authorities require coordination to ensure that all appointing authorities keep diversity in mind when considering prospective commissioners. One commission member spoke of reaching out to appointing authorities to describe the commission’s need at any particular moment in terms of diverse membership.

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23 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2 cmt. (1994).

24 Based on review of commission websites accessed through the National Center’s Center for Judicial Ethics, *available at* <http://stage.ncsc.org/Topics/Judicial-Officers/Ethics/State-Links.aspx>.

25 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2(C) (1994) (recommending a 12-member commission).

26 Cf. BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* (2011).

## FUNDING SOURCES AND METHODS

We agree with the ABA model rule that the legislature, not the judiciary, should fund the commission, and that the commission should prepare its own budget requests, separate from the judicial branch budget request.<sup>27</sup> Further, the commission should administer the funds provided, free of supervision of the court system's administrative machinery. Just as the judicial branch should not be the budgetary ward of the executive branch, the judicial discipline commission should not be the budgetary ward of the judicial branch whose members' conduct it investigates. One participant noted the downside—in legislative debates over funds, the commission does not have “the clout [it] would have if the supreme court advocated on their behalf.” On the other hand, nor does the commission have “the clout to combat an unhappy supreme court bent on reducing commission funding.”

Budgetary independence, of course, will not by itself ensure legislative appropriations sufficient to operate and staff a vibrant commission. States may wish to explore supplementary sources, such as judge-paid or lawyer-paid fees (several states' lawyers pay a portion of their registration fees to cover judicial discipline system costs). Colorado, for example, now follows this model.<sup>28</sup>

## STRUCTURE THAT SEPARATES INVESTIGATION FROM ADJUDICATION

Most commissions are “one-tier”: a single body performs the investigative, prosecutorial, and adjudicative functions. Judges argue that this arrangement violates due process given a commissioner's likely difficulty during the adjudicative stage of ignoring problematic evidence submitted during the investigative stage. Nevertheless, the twenty or so supreme courts that had considered the due process objection as of 2007 rejected it, primarily because appellate review in the supreme court is available to correct conflict-of-interest-related errors.<sup>29</sup>

A few commissions separate the investigative and adjudicative functions through a bifurcated structure—either two panels within the same commission, or two separate bodies (a “two-tier” structure), each tier with its own membership, offices, and staff. Bifurcated structures can promote objectivity and the appearance of objectivity, and not all complainants have the resources to pursue appeals to the state's court of last resort.

Several Convening participants argued that bifurcated structures are unnecessarily costly and may take longer to reach a resolution—causing delay that is “agonizing for judges who have their reputations up in the air”—and that internal structural checks can seemingly overcome one-tier threats to objectivity.

Two additional structural issues warrant mention. First, many commissions appoint a single hearing officer to serve as the initial fact-finder. This practice means that important issues, at least initially, are decided by a single, often-retired judge, rather than with the diverse input from lawyer, public, and sitting-judge members. Because this practice is inconsistent with the wise design of commission bodies, we recommend that states resort to it as little as possible.

Second, most commissions have an executive director and disciplinary counsel. States should establish clear rules barring executive directors from performing both investigative- and adjudicative-stage functions for the commissions.<sup>30</sup> In addition, the independence of disciplinary counsel can vary significantly from state to state, including counsel's reporting relationships as to the commission and its executive director. States should ensure that disciplinary counsel have sufficient independence to ensure full and fair investigations and, as appropriate, prosecutions.

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27 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2(F) (1994).

28 See, e.g., COLO. COMM'N ON JUDICIAL DISCIPLINE, ANNUAL REPORT 2015.

29 See Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 414 (2007).

30 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 4 cmt. (1994).

## RECUSAL

States should also adopt and enforce recusal provisions to protect impartiality and its appearance.<sup>31</sup> For example, recusal rules and procedures should address recurring issues, such as when a judge-commissioner sits on the same, collegial court as the respondent-judge or knows or believes some good or bad fact about the respondent-judge. One commission reported each year giving a list of all judges in the state to each commissioner with instructions to check off those from whose matters they should be recused; they receive no information about complaints about those judges. States should all employ conflict-checking procedures.

Commissioners typically should recuse themselves to the same extent as a judge presiding over a (non-disciplinary) case, but appearances of partiality and subconscious biases can arise even when recusal is not strictly required.<sup>32</sup> Recusal of commissioners and staff members should be rigorous, and recusal rules should be clearly articulated to commissioners and staff. A small number of states provide for alternate commissioners, thereby lessening the potential disruption to the commission's work when a member has to recuse from the investigation or hearing. In that instance, of course, it is important that the commission member who recuses has no contact with the alternate commissioner as to the case at issue.

## WRITTEN AND THOROUGH PROCEDURAL RULES AND CODES OF CONDUCT

Convening participants agreed, given the spotlight that often shines on commissions, that they cannot be governed by an attitude of “it’s just the way we do things.” That is why all commissions have adopted written rules and most have posted them on their websites. Still, many Convening participants acknowledged many “practices” that to date have not been included in their commissions’ procedural rules; while not every practice must necessarily be codified, most should be to promote fairness and transparency to all. Commissions should also have significant control over amending and maintaining their own rules. The Convening participants recounted troubling instances in which a state high court adversely reacted to the potential or actual discipline of its members and retaliated by restricting the commission’s jurisdiction and impeding its work through amendments to the rules governing the commissions’ procedures.

