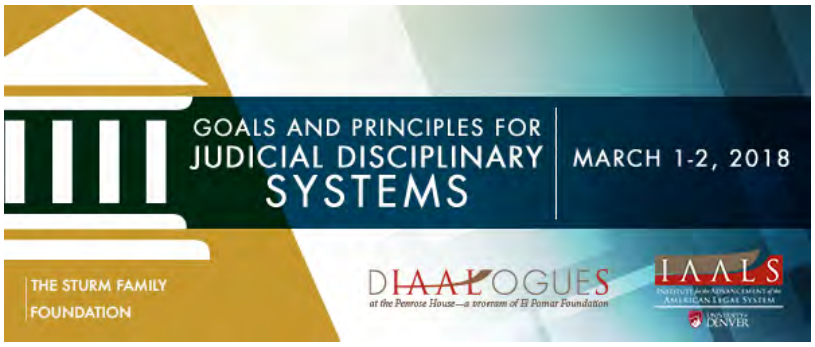

JUDICIAL DISCIPLINE IN THE STATES

IAALS' Judicial Discipline Pre-Convening Whitepaper

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PART OF IAALS' JUDICIAL DISCIPLINE PROJECT SPONSORED BY THE STURM FAMILY FOUNDATION

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Wielding significant power over the parties before them, judges are expected to exhibit integrity, impartiality, and independence and to avoid even the appearance of impropriety. Codifying these expectations, judicial ethics codes govern all state judges, and judicial conduct commissions monitor, enforce, and publicize code compliance (or the lack of it).[1] These commissions seek to provide accountability to judges and confidence to the public that judges are not above the law or below the dignity of judicial office. Prepared in anticipation of the IAALS Judicial Discipline Convening, this paper surveys judicial disciplinary processes, offers comparisons, and highlights several issues of divergence and controversy within state disciplinary systems. The issues raised go to the heart of the judicial disciplinary system's impartiality, independence, integrity, transparency, fairness and efficiency.

I. General Purposes and Processes of Modern Judicial Discipline

Through the 1960s, states dealt with judicial misconduct, if at all, "primarily through the traditional procedures of impeachment, address, or recall."[2] Yet these procedures "were cumbersome, time-consuming, uncertain in result, and often entangled in partisan politics."[3] Furthermore, "they provided for only one sanction—the draconian penalty of removal—which was not appropriate for all or even most cases of judicial misbehavior."[4] What was thus needed was a new process by which to enforce judicial ethics, to deter misconduct, to produce fair outcomes, and to assure the public of the integrity of the system.

The answer came largely in the form of judicial conduct commissions, starting first in California in 1960 and fairly rapidly spreading across the states thereafter. Today, all states have a permanent judicial conduct commission to hold judges accountable for misconduct. As illustrated in the pages below, however, no two states employ a perfectly identical judicial disciplinary system, and the composition, powers, and procedures of the judicial conduct commissions vary significantly across state lines.[5] (Indeed, even the names of the commissions, committees, and boards vary significantly from state to state, but for simplicity's sake, this paper uses the most common label: judicial conduct commissions.) Generally speaking, the commission structure is quite effective at recognizing both meritorious and non-meritorious complaints and taking action on (and only on) the former.[6]

The purpose of today's judicial disciplinary systems is to protect the public and the integrity of judicial proceedings, deter future misconduct, and promote public confidence in the judicial system.[7] By way of example, the Mission Statement of the Texas State Commission on Judicial Conduct concisely summarizes the key purposes of the system and how state commissions generally implement their mission:

> The mission of the State Commission on Judicial Conduct 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.
>
> The Commission accomplishes this mission through its investigation of allegations of judicial misconduct or incapacity. In cases where a judge is found to have engaged in misconduct or to be permanently incapacitated, the Texas Constitution authorizes the Commission to take appropriate disciplinary action, including issuing sanctions, censures, suspensions, or recommendations for removal from office.[8]

As another, representative example of the system's purpose, the California Supreme Court has noted that "the 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."[9] To be sure, some of these purposes are stated too generally, and other purposes can be (and have been) articulated.[10]

In practice, and according to the American Bar Association's 1994 Model Rules for Judicial Disciplinary Enforcement, the primary grounds on which to discipline a judge are: "(1) any conduct constituting a violation of the [code of judicial conduct] . . . or other applicable ethics codes; or (2) a willful violation of a valid order of the highest court, commission or panels of the commission in a proceeding under these Rules, a willful failure to appear personally as directed, or a knowing failure to respond to a lawful demand from a disciplinary authority."[11] Not every violation, however technical or fleeting, warrants discipline. Instead, the commission (and often later the court) must consider the violation in the context of the purposes of the system, "taking into account such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system."[12] Indeed, as the ABA notes, judicial disciplinary procedure attempts to "balance of a number of competing interests: the rights of judges to fair treatment in the disposition of complaints against them; the judges' interest in the confidentiality of complaints for which the commission finds there is not reasonable cause to believe that misconduct occurred; the public's concern that complaints against judges are given serious consideration and that judges are held to high standards of behavior; and the interest of the judges and the public in having judicial disciplinary complaints resolved promptly and accurately."[13]

Various factors and circumstances may thus render discipline inappropriate, even if a recognized ground for discipline is technically present. When the commissions determine that discipline is appropriate, however, they generally have a variety of sanctions at their disposal, including most commonly public or private reprimand,[14] suspension, or even removal.[15] Before imposing these sanctions, however, commissions typically must prove, or at least be able to prove, the judicial misconduct by clear and convincing evidence. In addition, the state highest courts generally must agree with and adopt the commissions' recommendations, although commissions' decisions with respect to certain (often less severe) sanctions are final in some states.[16]

For these reasons and others, the total percentage of complaints resulting in actual discipline strikes many observers as low. For example, "the average number of judges disciplined each year as a percentage of closed complaints between 2005-2014 was 3.4% in California, 3.6% in Texas, and 1% in New York."[17] Indeed, the percentage rarely exceeds 10% in any state.[18] This seemingly low rate may be justified, however, in part because the majority of complaints are veiled or not-so-veiled appeals on the merits. To

be sure, judges in fact can be, have been, and should be disciplined for certain adjudicative misconduct, such as disregarding fundamental rights, ruling without jurisdiction, or exhibiting patterns of biased decision-making.[19] In the main, however, commissions properly recognize judges' decisional independence. "[I]n the approximately half-century history of modern judicial [discipline]," infringement on decisional independence "has come to fruition on only a few occasions."[20] The route for correcting legal error thus remains the appellate process, not the disciplinary process.[21]

In sum, the combination of clearer and mandatory judicial ethics codes and the arrival of commissions to enforce those codes has meant that state judges are under significant and fairly consistent ethical regulation. As with every human endeavor, however, the current disciplinary structure leaves room for improvement, and the second half of this paper raises some potentially fruitful opportunities for improvement.