Commissioners and staff members should be governed by a written, detailed, mandatory, and enforceable code of conduct, similar to IAALS’ *Model Code of Conduct for Judicial Nominating Commissioners*.<sup>33</sup> The code, whether integrated into a procedures handbook or standing alone, should cover work expectations (e.g., attendance), confidentiality (including social media), campaigns or endorsements, appropriate behavior in hearings, ex parte communications, among other topics. One participant, for example, recalled being unaware, until consulting a code, that members should not communicate with their respective appointing authorities. The code should regulate the use and admission of extraneous material (e.g., to define clearly how, if at all, investigations and prosecutions may take cognizance of anecdotal or general impressions of the respondent-judge, gained outside of an investigation). Finally, the code should also reinforce the independence of disciplinary counsel from undue staff or commissioner influence.

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31 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 3(1) (1994).

32 See Russell Wheeler & Malia Reddick, *Judicial Recusal Procedures, A Report on the IAALS Convening* (June 2017), available at [http://iaals.du.edu/sites/default/files/documents/publications/judicial\\_recusal\\_procedures.pdf](http://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf).

33 See Rebecca Love Kourlis & Malia Reddick, *Model Code of Conduct for Judicial Nominating Commissioners* (2016), available at [http://iaals.du.edu/sites/default/files/documents/publications/model\\_code\\_of\\_conduct\\_for\\_judicial\\_nominating\\_commissioners.pdf](http://iaals.du.edu/sites/default/files/documents/publications/model_code_of_conduct_for_judicial_nominating_commissioners.pdf).

## ORIENTATION AND CONTINUING EDUCATION FOR COMMISSIONERS AND STAFF

Commission members, busy people as they are, nevertheless need orientation—preferably, a personal session with top commission staff—and continuing education about their roles, including education about recognizing and correcting for implicit bias,<sup>34</sup> and guidance in discerning and processing matters involving mental health or substance abuse. Commissioners and staff should know about available programs in which respondent judges might receive help for mental health or substance abuse issues; where such programs do not exist, the commission can play a role in requesting that the state judiciary provide them. New public members also need an introduction to the state’s judicial process.

Convening participants referred to occasional problematic behavior—for example, “some new members rarely come to meetings” and “quorums have been difficult, embarrassingly so”—and how commissioners deal with such problems. An executive committee, for example, may meet with errant members, but if internal corrective action does not work, the committee may turn to the appointing authority to explain the grounds for removing the members for cause. Consistent with our recommendations above, several Convening participants emphasized the value of written expectations, procedures, and codes in efforts to correct behavior: “When something goes bad, and you don’t have a code or policies, it really goes bad.”

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34 Cf., e.g., Athena D. Mutua, *Disparity in Judicial Misconduct Cases: Color-Blind Diversity?*, 23.1 J. OF GENDER, SOCIAL POLICY, AND LAW 23 (2014), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1652&context=jgspl>.



# SANCTIONS

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To varying degrees, states have available a variety of disciplinary sanctions: removal, retirement, suspension, censure, public or private reprimand or admonishment, lawyer discipline, and diversion/deferred discipline arrangements. A minority of states impose fines or costs. In addition, the applicable court or commission may generally impose interim suspension when the judge has been charged with a criminal offense or poses a serious risk of substantial harm to the public.<sup>35</sup> States without a clearly and publicly articulated range of sanctions should adopt them, along with standards for their application. One Convening participant put it simply—“if there’s no articulated standards, no one can walk away with any sense of fairness.” Some states list very few standards for the imposition of one sanction over the other, and several other states rely on somewhat lean or incomplete factors previously announced by other state supreme courts.<sup>36</sup>

Each state should consider adopting a full array of sanctions and remedies seeking an optimal fit between conduct and remedy. For example, the availability and even preponderance of private remedies (over public ones) in a particular state may consciously or subconsciously drive commissions toward more private sanctions, even when a public sanction would be more appropriate. The few states that do not allow commissions to remove or suspend judges<sup>37</sup>—or at least recommend the same to the highest court—should reconsider that limitation. On the other end of the sanction spectrum, states without diversion arrangements or judicial assistance programs should consider them.

Participants said that those members of the public who follow the commission’s work tend to regard admonishments, reprimands, or censures as mere “hand slaps,” but judges see them differently, especially when the sanction is public. Some commissions or courts read aloud a censure order to the judge, in public, and many courts and commissions are now commendably distributing public disciplinary sanctions to the media in press releases or news items online.

## PRIVATE DISPOSITIONS

One participant warned “it will be hard for IAALS to come up with a recommendation” about private dispositions. Some questioned their utility—“why would you censure someone privately?” It is no deterrent to similar behavior by other judges, and it does not enhance public confidence in any way. Others distinguished between a private “admonishment”—okay—and a private reprimand—not okay. Others thought commissions should summarily publish such reprimands or retain and release them if a judge aspires to higher office. There was general agreement that commissions need the authority to send warnings—in various formulations (“heads-up” or “advisory” letters)—to give the judge the opportunity to change what appears to be an emerging pattern of problematic but not yet serious or prejudicial misbehavior. Other participants thought private reprimands were, or could be seen as, a way to sweep difficult matters under the rug, and, at the least, should be governed by well-articulated standards for their application so that they are used only when truly appropriate (as we recommend above).

Because the issue of “if and when” to use private dispositions is so thorny, we recommend that states review their treatment of private dispositions to ensure their appropriate and consistent treatment. They can be appropriate in certain circumstances (e.g., when a judge has committed a single, non-prejudicial error for which a private communication will likely remedy the issue), but there is a risk of abuse (e.g., when a judge has received one or more prior private dispositions or when the misconduct is egregious or prejudicial).

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35 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 and R. 15 (1994); see also National Center for State Courts, *Available Sanctions in Judicial Disciplinary Proceedings* (2015), available at [http://www.ncsc.org/~media/files/pdf/topics/center%20for%20judicial%20ethics/sanctions\\_tables\\_2015.ashx](http://www.ncsc.org/~media/files/pdf/topics/center%20for%20judicial%20ethics/sanctions_tables_2015.ashx).

36 See *In re Deming*, 736 P.2d 639 (Wa. 1987) (adopting ten, non-exclusive factors to guide the imposition of judicial disciplinary sanctions); *In re Brown*, 626 N.W.2d 403 (Mich. 2001) (listing seven factors); *In re Brown*, 625 N.W.2d 744, 745 (Mich. 2000).

37 Cynthia Gray, *A Study of State Judicial Discipline Sanctions* 7 (2002).

## SUSPENSIONS WITHOUT PAY

Suspension without pay is a useful alternative, particularly in cases of serious misconduct in which there are significant mitigating factors such as the judge's lack of a disciplinary record, and we thus recommend that states ensure that commissions and supreme courts have suspension without pay as an available sanction in appropriate cases. The length of suspension is a debatable topic, however, partly because lengthy suspensions burden other judges. One participant said the commission's or supreme court's job should be to remove someone if warranted, not to suspend the judge for a long time and hope for a resignation. Although we do not here recommend a specific maximum or minimum length, we recommend that states review this issue and consider it in context of their other available sanctions.

## ALLOCATING COSTS

States and commissions should consider whether judges who consent to discipline or are found to have committed misconduct should be forced to pay some or all of the commissions' or courts' costs—at least if the judge was deceptive or obstructionist during the proceedings. Avoiding the embarrassment of a misconduct finding may be a strong deterrent to misconduct. An added deterrent is the financial pressure of having to pay some or all of the investigative or prosecutorial costs. On the other hand, assessing costs could strap respondent-judges with potentially inflated or otherwise inaccurate estimates of disciplinary costs and accomplish little except excessive punishment. Assessing costs might also discourage sanctioned judges—with arguably valid cases but limited financial resources—from pursuing an appeal after paying or facing the risk of paying for some or all of the disciplinary proceeding costs. These costs, of course, tend to rise the longer the proceeding is disputed—to fold is cheaper.

States and commissions should also consider whether to provide respondent-judges with appointed counsel or later reimburse them for the costs of retaining counsel. When a commission concludes that a misconduct complaint, fully investigated or adjudicated, was not meritorious, it would carry a lot of weight with the judiciary if the commission were to reimburse the costs of that defense. This recommendation probably should be considered in tandem with the recommendation above, as paying for non-misbehaving judges' counsel might appear more publicly palatable if misbehaving judges have to pay disciplinary costs.

## INFORMAL MEASURES AND REMEDIAL STEPS

Informal measures are often appropriate for cases involving a temporary disability that creates an inability to perform the duties of the judicial office. These are difficult, often wrenching situations, and commissions should have available the greatest spectrum of measures possible, from training, counseling, and diversion through suspension, retirement, and removal. Substance addiction cases are particularly perplexing, in which a less typical and more rehabilitative approach may be warranted. In permanent disability cases, moreover, commissions and courts need solutions, such as a retirement path, that do not necessarily utilize the typical disciplinary sanctions, such as censure or removal.

The Convening's discussion of sanctions highlighted differences over the use of informal sanctions, with general agreement that beyond the standard sanctions, commissions should be empowered to recommend or require corrective action, including "remedial measures, making apologies, and undergoing education, counseling, or mentoring."<sup>38</sup> The latter types of remedies—such as alcohol abuse counseling, stress management counseling, or anger management programs—often get closer to the root cause of the misconduct. Deferred discipline agreements, for example, are confidential agreements, entered prior to formal charges, allowing the judge to take some form of corrective action but imposing consequences if the judge does not comply.<sup>39</sup>

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38 Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 416 (2007); *see also generally* Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 311 (1993).

39 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994).

## JUDICIAL PERFORMANCE EVALUATIONS

Several Convening participants volunteered that their states have judicial performance evaluation programs in place, and said they thought a benefit was fewer complaints: “judges get evaluated, criticized, and have a chance to correct problems.” In fact, the dual purposes of judicial performance evaluation are to provide information to voters in retention elections and to give the judge feedback that he or she would not otherwise get. Where egregious or uncorrected patterns of misconduct are uncovered through judicial performance evaluation, states should ensure that the commissions receive such information.