II. Composition of Judicial Conduct Commissions

The ABA recommends that each state create a judicial conduct commission (which every state has done) through the state constitution (which many but not all states have done).[22] The ABA Model suggests that a commission consist of twelve members, resident in the state, of whom four are intermediate or trial court judges appointed by the highest court, four are lawyers admitted to practice in the state and appointed by a bar association, and four are gubernatorial-appointed public members.[23] Removal of any member should be only for cause.[24] On diversity, the commentary says only that "[t]o the extent practical, appointments should reflect the diversity of the state's population."[25] In the states, the "commission membership ranges from twenty-eight members (Ohio) to five (Montana), although most commissions have between seven and eleven members."[26]

To promote independence, the ABA suggests that the legislature, not the judiciary, fund the commissions, and that each commission should prepare and have its own budget.[27] Not every state has adopted this recommendation, however, and in any event commissions from state to state work with significantly varied, and sometimes inadequate, budgets and staff support. Additional staff support is generally advisable for most commissions because it expands investigative reach, increases (meritorious) disciplinary actions, and increases judicial and public outreach and education (through websites, social media, additional reports, seminars, publications, and the like).

III. JURISDICTION

A. *INITIATION*

Most states have liberal rules for complaint initiation. For example, as the ABA has recommended, "[t]he term 'complaint' includes information received by telephone, news items and any other source and includes complaints initiated by disciplinary counsel on their own motions."[28] Thus, even a news piece can form the basis of a complaint, and disciplinary counsel can serve as the complainant. Complainants may generally remain anonymous to the extent practicable.[29] Although complaint forms are generally accessible, commissions should have online complaint forms with filing instructions, in at least English and Spanish, to enhance accessibility.

Once in receipt of a complaint, the commissions generally will screen for and act on complaints alleging a particular type of subject matter—violations of the state code of judicial conduct. In addition, various state constitutions and rules grant other, sometimes-overlapping grounds for discipline (such as conviction of a crime or persistent failure to perform judicial duties).[30]

B. *PRE- AND POST-BENCH CONDUCT*

State approaches vary over "whether judicial conduct organizations may exercise authority over a judge who has left office but who may have engaged in misconduct while still on the bench."[31] The ABA recommends that the state commissions maintain jurisdiction over judges for conduct that occurred before the judge's service on the bench and over former judges for complaints made within a year of leaving the bench.[32] And "[i]n most states, the judicial conduct commission or supreme court retains authority to impose a sanction on a former judge—at least if formal charges have been filed before the judge left office."[33]

Judges who have retired voluntarily but who continue to hear cases typically may be disciplined as well. Finally, judges or former judges in most states face the possibility of lawyer discipline, such as disbarment.[34] In sum, much state convergence exists, but a minority of states maintain unique rules governing pre- and post-bench conduct, which may be ripe for reexamination.

IV. Different Disciplinary Processes

A. ABA Model

The ABA recommends (and eight states indeed use) a two-panel system for (1) investigating judicial complaints and (2) adjudicating those complaints. The investigative panel must prove or be able to prove to the adjudicating panel, by clear and convincing evidence, that the judge violated the state's code of judicial conduct (or other applicable code or law).[35] A judge may have counsel present "at every stage of the proceedings,"[36] although usually not at state expense. Commissions (or their staff) must acknowledge receipt of every complaint and provide the complainant with written notice of the final disposition.[37]

The ABA recommends that disciplinary counsel evaluate all information that comes to its attention from whatever source and dismiss the complaint if it does not allege disciplinable conduct or disability (subject to investigative panel review) or refer the information to another agency. Although "[d]isciplinary counsel must be authorized to screen complaints because complaints that fail to state grounds for discipline represent a large portion of those received by commissions," it is an important commission oversight function that "an investigative panel . . . review the dismissals to determine that the screening is being done properly."[38]

For complaints "that would constitute judicial misconduct or incapacity if true, disciplinary counsel shall conduct a preliminary investigation."[39] At the conclusion of the preliminary investigation, an "investigative panel shall review disciplinary counsel's recommendations and either dismiss the complaint or authorize a full investigation."[40] A dismissed complaint should not be used against the judge in any future proceeding.[41] If the panel decides that a full investigation is warranted, disciplinary counsel must provide the judge with the following notice:

- A specific statement of the allegations being investigated and the canons or rules allegedly violated, with the provision that the investigation can be expanded if appropriate;
- The judge's duty to respond . . . ;
- The judge's opportunity to meet with disciplinary counsel . . . ; and
- The name of the complainant unless the investigative panel determines that there is good cause to withhold that information.[42]

Following the investigation and the judge's response (if any), the panel may dismiss the matter, or if it "finds that there is reasonable cause to believe the judge

committed misconduct . . . it may propose a private admonition or deferred discipline agreement to the respondent and if the respondent consents, it shall admonish the respondent or implement the deferred disciplinary agreement; in addition, it may assess costs against the respondent as a condition of the private admonition or deferred disciplinary agreement; . . . or . . . it may direct disciplinary counsel to file formal charges."[43] Formal charges when warranted should be filed with the commission and give "give fair and adequate notice of the nature of the alleged misconduct or incapacity."[44] Unless the hearing panel grants an extension, the judge must respond in writing to the formal charges within twenty days.[45] Should the judge fail to respond, it "shall constitute an admission of the factual allegations."[46]

The Model Rules provide both disclosure and discovery, at least in a limited fashion. Both sides, moreover, typically should have the ability to compel documents and witnesses.[47] With respect to mandatory disclosure, "[w]ithin [20] days of the filing of an answer, disciplinary counsel and respondent shall exchange the names and addresses of all persons known to have knowledge of the relevant facts."[48] Later, "[t]he hearing panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing."[49] Both sides must also "exchange . . . non-privileged evidence relevant to the formal charges, documents to be presented at the hearing, witness statements and summaries of interviews with witnesses who will be called at the hearing . . . ."[50] Finally, the ABA recommends that disciplinary counsel adhere to, in essence, a *Brady* obligation—to "provide respondent with exculpatory evidence relevant to the formal charges."[51] If either side fails to honor its disclosure obligations, the hearing panel (or hearing officer) may preclude the testimony.[52]

In terms of discovery, either side "may take depositions only of witnesses to be called at the hearing and other witnesses who are unavailable to testify."[53] Additional depositions, if any, "may be taken only with permission of the chair of the hearing panel or the chair's designee and only for good cause shown."[54] Although the ABA would not apply all of the rules of civil procedure to the disciplinary discovery context, it does recommend following the applicable rules of civil procedure relating to depositions and subpoenas.[55]