# FAIRNESS AND EFFICIENCY IN COMMISSION OPERATIONS

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## JURISDICTION

Most commissions' jurisdictions extend at a minimum to all non-federal judges in the state. Commission jurisdiction should also reach misconduct of resigned or retired judges that occurred before the judge stopped hearing cases. Most convening participants agreed with that scope of jurisdiction, as does the ABA model rule (at least for complaints filed within a specified period after termination of service).<sup>40</sup> Removal from office obviously has much less practical consequence to a retired judge (who might no longer hear any cases after retirement or might do so only on a sporadic and pro bono basis), but commissions and courts should also have the authority to issue public reprimands, censures, or admonishments (depending on the state's range of available sanctions), order loss of benefits, impose monetary fines, disqualify judges from holding other public offices, or refer them to attorney disciplinary authorities. Alternatives to post-service commission action are parallel procedures for lawyer discipline, which may not be well-suited to deal with judicial misconduct, or commission authority, where appropriate, to refer alleged misconduct to prosecutorial authorities.

The deterrent effect of a potential misconduct finding is mitigated if a judge may resign to avoid the sanction, and some judges surely leave the bench for that reason. Recently, for example, a court employee alleged that a state judge committed sexual harassment, and according to the press, "[n]othing was made public, and the judge has announced that he plans to retire . . . apparently ending the state investigation. He probably will receive full retirement benefits."<sup>41</sup> Certainly, as many but not all states have provided, judges should be unable to remove themselves from commission sanctions simply by leaving the bench, at least in situations involving egregious misconduct.

Commissions vary in their authority to investigate allegations of misconduct by judges before they assumed office. Some states allow it, at least for allegations of serious misconduct that may bear on the judge's fitness to hold judicial office. Others disallow pre-judge investigations on the basis that the commission's charge is to deal with misconduct by judges, and that other authorities, such as bar discipline committees or criminal prosecutors, should explore such allegations. In any case, there should be some authority to act on such misconduct, either in the bar or the commission.

## INITIATING COMPLAINTS

The commission should post prominently on its website, as almost all do, the judicial ethics rules enacted by the state supreme court in the state's code of judicial conduct and any additional statutory or constitutional provisions. Given the headwinds that may discourage filing complaints against powerful figures like judges, we also encourage commission openness in receiving complaints—such as providing complaint forms online and with filing and appellate instructions, in English, Spanish, and other languages depending on the state's population mix. We encourage jettisoning unnecessary prerequisites to submission (e.g., notarization); displaying notices in the clerk's office and courthouse generally advising litigants of the complaint mechanism's availability; and accepting electronic submissions. On this last recommendation, although e-tax and court filings are now commonplace, most commissions still accept complaints only through mail or hand-delivery; we encourage commissions to consider accepting electronic submission of complaints and correspondence about complaints. In addition, chatbots and other forms of artificial intelligence may be potentially efficient

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<sup>40</sup> MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2 (1994).

<sup>41</sup> Editorial Board, *Justice Undercut After a Complaint of Sexual Harassment*, Wash. Post, April 17, 2018, available at [https://www.washingtonpost.com/opinions/justice-undercut-after-a-complaint-of-sexual-harassment/2018/04/17/8ea94e20-41bf-11e8-8569-26fda6b404c7\\_story.html?noredirect=on](https://www.washingtonpost.com/opinions/justice-undercut-after-a-complaint-of-sexual-harassment/2018/04/17/8ea94e20-41bf-11e8-8569-26fda6b404c7_story.html?noredirect=on). The editorial was based on this news story: Lynn Bui, "Md. Judge was Reprimanded after a Sexual Harassment Complaint. His Discipline Remains Secret," Wash. Post, March 24, 2018, available at [https://www.washingtonpost.com/local/public-safety/a-md-judge-was-reprimanded-after-a-sexual-harassment-complaint-his-discipline-remains-secret/2017/03/23/979d9d52-0a65-11e7-93dc-00f9bdd74ed1\\_story.html?utm\\_term=.c383c400e124](https://www.washingtonpost.com/local/public-safety/a-md-judge-was-reprimanded-after-a-sexual-harassment-complaint-his-discipline-remains-secret/2017/03/23/979d9d52-0a65-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.c383c400e124).

ways to help potential complainants understand the process and weed out complaints solely about the merits of judicial decisions.

As recommended earlier, commissions imposing word or space limitations on the complaint forms might reduce the burden on staff and commissioners in wading through large numbers of long-winded complaints. One participant suggested requiring complainants to cite the canon or other ethical rule (from the corpus of rules posted on the commission website) that they claim the judge violated. But, the bottom line is that commissions are there to deal with complaints, and they need to focus on public access to the process.

Commissions, especially those facing large caseloads, are concerned that greater openness to receiving complaints and greater ease in submission procedures will encourage meritless complaints, which abound already. The concern can be acute as to online submissions. Some convening participants reported no increase in filings once their commissions accepted online complaints while others said “the number of cases opened increased tremendously as did hours processing them but the number of full investigations and discipline imposed did not.” Participants generally opposed responding to complaints in cyberspace because of confidentiality concerns. On balance, we nevertheless recommend permitting electronic submission of complaints and as appropriate electronic communications concerning complaints, coupled of course with good cybersecurity practices. Eight commissions now accept complaints filed online and generally report favorably on the practice, noting that any increase in filings is outweighed by more legible and comprehensive information and lower processing costs. Said one commission: “It’s the way of the future and nice to deal with less paper.”<sup>42</sup> But commissions should also permit complainants, such as prisoners without online access, to submit complaints in paper. Following these dual recommendations will modernize and increase access to the disciplinary system.