In lieu of a full disciplinary hearing, the parties may enter an agreement for discipline by consent, through which the parties may essentially stipulate to the appropriate sanction.[56] In that event, "[t]he agreement shall be submitted to the hearing panel of the commission assigned to the case, which shall either: (1) reject the agreement; or (2) submit the agreement to the highest court for approval."[57] If the hearing panel or the court rejects the agreement, it "shall be withdrawn and cannot be used against the respondent in any proceedings."[58]

If a full hearing is necessary, it should be public and recorded.[59] Both parties have an opportunity to offer evidence and examine witnesses.[60] The respondent-judge must

testify, if called, although pleading the Fifth Amendment is potentially an option.[61] At the conclusion, "[t]he hearing panel shall either dismiss the case or recommend a sanction to the highest court."[62] Generally within thirty days from the conclusion of the proceeding, the hearing panel must "file with the highest court the record of the proceeding and a report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions and the order of dismissal or recommendation for sanction."[63] If the report recommends suspension or removal of the judge, the hearing panel must simultaneously submit a copy of its report to the applicable lawyer disciplinary authority for possible action against the judge.[64] Either side may then "file with the highest court notice of exceptions to the findings, conclusions or recommendations for sanction or order of dismissal of the hearing panel;" the failure to do so "constitutes acceptance of the findings of fact, conclusions of law and order of dismissal or recommendation for sanction."[65]

The highest state court, the Model Rule continues, should then docket the matter for expedited briefing and consideration.[66] The court should review the findings of fact and conclusions of law de novo, and it may remand to the hearing panel for an expansion of the record or further factual findings.[67] Unless the court remands the matter, or stays the matter to consider other pending complaints against the same judge, the court must "file a written decision dismissing the case or imposing a sanction," and its decision "shall be published in the official reports for the guidance of other judges and for public information."[68] Under the ABA Model, a special court or tribunal is unnecessary unless misconduct is alleged against a justice or judge of the highest court.[69]

Finally, the ABA treats disability proceedings (which it calls incapacity proceedings) [70] consistently with disciplinary proceedings, but with several key differences. The purpose of the proceedings is "to determine whether the judge suffers from a physical or mental condition that adversely affects the judge's ability to perform judicial functions," and "all of the proceedings shall be confidential."[71] In addition, "the commission may appoint a lawyer to represent the judge if the judge is without representation."[72] When a judge is indeed incapacitated, the proceedings would typically lead to one of the following outcomes:

- Retiring the judge;
- Transferring the judge to judicial incapacity inactive status;
- If the highest court concludes that the judge is incapacitated to practice law, transferring the judge to lawyer incapacity inactive status; and
- If a judicial disciplinary proceeding against the judge is pending and the highest court concludes that the judge is incapacitated to defend, deferring the disciplinary proceeding. . . .[73]

To assist with the determination of incapacity, the ABA Model would have the hearing panel "designate one or more qualified medical, psychiatric or psychological experts to examine the judge prior to the hearing on the matter."[74] After receiving the examination report(s), the parties may enter into a stipulated agreement.[75] If through agreement or otherwise the judge is placed on incapacity inactive status, the judge must later petition the court for transfer back to active status. On filing the petition, "the judge shall be required to disclose the name of each psychiatrist, psychologist, physician and hospital or other institution by whom or in which the judge has been examined or treated since the transfer to incapacity inactive status," and "[t]he judge shall furnish to the highest court written consent to the release of information and records relating to the incapacity if requested by the highest court or court-appointed medical or psychological experts."[76]

B. FEDERAL SYSTEM

The federal system's judicial conduct and disability procedure[77] is notable in a variety of ways, mostly negative. For example, no public members or even lawyers have any official role in addressing the complaints,[78] and it has notably low rates of discipline, has lagged behind many states in its transparency,[79] and in at least one large study, had a high error rate in cases garnering a large amount of publicity.[80] (Also in the press of late, the system generally is ineffectual when the judge retires before the disciplinary process concludes.[81]) Editorial characterizations aside, Professor Arthur Hellman aptly describes the process:

> There are two ways in which a proceeding may be initiated to consider allegations of misconduct by a federal judge. Ordinarily, the process begins with the filing of a complaint about a judge with the clerk of the court of appeals for the circuit. "Any person" may file a complaint; the complainant need not have any connection with the proceedings or activities that are the subject of the complaint, nor must the complainant have personal knowledge of the facts asserted. But the Act also provides that the chief judge of the circuit may "identify a complaint" and thus initiate the investigatory process even when no complaint has been filed by a litigant or anyone else.[82]

Chief judges identify few complaints, but under either path, "[t]he chief judge 'may conduct a limited inquiry' but must not 'make findings of fact about any matter that is reasonably in dispute' and proceed in one of three ways: (a) dismiss the complaint, (b) 'conclude the proceeding' upon finding that 'appropriate corrective action has been taken [by the judge, not, for example, by an appellate court] or that action on the complaint is no longer necessary because of intervening events,' or (c) appoint a 'special committee' to investigate the allegations."[83] If the complaint is dismissed, the complainant can seek

review with the judicial council of the applicable circuit, which can order further proceedings or deny review.[84] Circuit councils almost never order further proceedings and, by statute, a council decision affirming the chief judge dismissal is unreviewable. (From the judge's perspective, if the complaint is dismissed, the judge may be reimbursed for attorney's fees spent in defense of the complaint.[85])

If the chief judge does not dismiss or conclude the complaint, the chief judge must appoint a "special committee" of judges to investigate the matter and submit a report to the circuit council. The council may dismiss the matter, investigate further, or impose a range of sanctions, including but not limited to public or private censure and temporary reassignment of cases.[86] The council may recommend removal of bankruptcy or magistrate judges pursuant to statutory provisions. It may not remove from office judges with Article III "good behavior" protections but can certify their disability or ask them to resign.[87] "A complainant or judge who is aggrieved by an order of the circuit council can file a petition for review by" the Judicial Conference of the United States (and its Committee on Judicial Conduct and Disability), which generally has final authority. The Conference may also advise the House of Representatives that it believes there are grounds for impeachment,[88] and it has done so twice in recent years.