Commissions furthermore need not wait for complaints when there is evidence of misconduct. A news piece can form the basis of a complaint, and disciplinary counsel can serve as the complainant. Anonymous complaints should be processed as fully and as routinely as possible. Most commissions require the complainant to identify him or herself on the complaint and sign it. Some require complainant identification but agree not to reveal the identity to the subject judge. Although total anonymity precludes asking questions of, or providing feedback to, complainants, it protects vulnerable complainants, such as court employees, who fear career-threatening retribution were a judge to learn that an employee had alleged sexual or other misconduct. Convening participants brought forth numerous examples of court personnel and even some attorneys who have been unwilling to complain without anonymity or, at a minimum, an assurance of confidentiality in the early stages of the investigation.

## OMBUDSMEN

The Convening discussion broadened toward the end into how to accommodate lawyers and litigants and others who think the court system is in one way or the other giving them a raw deal but who are reluctant to file a complaint, even anonymously, or are distressed by problematic conduct that may not be within the commission’s jurisdiction. One cited a judge’s taking a vacation in the middle of a trial, which may not violate a code provision but still seems irresponsible. Participants warmed to the idea of an ombudsman, or perhaps a committee of senior, unlikely-to-be-intimidated members of the bar—who could receive complaints and take them to a chief judge, court administrator, or perhaps the discipline commission chair who could seek a non-punitive resolution of the problem.

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42 Cynthia Gray, “On-Line Complaints,” posted May 22, 2018, *available at* <https://ncsejudicialethicsblog.org/2018/05/22/on-line-complaints-2/>.



## STAFF SCREENING

Encouraging filing through openness and treating all complaints with respect does not preclude screening procedures. Disciplinary counsel generally have great responsibility and discretion in screening complaints. However, commissions, as a whole or as a panel, should review staff-proposed dismissals. (Many do, although the timing and attention differs across states.) It is, said one participant, “important to be able to say that the membership made these decisions.” Commission and staff must resist the understandable tendency to regard some categories of complaints—by prisoners, for example—as inherently suspect, or the tendency to assume that complaints alleging a form of legal error cannot, by that fact alone, be meritorious.

## TRANSPARENCY AND CONFIDENTIALITY OF PROCEEDINGS

While all commissions hold confidential their investigative activity, 34 states make the proceedings public once the commission brings formal charges. Twenty-six do so when charges are brought, four when the subject judge answers, and two when the hearing itself begins.<sup>43</sup> Commissions inform the complainant and the subject judge once they dismiss a complaint, but only a few states publicly disclose dismissed complaints.<sup>44</sup> Keeping confidential the initial stages of complaint processing can encourage people to file complaints and witnesses to cooperate by guarding against retaliation, protect judges and the judiciary as a whole from unfair publicity stemming from frivolous complaints, encourage judges to resign or retire rather than fight legitimate complaints in public proceedings, and, in the case of minor problems, allow corrective action without the glare of publicity.<sup>45</sup>

Publicizing complaints that commissions dismiss can give rise to unfair “adverse inferences”<sup>46</sup> if the judge’s name becomes public, although it is speculative how wide or deep this “adverse inference” from a dismissal cuts. (A different question is whether, in the interests of transparency, to post routine dismissal orders without the judge’s name. If it posts such outright dismissals, the commission should identify them as such, as does Arizona,<sup>47</sup> rather than oblige researchers to sift through haystacks of complaints to find the few meritorious needles.)

Convening participants were divided over whether a complaint should be kept confidential from the subject judge until the commission dismisses the complaint or needs to request a response or explanation. Participants generally saw little point in alerting a judge to all pending complaints, because most are dismissed after initial review. And a policy of initial complaint confidentiality may encourage complainants who would otherwise be reluctant to file. On the other hand, in one participant’s words, “if judges knew how many complaints get dismissed, they would have more faith in the process.” There is a transparency issue here, too, in that the public deserves to know that the commission is doing its work—and needs to understand the basis upon which complaints are dismissed. Otherwise, the appearance is that the system rarely disciplines judges despite the high number of complaints. Perhaps it would be wise to develop a particular kind of dismissal order titled so as to highlight that the issues raised were appellate in nature and not appropriately handled through the discipline process.

There are, however, exceptions to the rule of confidentiality in the investigative stage. First, commissions should be permitted to call possible misconduct to the attention of bar authorities, prosecutors and bodies considering a judge’s appointment or reappointment to judicial or other public offices. Second, we do not think that the First Amendment permits states to prohibit complainants from disclosing that they have filed complaints or describing their content, to prohibit judges from responding at all in such situations, or at least to prohibit complainants to describe alleged misconduct without disclosing the filed complaint itself.<sup>48</sup> A Convening participant said that complainants who believe a judge committed serious misconduct should not be forced to decide between filing a complaint under rigid confidentiality rules or eschewing a complaint to

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43 Center for Judicial Ethics, *When confidentiality ceases in judicial discipline proceedings*, available at <http://www.ncsc.org/~media/files/pdf/topics/center%20for%20judicial%20ethics/when-confidentiality-ceases.ashx>.

44 Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 411 (2007).

45 *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835-36 (1978).