C. STATE EXAMPLES

This section describes the general disciplinary paths in three notable states: California, New York, and Texas. In addition to their geographical diversity and well-established disciplinary systems, these three states have a relatively high number of judges and therefore process a relatively high number of complaints per year.[89] For further comparative purposes, the procedure of another state, West Virginia, is included to provide a glimpse of a relatively smaller disciplinary system and one that follows a significantly different structure. Although these four systems contain many representative features, they cannot capture all procedural variations existing in the fifty states.[90]

1. California

In 1960, California became the first state to establish a permanent commission on judicial conduct. "The California Commission on Judicial Performance . . . is the independent state agency responsible for investigating allegations of judicial misconduct and disciplining California judges."[91] Of its eleven members, the majority (six) are public members.[92] Its jurisdiction reaches all judges in the state.

According to the commission, "[j]udicial misconduct usually involves conduct that conflicts with the standards set forth in the Code of Judicial Ethics" on the bench, including "intemperate courtroom conduct (such as yelling, rudeness, or profanity), communications with only one of the parties in a case when not permitted by law, failure

to disqualify oneself in cases in which the judge has or appears to have a financial or personal interest in the outcome, delay in performing judicial duties, and abuse of authority," and "off-the-bench conduct such as driving under the influence of alcohol, using court stationery for personal business, or soliciting money from persons other than judges on behalf of charitable organizations."[93]

The commission acts on complaints from virtually any source, including anonymous sources. For any complaints "stating facts, which, if true, would constitute misconduct,"[94] the commission will open an investigation, which commission staff conducts. "Cases lacking merit – either because the allegations are untrue or unprovable by clear and convincing evidence – are closed, and the complainant is so notified."[95] "If 'relatively minor' misconduct is found after an investigation and opportunity for comment from the judge, the Commission may issue a confidential advisory letter that 'advises caution or expresses disapproval' to the judge."[96] If additional disciplinary action is needed, the commission may issue a private admonishment. Although admonishments are confidential, the commission "publishes redacted summaries of all private discipline each year in its annual report."[97]

For more serious misconduct, the commission may publicly admonish or censure a judge.[98] Finally, following a formal hearing (typically before three special masters),[99] the commission may even remove a judge.[100] If a judge is disciplined, the judge "may petition the Supreme Court to review any discipline or involuntary retirement ordered by the Commission."[101] The court's review is discretionary, and if granted, it is conducted de novo.[102]

Over a recent, twenty-year period of study, "the Commission imposed discipline on trial court judges in 790 cases: 496 cases from 1990 to 1999 and 294 cases from 2000 to 2009."[103] Drawing general observations from the same study, the commission noted (among other findings) that:

- Female judges were less frequently sanctioned than male judges.
- Initially elected judges were more frequently sanctioned than initially appointed judges.
- Judges on small courts were more frequently sanctioned than judges on larger courts.
- Judges who had previously been sanctioned by the Commission made up a large share of disciplined judges.[104]

2. *New York*

The New York State Commission on Judicial Conduct views its mandate as follows: "By offering a forum for citizens with conduct-related complaints, and by disciplining those judges who transgress ethical constraints, the Commission seeks to

insure compliance with established standards of ethical judicial behavior, thereby promoting public confidence in the integrity and honor of the judiciary." [105] The commission is comprised of eleven members, at least four of whom must be judges, one must be an attorney, and two must be public members. The commission reviews all complaints and decides initially whether they should be dismissed or investigated. Quite notably, "in its 35 years of operation, the Commission has received and processed over 41,000 complaints, conducted over 7,500 investigations, publicly disciplined over 700 judges and confidentially cautioned over 1,400 others."[106]

The commission investigates various types of complaints, including "improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench." [107] When the commission orders an investigation, staff attorneys (and investigators) conduct the investigation. If the commission decides that formal proceedings are warranted, it asks staff to file a formal written complaint, to which the judge may respond. When a formal hearing is needed,[108] the commission appoints a referee to conduct the proceedings and issue findings of fact and conclusions of law for commission review.[109] Unlike most states, the burden of proof in New York is a preponderance of the evidence.[110] The commission may dismiss the complaint or admonish, censure, retire, or remove the judge.[111] (The commission has no ability to impose a suspension.[112]) This determination and the record of proceedings then become public.[113] The judge has thirty days to seek plenary review of the commission's determination in the state's highest court, the Court of Appeals;[114] else the commission's decision becomes final.

3. *Texas*

Established in 1965, the Texas State Commission on Judicial Conduct is an independent agency (but within the judicial branch). [115] The commission's thirteen members include six judges appointed by the Supreme Court and drawn from the six levels of courts, five non-judge, non-lawyer public members appointed by the governor, and two non-judge attorneys appointed by the State Bar of Texas.[116]

The commission has jurisdiction over all judges in the state (excluding only federal judges and administrative hearing officers), but it "does not have authority to sanction anyone who was not a sitting judge at the time the alleged misconduct occurred." [117] The state constitution defines judicial misconduct as the "willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of [the judge's] duties or casts public discredit upon the judiciary or administration of justice."[118]

The commission will review "allegations from any source, including an individual, a news article, or information obtained during an investigation." [119] In addition, "[c]omplaints may be made anonymously, or the complainant may request confidentiality; however, in those instances, the Commission may be restricted in its ability to fully investigate the allegations."[120] Since March of 2016, Complaints may be filed electronically: "From April 1, 2016, to August 31, 2016, 28.63% of complainants filed the complaints electronically . . . [and] for fiscal year 2017, 57% of the complaints received were filed through the Commission's website."[121] The complaint form may also be downloaded in English or Spanish.[122]

Commission staff investigates complaints and submits a report to the commission for its decision.[123] The commission may dismiss the matter, sanction the judge, accept a resignation agreement in lieu of discipline, or institute formal proceedings. The complainant is notified of any commission action (although the judge's name is generally omitted unless the sanction is public). The judge may appeal any public or private sanction to the Special Court of Review (composed of three appellate judges appointed by the Supreme Court of Texas). On appeal, commission staff files a charging document with the Supreme Court of Texas, making the charges and the previous sanctions public documents. The Special Court of Review then considers the appeal de novo.

Commission staff members serve as disciplinary counsel in formal hearings. The commission generally asks the Supreme Court to appoint a special master to hear the matter, who in turn will issue findings of fact to the commission. If either side objects, the commission will hold a hearing on the findings. The commission then makes its determination. If the commission seeks removal, it must recommend it to a Review Tribunal (composed of seven judges appointed by the Supreme Court of Texas). If the Review Tribunal orders removal, the judge may appeal the order to the Supreme Court of Texas, whose decision is final.[124]

Although generally restrictive, [125] the Government Code authorizes the commission to make the following disclosures to the public:

- When the Commission issues a public sanction against a judge, . . . the Texas Government Code provides that "the record of the informal appearance and the documents presented to the commission during the informal appearance that are not protected by attorney-client or work product privilege shall be public."
- [The Government Code] also provides that suspension orders and voluntary agreements to resign in lieu of disciplinary proceedings are publicly available.
- [The Code] also authorizes the release to the public of papers filed in a formal proceeding upon the filing of formal charges.[126]

Finally, the commission may and occasionally does issue "public statements" (pursuant to the state constitution) "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."[127]

4. West Virginia

West Virginia follows a true "two-tiered" judicial disciplinary system. The first tier is the Judicial Investigation Commission, which "consists of nine members: three circuit judges; one magistrate; one family court judge; one retired circuit judge; and three members of the public."[128] The Supreme Court of Appeals appoints all nine members, who serve staggered three-year terms.[129] In 2017, the commission received 149 new complaints (and had 14 pending complaints from the previous year); in response, it dismissed 129 complaints for lack of probable cause, dismissed 6 complaints for lack of jurisdiction, issued 7 admonishments, and initiated hearings on 4 complaints.[130]

Consistent with other states, the Judicial Investigation Commission "must file an annual report with the Supreme Court of Appeals on the operation of the Commission and inform the public about the existence and operation of the judicial disciplinary system, the filing of formal charges, and the discipline imposed or recommended."[131] The commission also issues advisory opinions, which are not binding but are admissible in a subsequent disciplinary proceeding against the requesting judge. In 2017, the commission issued twenty-four advisory opinions.[132]

When the commission receives a qualifying complaint of misconduct,[133] its staff[134] investigates the matter and generally provides the judge an opportunity to respond in writing. Counsel recommends to the commission whether to dismiss the complaint or to find probable cause. For minor matters, the commission may find probable cause and issue a written admonishment to the judge, which becomes public. If the judge objects to the admonishment or if the matter involves conduct for which an admonishment is insufficient,[135] the commission must refer the matter to the second tier, the Judicial Hearing Board, by filing formal, public charges with the Clerk of the Supreme Court of Appeals.

The Judicial Hearing Board looks virtually identical to the Judicial Investigation Commission. It also has nine members, consisting of "three circuit judges, one magistrate, one family court judge, one mental hygiene commissioner, juvenile referee, special commissioner, special master, or former judge or justice, state or federal, and three members of the public."[136] As with the Judicial Investigation Commission, the Supreme Court of Appeals appoints all members, who serve staggered three-year terms.

The Judicial Hearing Board (or with the parties' consent, a single examiner) must conduct a hearing within ninety days. The Rules of Civil Procedure and the Rules of Evidence apply to the hearing. If misconduct is established by clear and convincing evidence, the Board "may recommend . . . any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to $5,000; or (6) involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits under the judges' retirement system or public employees retirement system."[137] The Board may also recommend lawyer sanctions against the judge's law license.[138] (If the judge is exonerated, however, the judge "shall be entitled to reasonable attorneys fees which shall be paid by the State."[139]) The Supreme Court of Appeals then makes the ultimate decision on the violations and the sanctions, if any; it reviews de novo the record and the Judicial Hearing Board's recommendations.[140]

V. Available Sanctions and Remedies for Misconduct

The available sanctions for judicial misconduct generally include: removal, retirement, suspension, censure, reprimand, lawyer discipline, and diversion/deferred discipline arrangements.[141] In addition, the court or commission may generally impose interim suspension when the judge has been charged with a criminal offense or poses a serious and imminent risk of substantial harm to the public.[142] Whether the disciplinary matter should be stayed pending resolution of a criminal matter is generally left to the discretion of the commission or court.[143] The judge generally may object in advance to the suspension or move to reconsider it after imposition.[144]

For minor misconduct and for disability issues, deferred discipline agreements are an important tool for commissions and respondent-judges.[145] Beyond the standard sanctions, commissions generally may recommend or require correction action, including "remedial measures, making apologies, and undergoing education, counseling, or mentoring."[146] 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.[147]

Disability cases in particular raise difficult issues for commissions and judges. Disability considerations arise when "a physical or mental impairment significantly interferes with the capacity of a judge to perform judicial functions or duties."[148] "[T]he modern trend calls for treatment and help, whenever possible, for the disabled judge," and judicial assistance programs can play a key role.[149] As in the judicial misconduct context, the disciplinary authority generally must establish disability by clear and

convincing evidence, although fortunately mutual agreements and assistance programs can sometimes render full proceedings unnecessary. Where such further proceedings are necessary, the judge may need or want to undergo a physical or mental examination.

Many assume that the judicial disciplinary regime is the appropriate forum for judicial disability matters.[150] Whatever the system, under the new(er) Model Code of Judicial Conduct, fellow judges generally must take "appropriate action, which may include confidential referral to a . . . judicial assistance program," for a judge reasonably believed to be impaired from substantial abuse or a mental or physical condition.[151]

Each state (and especially those in which a constitutional amendment would not first be required) should consider adopting the full array of sanctions and remedies discussed above, which enable an optimal fit between conduct and remedy. For example, the preponderance of private remedies (over public ones) may consciously or subconsciously drive commissions toward more private sanctions, even when a public sanction would be more appropriate. As another, perhaps even more problematic example, in Maine, Massachusetts, Tennessee, Vermont, and West Virginia, "removal is not an option in judicial discipline proceedings;" they "may be removed only through impeachment or address."[152] The problem exists on the other end of the spectrum as well: minor misconduct or disabilities may not be fairly addressed because the state does not use diversion arrangements or judicial assistance programs. In sum, a broader array of available sanctions and remedies promotes proportionate, effective, and fair outcomes.

VI. CONTROVERSIAL, TIMELY, OR TIMELESS ISSUES WARRANTING FOCUSED CONSIDERATION

This final Part groups controversial, timely, or timeless issues in judicial discipline under five overarching categories: (1) Impartiality, (2) Integrity, (3) Independence, (4) Fairness and Efficiency, and (5) Transparency and Promoting Public Confidence. These categories cover all or at least most of the values and goals behind judicial disciplinary systems, using terminology familiar to judges and common to judicial ethics issues. To be sure, the groupings are not mutually exclusive, and other groupings would be justifiable; nor, of course, is every judicial-discipline-related issue raised below.