46 MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 11 cmt (1994).

47 See ARIZ. COMM’N ON JUDICIAL CONDUCT, PUBLIC DECISIONS SUMMARY 2018, available at <http://www.azcourts.gov/azcjc/Public-Decisions/2018>.

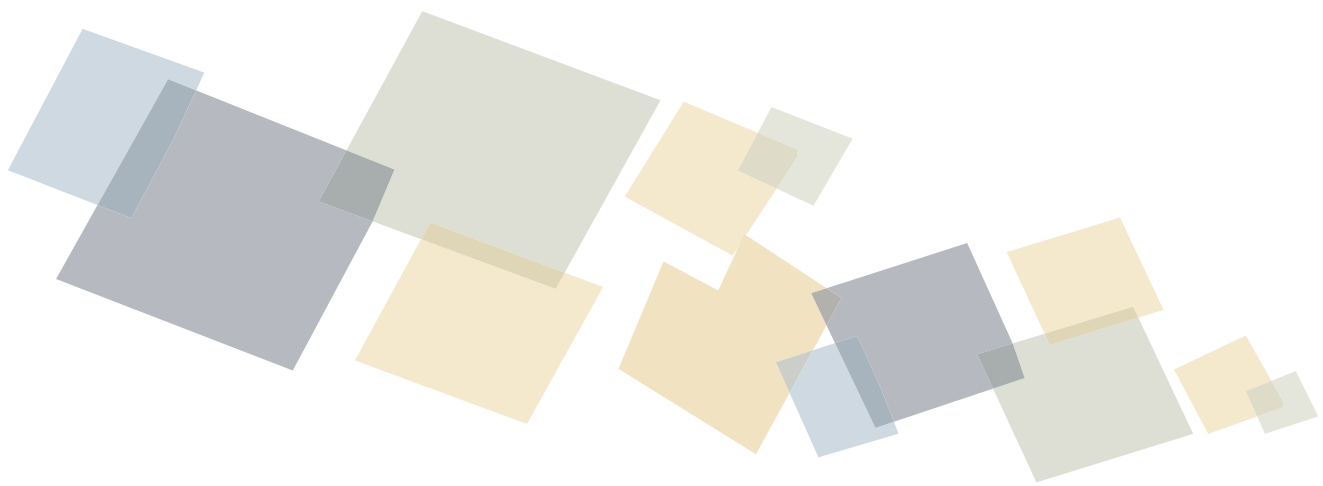
48 Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 410-411 (2007).

be able to describe the alleged misconduct publicly. Besides, some said, prosecuting complainants who violate confidentiality rules is a “lost cause” given everything else on commissions’ plates and the First Amendment.

Third, there should be a rule of reason allowing a commission to confirm that it is investigating a complaint when the news media alleges that a complaint has been submitted or describes a judge’s reported conduct that reasonable people believe would merit investigation. For one example, the state constitution authorizes the Texas commission to issue “a public statement concerning any proceeding when sources other than the Commission cause notoriety concerning a judge or the Commission itself and it determines that the best interests of a judge or of the public will be served by issuing the statement.” According to the commission website, it has issued nine such statements, starting in 2000, the most recent in 2013.<sup>49</sup>

## ORDERS

Putting aside dispositions by stipulation, commission and court orders explaining disciplinary decisions often contain less analysis than do standard judicial opinions. To the extent possible, commission orders and court decisions should summarize the allegations, explain why they do or do not describe cognizable misconduct, and explain how any sanction imposed is appropriate. Collectively, such orders can clarify broadly worded codes of conduct by making clear to judges and potential complainants what behavior constitutes misconduct. Orders can clarify what facts are necessary to establish misconduct, or why various sanctions are appropriate. In doing so, the detailed orders convey the message that the state takes seriously allegations of misconduct and disability, and when published, they contribute to the development of the state’s common law of judicial misconduct.



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49 See TEX. COMM’N ON JUDICIAL CONDUCT, PUBLIC STATEMENTS, *available at* <http://www.scjc.texas.gov/public-information/public-statements>.

# ADVISORY OPINIONS

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As of 2011, 43 states,<sup>50</sup> through the disciplinary commission or more often some other entity,<sup>51</sup> provided advisory opinions to judges requesting guidance about whether some contemplated action would run afoul of the code of conduct or other rule. Separating the advice-giving entity from the discipline commission lessens the demands on commission staff, who are busy enough simply processing complaints. Creating a separate body, however, makes it all the more important that commission orders are clear and explanatory, so that the advisory opinions can speak with confidence about the state of the disciplinary law. States should make clear whether a judge's reliance on an advisory opinion approving some course of conduct may serve as a defense to misconduct allegations or mitigate discipline. Procedures for requesting and writing advisory opinions, the opinions themselves (or a link to a separate website if applicable—and with names, if any, redacted) and the effect of such opinions should be embodied in written rules and available online.

Many commissions offer informal advice by telephone or otherwise. That advice should be committed to some written record, should a judge later rely on it as a defense in a misconduct proceeding.

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50 Jennifer M. Perkins, *Current Developments in Arizona Judicial Ethics*, 4 PHOENIX L. REV. 667, 667 & n.2 (2011).