A. ISSUES OF IMPARTIALITY

Risks of bias can arise in the structure or administration of judicial discipline. Most states employ a "one-tier" commission structure, which essentially means that the commission investigates, prosecutes, and adjudicates misconduct. One-tier structures

generally raise due process concerns because the same body investigates complaints and acts on its own investigation, and commissioners, when adjudicating, cannot help but recall evidence from the investigation (which for example might be inadmissible, tenuous, or one-sided).[153] The ABA therefore recommends, and several states follow in essence, a two-panel system.[154] Of the ABA's model twelve-member commission structure, three members sit on the investigative panel and nine sit on the hearing panel; no member may sit on both panels in the same matter, and each member category (judge, lawyer, public) must be represented on both panels.[155]

This two-panel structure, in which one representative panel investigates the matter and decides whether to bring charges against a judge and another representative panel hears the matter, is subject to a number of qualifications and exceptions. For example, the commissions are generally permitted to hire a (non-representative) disciplinary counsel to investigate complaints and prosecute charges and to hire commission counsel to advise the commission (or a panel of the commission).[156] Disciplinary counsel must not participate in the adjudicative function,[157] but the independence of disciplinary counsel can vary significantly from state to state, as raised below.[158] As another example, many commissions use a single hearing officer (who, as with disciplinary counsel, necessarily will not represent all member categories) to serve as the initial fact-finder.[159] Furthermore, the two-panel structure, while more solicitous of due process norms than a single-tiered structure, does not eliminate completely the problematic appearances: it is, after all, the same commission performing both roles, and although the panels divide themselves, the commission typically still meets and converses as a whole on general administrative matters.

Albeit with less efficiency, an actual two-tiered structure can remedy the concerns above. "There are eight two-tier states—Alabama, Delaware, Illinois, Ohio, Oklahoma, Pennsylvania, West Virginia, and Wisconsin"—in which "complaints against judges are investigated by one body (the first tier), which decides whether to file formal charges, [and] the formal charges are heard and decided by a second body (the second tier) that has a different name, different membership, different offices, and different staff."[160] As with one-tier systems, an appeal to the highest court is available, adding a third layer of potential error-correction. For states following the one-tier system, they should at least consider the advantages and feasibility of adopting a two-tier or at least two-panel model.

Another issue of impartiality, or at least the appearance of partiality, is the extent to which judge-commissioners might share professional or personal connections with the respondent-judges. Does a judge-commissioner, for example, sit on the same, presumably collegial court as the respondent-judge? In addition to or in lieu of the preceding potential issue, does the commissioner know or believe some good or bad fact about the respondent-judge? Commissioners typically must 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.

The reporting structure of disciplinary counsel may also warrant discussion. For example, and without suggesting these questions have merit in any individual states, do executive directors in certain states have too much influence over the direction of disciplinary counsel, or do commission members deter potentially meritorious investigations for improper or suboptimal reasons? Furthermore, where is disciplinary counsel's office (within the commission, next door to the commission's director, and so on)? If these or similar concerns do have some merit, what steps might boost the independence of disciplinary counsel or deter others from hindering potentially meritorious investigations and prosecutions?[161]

B. Issues of Independence

This category addresses both the independence of the judiciary and the independence of the commissions to review judicial conduct and, where appropriate, to hold judges accountable. Three such independence-related issues are raised below: commission review of judges' adjudicative conduct; funding or budget of commissions and staff; and standards of review of commission determinations.

Review of judges' alleged adjudicative legal errors (from the merely perceived to the egregious) continues to clog the disciplinary systems and put bandwidth pressure on commission members and staff by driving up significantly the number of complaints to review. Some adjudicative conduct certainly warrants discipline, but discerning non-disciplinable legal error from disciplinable misconduct can be time-consuming and even analytically challenging.[162] Commissions' perhaps understandable haste to deter potential complainants from alleging legal errors may also deter meritorious complaints.[163] Even as to otherwise innocent legal errors, judges, like lawyers, have a duty of competence.[164] In sum, navigating the workload, preserving decisional independence, and holding judges accountable for adjudicative misconduct often requires a complex balancing act, warranting examination (and reexamination).[165]

Standards of review, and the appellate process more generally, in judicial disciplinary cases raise a form of independence concern and are ripe for comparative analysis.[166] For the most part, state high courts conduct a de novo review, often giving little-to-no official deference to the commission's decision.[167] To honor the high court's superintendent function over the judiciary, must or should the review be de novo? Conversely, some commissions' decisions are final, or become final, after the high court declines discretionary review (or the time for seeking such review has passed). Particularly in one-tier (including two-panel) states, should high court review be mandatory, not discretionary? Would automatic and meaningful review deter commissions from issuing minor sanctions under the belief that the judge will take the sanction rather than expend the time, money, and emotional capital to challenge the minor sanction?

Finally, the manner and extent of the commission's funding may impact the commission's independence. In brief, do the commission and staff have adequate funding to do their job independently, competently, and impartially? Is their funding or budget instead subject to lobbying or whim?[168] Are the funds so thin or the restrictions so strict that meritorious misconduct cases are not being investigated adequately or at all?

As the examples above suggest, independence-related issues warrant careful and systematic attention.

C. Issues of Integrity

To ensure that commission members and staff are operating with integrity and to promote public confidence in the judicial disciplinary system, two issues are raised below: whether commissioners and staff should operate under a code of conduct (or whether particular rules or at least best practices should be followed); and whether diversity of commissioners and staff should be reviewed.

First, given the importance of their work and their different backgrounds (as noted above, three different member categories exist), judicial conduct commission members need training, guidance, and rules. States should provide members and new staff with judicial ethics and (at least for the public members) judicial process training and should ensure that a code of conduct governs their work.[169] For example, strict and clearly articulated rules on screens should separate the investigative and adjudicative roles, in addition to rules regulating ex parte communications with those outside of the disciplinary system.

Second, although the general commission structure provides a type of vocational diversity, other forms of diversity are underrepresented. Appointing bodies should also consider gender, ethnic, and geographic diversity, among other forms.

D. Issues of Fairness and Efficiency

It is not controversial that judicial disciplinary systems should operate fairly and efficiency, but states approach these sometimes-conflicting goals in significantly different ways. Some key (but by no means exclusive) issues are raised below: case screening methods; available sanctions and remedies for discipline and disability cases; handling substance abuse cases; investigative and disciplinary defense costs; and advisory opinions.

Disciplinary counsel are generally left with great responsibility and discretion in screening complaints. Should commissions, as a whole or as a panel, review each

dismissal? (Many do, although the timing and attention differs across states.) In addition, is each complaint being read for its own potential merit, or are some complaints being prematurely placed and ultimately dismissed in some predetermined category? For example, are inmate complaints treated with the same respect as other complaints? Are complaints alleging a form of legal error still being reviewed for possible merit (e.g., a pattern of incompetence, rulings without jurisdiction, abuse of procedural rights)? Are complainants receiving adequate notice of dismissals and the reasoning for the dismissals, and do they have an opportunity for appeal or reconsideration? Are disciplinary counsel afforded sufficient time to review all complaints and as appropriate investigate complaints preliminarily?