51 See GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.13, at 38 (5th ed. 2013).

# EDUCATION AND DISSEMINATION

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## DESCRIBING AND EXPLAINING COMMISSION ACTIVITIES

Commissions vary in whether and how they make their discipline orders public. It appears that about half the states post online at least some final discipline-imposing orders issued by the commission or the supreme court, usually identifying the judge by name and sometimes briefly characterizing the nature of the disposition (e.g., “Informal Sanction (Public Reprimand)”). As noted earlier, only a few states appear to post routine dismissal orders.

Simply posting orders by date and number or even name of judge puts a time-consuming burden on scholars, news media, and watchdog groups that want to know and report what types of judges have been disciplined, for what action, and with what sanctions. (CNN recently faced this significant challenge in attempting to research and analyze how the federal judicial conduct system handles sexual misconduct claims.<sup>52</sup>)

By contrast, the New York and Washington commissions post all determinations imposing some kind of discipline and provide filtering mechanisms to let users sort the orders by type of determination (e.g., admonition, censure, etc.), year, county, and judge type.<sup>53</sup> Of course, some states may not have the resources to provide this type of availability, and small states that produce a handful of determinations each year probably have no reason to do so. Nevertheless, posting information about orders and providing a search function are fairly easy and inexpensive tasks in light of today’s technology.

States should also consider listing judges’ aggregate disciplinary records, thus keeping up with state bar programs that allow clients or employers to look up a lawyer’s disciplinary record, if any, on the state bar’s or supreme court’s website.

## SUMMARY STATISTICS

Transparency also requires commission websites to provide summary statistics on the operation of the disciplinary system—data should at least include the number of complaints filed by type of allegation, against what type of judge, with what disposition, the time from filing to commission disposition (and separately, the time from appeal to the supreme court or other appellate body and its disposition), as well as available or easily obtainable demographic information about complainants and subject judges. Most commissions provide some type of information—directly on the website or through a link to the commission’s annual report—and when they do, the data are usually well categorized. Transparency is not the only reason to provide clear explanations of a commission’s work. Because the percentage of complaints resulting in actual discipline strikes many observers as low—usually in the one to five percent range—commissions need to document and routinely explain that such numbers are mainly the result of high numbers of collateral attacks masquerading as misconduct complaints.

## EDUCATING JUDGES AND OTHERS ABOUT COMMISSION WORK

In addition, commissions and staff should—as many do—educate judges (or educate the court system’s continuing education body) about common judicial ethical issues and educate the public about the disciplinary system to promote confidence that judges are not above the law.

In addition, most commissions indeed regularly offer outreach and trainings to judges and court staff so that common judicial ethics pitfalls are avoided; these outreach and training opportunities also foster a more

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52 See Joan Biskupic, *CNN Investigation: Sexual misconduct by judges kept under wraps*, CNN, Jan. 26, 2018, available at <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html>.

53 See N.Y. COMM’N ON JUDICIAL CONDUCT, COMMISSION DECISIONS, available at [http://www.cjc.ny.gov/Determinations/all\\_decisions.htm](http://www.cjc.ny.gov/Determinations/all_decisions.htm); see also WASH. COMM’N ON JUDICIAL CONDUCT, available at [https://www.cjc.state.wa.us/index.php?page=search\\_discipline](https://www.cjc.state.wa.us/index.php?page=search_discipline).

proactive, rather than reactive, approach to judicial discipline. Convening participants referred to press releases about annual reports and high visibility cases, commission presence at annual bench-bar and other conferences, regular interactions with reporters and editorial boards as ways of keeping the media and the public informed about how commissions operate, what they do and how to understand their determinations.

## CONCLUDING CONSIDERATIONS

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To repeat, there is no one-size-fits-all ideal organizational structure or set of procedures for all disciplinary commissions. Variations in size and resources mean that what might work in one state would be impractical or impossible in another. Similarly, the extent to which a commission is operating under constitutional, statutory, or court rule mandates also dictates what it can change and what it cannot.

Accordingly, this Report is not an all-inclusive, best-practices guide, and this final section is not a compilation of recommended practices. Rather, we submit here observations and suggestions that commissions and, as appropriate, legislative, executive, and judicial branches might consider in assessing commission structure and procedures. We realize that many of these suggestions reflect arrangements and practices already adopted in many if not most states.