To address meritorious complaints, do counsel, commissions, and courts have sufficient sanctions and remedies at their disposal to reach proportionate and effective dispositions? It would seem that commissions and courts should have the greatest spectrum possible, from training, counseling, and diversion through suspension, retirement, and removal. Substance addiction cases present a particularly perplexing genre, in which a less typical and more rehabilitative approach may be warranted. In 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. Conversely, serious cases of intentional misconduct warrant strong sanctions, such as suspension or removal, which not every state currently authorizes.

Another issue that could benefit from greater systematic attention is the treatment of costs. Should judges found to have committed misconduct (including those judges who agree to discipline by consent) be forced to pay some or all of the commissions' or courts' costs? Does such a requirement have a deterrent effect or serve another purpose of judicial discipline, or does it instead strap respondent-judges with potentially inflated or otherwise inaccurate estimates of disciplinary costs and accomplish little except excessive punishment? Do such costs deter, or otherwise infringe on, respondent-judges' right to appeal? In systems that permit the imposition of costs, are costs being imposed consistently or arbitrarily?

Another key issue is whether commissions should provide respondent-judges with appointed counsel or later reimburse them for the costs of retaining counsel. For judges who did not commit misconduct, or when the misconduct is disputed, should the state pay for the judge to have an experienced ethics attorney or at least (after dismissal) reimburse for out-of-pocket expenses in having to defend a (non-meritorious) complaint resulting from on-the-job functions?

Finally, the issue of judicial ethics advisory opinions presents interesting questions of resource allocation and disciplinary treatment. "Some states issue advisory opinions either through a separate entity (the majority approach) or their judicial conduct commission (the minority approach), although approximately fifteen states issue no

advisory opinions."[170] In particular, "[e]ight commissions . . . issue judicial ethics opinions on request from judges wanting advice on prospective conduct."[171] Advisory committees generally exist to provide ethical guidance to judges and to recommend ethical amendments as necessary to the relevant court (typically the state supreme court). Their advisory opinions are generally open to the public, although the name of the judge who requested the opinion typically is redacted (or omitted in the first place). Although not addressed in every state, judges who rely on these advisory opinions may have a defense to, or receive mitigation in, disciplinary proceedings. For states that have not explicitly addressed this defensive use, if any, of advisory opinions, they should consider the issue.

The ABA recommends that the advisory committee consist of five judges, two non-judge lawyers, and two members of the public; implicit in the recommendation is that the advisory committee be separate from the judicial conduct commission.[172] The ABA also recommends that a judge "who has requested and relied on an opinion may not be disciplined for conduct conforming to that opinion."[173] Although the ABA contemplates a separate body to issue advice, at least eight commissions issue advisory opinions and many more issue telephonic advice through staff members. This raises a dilemma: the commissions and their staff are generally a wealth of knowledge on judicial ethics and disciplinary matters, making their issuance of advisory opinions and guidance a perhaps obvious choice, yet commissions are generally understaffed and overworked, meaning that responsibility for advisory opinions will presumably be neglected or pull away scare resources from disciplinary enforcement.

In short, more guidance may be welcome on what advice, if any, commissions should issue and how advice should be treated.

E. Issues of Transparency

This final category groups issues bearing directly on transparency and promoting public confidence, including the timing and extent of public disclosure of investigations and dispositions, public and judicial education, and reporting disciplinary sanctions.

1. Confidentiality v. Transparency

Disciplinary systems value both transparency and confidentiality, which inherently conflict. Essentially all states "provide for the confidentiality of judicial disciplinary proceedings, although in most the guarantee of confidentiality extends only to the point when a formal complaint is filed with the State Supreme Court or equivalent body."[174] In only "three states, the commission's decision to dismiss a complaint is subject to public disclosure."[175] In 1978, the Supreme Court summarized the key assumptions driving the widespread use of confidentiality: It may 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.[176]

A long-time observer of disciplinary proceedings has noted "disagreement about whether, consistent with the First Amendment, a state may prohibit a complainant, before a finding of probable cause, from disclosing that he or she has filed a complaint."[177] The ABA, furthermore, insists that commissions and staff keep confidential "[a]ll information relating to a complaint that has been dismissed without formal charges being filed . . . ."[178] It reasons that "[i]n the initial stages of the disciplinary case, confidentiality is necessary to protect a judge's reputation from unfounded charges and to protect witnesses from possible recriminations while a claim is being investigated."[179] Indeed, the ABA places a very high premium on confidentiality, arguing that it "is unfair to the judge . . . to allow any adverse inferences to be drawn from the mere existence of a complaint when it was not substantial enough to state a possible ground for discipline" and that disclosure arguably undermines "the commission's work because the commission and disciplinary counsel will have greater credibility if they do not release information about dismissed complaints under any circumstances."[180] But "[o]nce the formal charges have been filed and served upon the judge, the policy emphasis shifts from confidentiality to the public's right to know,"[181] and the commission may finally disclose important details to the press or public. Thus, the ABA recommends (as did the American Judicature Society) that confidentiality cease upon the filing of formal charges.[182]

Do states (and the ABA) place too high a stake in confidentiality? Although it may protect judges from adverse inferences, it may also create a public appearance that the judiciary maintains a "secret" disciplinary process. (In addition, does strict confidentiality even serve a purpose in high-visibility cases of alleged misconduct, when the front-page news indicates that a complaint has been submitted and describes the nature of the judge's alleged misconduct?) Moreover, judges are powerful public officials who typically act in public proceedings: does the public have a right to know about the types of public interactions (through complaints) that are occurring with these officials? For example, might that a judge provokes disproportionately high numbers of litigant complaints, even if not rising to the level of judicial misconduct, constitute relevant information for appointers, electors, or the public generally? That said, if the complaints are dismissed, how many reasonable adverse inferences can be drawn against the applicable judges? Are not the dismissals a form of vindication?

2. Public and Judicial Education

As a whole, commissions should do a better job of making discipline, by judge, type of conduct, sanction, date, and other criteria, readily available and searchable.[183]

Several states simply post the orders, with heavy redactions, and with almost no way to tell bare-boned orders from substantive decisions. (Indeed, CNN recently faced this significant challenge in attempting to research and analyze the federal judiciary's lax attention to sexual misconduct claims.[184]) Commissions and courts should instead consider flagging substantive decisions for the public's and judges' reference. Commissions and courts should also (as many do) issue detailed annual reports explaining their yearly dispositions, other activities, pending cases, and related statistics.