# RECOMMENDATIONS

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1. The commission should clearly explain the difference between conduct that is appropriate for an appeal and conduct that is appropriate for a discipline complaint, and commissions should carefully screen for the latter, even when the conduct complained about is a judicial decision.
2. The commission is more secure from easy manipulation if based in the state constitution.
3. The commission should pay attention to emerging patterns of problematic behavior reflected in complaints (even non-actionable complaints) and other sources and alert the respective judges to its awareness of those patterns. Administrators of judicial performance evaluations should share misconduct as appropriate with disciplinary authorities (and states that do not have judicial performance evaluation should consider adopting it).
4. The commission should have a diverse membership—demographically, vocationally, and geographically. Appointing authorities should be able to remove commissioners only for cause.
5. The commission should be able to assess its budgetary needs and present them unfiltered to the legislature, with appropriate autonomy to administer its funds. Commissions should consider seeking alternative or supplementary sources of funding, such as bar fees, fines, and orders recovering costs.
6. The commission should, through its structure or internal checks, separate the investigative and prosecutorial functions from the adjudicative functions. The commission executive director should not perform investigative and adjudicative functions in tandem, and disciplinary counsel should be given sufficient independence to assure full and fair investigations and as appropriate prosecutions.
7. The commission should have written rules of procedure and a code of conduct binding commissioners and staff. Commissioners' breach of the conduct rules, including such violations as failure to attend meetings, should be actionable by the appointing authorities. States should employ conflict-checking procedures that flag when commissioner recusal may be warranted.
8. The state's code of judicial conduct, other ethical rules and applicable sanctions should be clear and publicly available on commission websites. The commission and the court should consider adopting a wide array of potential sanctions and should develop standards for discerning what sanctions to impose.
9. The commission should eliminate unnecessary barriers to complaint filing, such as notarization, and provide for online filing.
10. The rules or instructions should be clear as to whether the commissions will accept anonymous complaints. Commission websites should advise complainants of the extent of their legitimate expectation of anonymity. And the commission should review any policies that restrict complainants or subject judges from discussing complaints publicly, consistent with the First Amendment.
11. States should consider establishing a forum—perhaps an ombudsman—to receive and try to resolve non-punitively judicial behavior that may be concerning or irresponsible but not necessarily unethical.
12. The commission should operate under rules that balance the need for confidentiality in the early stages of proceedings and for transparency about complaints with potential merit. Its procedures should shield judges from complaints unless there is a need for a response or the commission decides to bring charges. Its confidentiality rules must be consistent with the First Amendment.
13. Judges should be able to receive advice in various forms, either from the commission, its staff or a separate body, about whether contemplated actions are consistent with applicable conduct rules. Such advice should be duly recorded, and there should be clarity about what protection, if any, judges have from misconduct complaints if they conform conduct to advice provided. The body of advisory opinions should be readily available and searchable online.

14. Commission orders, aside from stipulated dispositions, should adequately describe the underlying complaint, explain why the commission did or did not give credence to the complaint, why the conduct alleged does or does not constitute misconduct, and describe and justify the appropriate sanction. The orders should contribute to a common law of judicial discipline, including defining the meaning of ambiguous or general conduct codes. Commission orders—at least in non-dismissed cases—should be available online, searchable, and with guides or filters to identify different types of orders. The commission should provide summary statistics on commission activity, and consider posting judges' aggregate disciplinary record, as state bars generally do as to lawyers.
15. The commission should operate under rules that limit the ability of judges to use resignation or retirement from the bench as a means of avoiding investigation for allegations of serious sexual and other misconduct, and sanctions for documented misconduct.



# APPENDIX A

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**Hon. Rebecca L. Kourlis**, Executive Director, Institute for the Advancement of the American Legal System; Colorado Supreme Court (Ret.)

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**Randall D. Roybal**, Executive Director & General Counsel, New Mexico Judicial Standards Commission

**Michael L. Schneider**, Executive Director and General Counsel, Florida Judicial Qualifications Commission

**Judie Stanton**, Public Member, Washington State Commission on Judicial Conduct

**Keith Swisher**, Prof. of Legal Ethics, University of Arizona James E. Rogers College of Law

**Nicole VanderDoes**, Chief Counsel, ABA Standing Committee on the American Judicial System

**Dorothy M. Webster**, Alternate Commissioner, Washington State Commission on Judicial Conduct

**Russell R. Wheeler**, Visiting Fellow, Governance Studies, The Brookings Institution

**Seana Willing**, Executive Director, Texas Ethics Commission

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\* Participants' affiliations are provided for informational purposes and do not denote the affiliated organization's support for this report.

# APPENDIX B

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## CONVENING AGENDA

March 1-2, 2018 | The Penrose House | 10 Lake Circle | Colorado Springs, CO 80906

### Thursday, March 1

10:00am – Noon	Welcome & Introductions <i>Hon. Rebecca Love Kourlis</i> Impartiality <i>Keith Swisher</i>  <b>- BREAK -</b>
1:00 – 5:15pm	Independence <i>James J. Alfini</i> Integrity <i>William J. Campbell</i>  <b>- BREAK -</b>  Fairness and Efficiency <i>Cynthia Gray</i>
5:15pm	Cocktails & Dinner

### Friday, March 2

8:30 – 11:30am	Transparency and Promoting Public Confidence <i>Russell R. Wheeler</i>  <b>- BREAK -</b>  Synthesis of Discussion Identification of Discipline System Reform Proposals <i>Hon. Rebecca Love Kourlis</i>
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### Topic Outlines:

#### Impartiality (*Swisher*):

- Disciplinary System Structure
- Disciplinary Counsel

#### Independence (*Alfini*):

- Treatment of Adjudicative Legal Errors
- Budget/Funding
- Standards of Review

[This grouping addresses both the independence of the judiciary and the independence of the commissions to review judicial conduct and, where appropriate, to hold judges accountable.]

#### Integrity (*Campbell*):

- Code of Conduct or Best Practices for Commission Members and Staff
- Diversity of Commission Members

#### Fairness and Efficiency (*Gray*):

- Efficient, Yet Thorough Case Screening
- Available Sanctions
- Handling Substance Abuse Cases
- Investigative and Disciplinary Defense Costs
- Advisory Opinions

#### Transparency and Promoting Public Confidence (*Wheeler*):

- Timing and Extent of Public Disclosure of Investigations and Dispositions
- Public and Judicial Education
- Reporting Disciplinary Sanctions



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