In addition to web-archiving their activities and providing the media and the public with more information about the performance of powerful state officials (judges) and the third branch of government, courts and commissions should remember to issue well-articulated written opinions and orders:

> Most importantly, when recommending or imposing a sanction, a conduct commission should give a detailed explanation of the factors that formed the basis for its decision and include comparisons with analogous cases where possible. Similarly, the supreme court in imposing a sanction should expressly articulate the factors leading to its decision, particularly if the court disagrees with the sanction recommended by the commission. A clear explanation for a decision bolsters confidence that the process by which it was reached was rationale and unbiased even if the conclusion is debatable.[185]

It is sadly still the case that disciplinary decisions typically contain less analysis than their non-disciplinary counterparts. Moreover, "because part of the purpose of judicial discipline is to deter other judges and to reassure the public that the judiciary does not tolerate judicial misconduct, court decisions imposing public sanctions should clearly explain the misconduct that gave rise to the sanction (not simply refer to the commission recommendation and findings) and should be treated as other important decisions by the court and be available on a web-site [and] in the court's official reporter . . . ."[186]

In addition, as many laudably do, commissions and staff should educate judges (or educate an arm of the court assigned to train judges) across the state about common judicial ethical issues and available assistance programs. Furthermore, through improving websites, social media, and official reports, commissions and staff should educate the public on the strength of the disciplinary system so that the public may have confidence that judges are acting with integrity, impartiality, and independence and, in short, are not above the law.

3. Reporting Disciplinary Sanctions

As suggested above, judicial disciplinary sanctions are important official actions. Are commissions and courts making these records readily available and properly reporting them to those who might need the records? By way of comparison, most would-be clients or employers can now easily look up a lawyer's disciplinary record, if any, on the state bar's or state supreme court's website. Are commissions or courts keeping up with the lawyer discipline example by making it easy to search a particular judge's disciplinary record? Even more to the point, are governmental appointing authorities (e.g., governors) receiving information about prior discipline when the judge or former judge is being considered for another judgeship or other governmental position?[187] In addition, are law enforcement agencies receiving a referral when the judge's conduct is potentially criminal in nature? If these reports and referrals do not typically occur at present, what actions might be taken to promote the transfer of disciplinary information in the future?

VII. CONCLUSION

Although many similarities exist, judicial disciplinary procedures in the states present an array of diversity from which other states may productively draw to improve their own procedures. In addition, based in part on the struggles of self-regulation and the delicate balance between judicial accountability and judicial independence, many recurring issues, some of which have been highlighted immediately above, remain unresolved and will benefit from further analysis and discussion. In sum, the judicial disciplinary systems in the states display strengths, not perfection.

List of Appendices

Endnotes

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[1] *See, e.g.*, Ben F. Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI.-KENT L. REV. 59, 59 (1977) ("The primary function of these commissions is to provide a procedure for enforcement of the code of judicial conduct in force in the jurisdiction.").

[2] GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.05, at 17-18 (5th ed. 2013) (citing Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 1-10 (1977)). In addition, a softer method was also employed: misbehaving or disabled judges sometimes received peer pressure to retire.

[3] *Id*.

[4] *Id*. (concluding that "[d]ue to these deficiencies, and also to a reluctance to compromise judicial independence, all three procedures were rarely used, and many cases of judicial misconduct were left unattended."). The ABA's Model Rules for Judicial Disciplinary Enforcement take a similarly critical view of impeachment. MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994) ("Removal by impeachment is the least desirable method of judicial discipline. It is an all-or-nothing approach. The impeachment process is subject to political considerations and it is expensive, cumbersome and ineffective. However, the availability of impeachment as a sanction serves as a check not only upon the judiciary, but upon the judicial discipline and incapacity process as well.").

[5] For interesting international perspectives on commission structures, see Marla N. Greenstein, *Judicial Conduct Commissions in Russia*, Judicial Conduct Report, Vol. 29, No.1, at 3 (Spring 2007) ("Unlike our structure of federalism, where each state autonomously decides what form of judicial disciplinary system it wants and what rules or code governing judicial ethics applies to their judges, Russia is a total federal, *i.e.*, national, system. There are separate Collegia for each region, but their actions ultimately go through the central government in Moscow. Under this system, there is one uniform structure for the makeup of the Collegia and one uniform Code of Judicial Conduct that they enforce. Another key difference is that the Qualifications Collegia also determines whether a judge should be 'promoted' to a higher judicial position. They also provide a screening function to determine the qualifications of proposed new judges."); Tomas Friedel & Michal Urban, *Are Czech Judges Angels or Devils? The Practice of Judicial Disciplinary Authorities in the Czech Republic* (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2540554 (providing an "an overview of the most recent practice of the Czech disciplinary court, which may be used for international comparison with the judicial disciplinary practice in other states").

[6] *See generally* Russell R. Wheeler & A. Leo Levin, *Judicial Discipline and Removal in the United States*, FJC-SP-79-2, 1979 WL 24794 (July 1979) (noting that "the commission system is in fact more effective than other formal disciplinary mechanisms. By this we mean that it acts upon legitimate complaints where other mechanisms do not. One reason it is more effective is that it has the

staff to receive and investigate complaints. Also, commissions typically have available to them a wider range of sanctions—from a private censure to a recommendation for removal by a judicial body. Traditional methods provide only 'all or nothing' remedies. Because removal from office ('all') is usually too extreme a sanction, they usually achieve 'nothing.'").

[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) (quoting in part *In re* Johnstone, 2 P.3d 1226, 1234 (Alaska 2000)) ("Although punishment plays an 'undeniable role' in judicial discipline, protecting the public, not sanctioning judges, is the primary purpose of the judicial conduct commissions."). According to the Joint Subcommittee largely responsible for the drafting of the ABA's Model Rules for Judicial Disciplinary Enforcement, its goals were to: "(1) assure conformity with the new ABA Model Code of Judicial Conduct, (2) ensure prompt and fair discipline for judges, (3) enhance public confidence in the judiciary and in the judicial disciplinary system, (4) ensure the protection of the public and the judiciary, (5) protect the independence of the judiciary and (6) establish a model for states to use as a resource to establish improved judicial discipline systems."

[8] Tex. St. Comm. on Judicial Conduct, Mission Statement, http://www.scjc.texas.gov/about/mission-statement/.

[9] Adams v. Comm'n on Judicial Performance, 897 P.2d 544 (Cal. 1995); *see also In re Ziegler*, 750 N.W.2d 710, 721 (Wisc. 2008) ("Discipline is not imposed to punish the individual judge. Rather, the purpose of judicial discipline, like the purpose of the Code of Judicial Conduct, is to protect our court system and the public from misconduct. Discipline is designed to restore and maintain the dignity, honor, and impartiality of the judicial office.") (footnotes omitted).

[10] CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 3 (2002) (noting different formulations of purpose, such as "[d]eterring similar conduct by the judge and others," "[r]eassuring the public that judicial misconduct is not tolerated or condoned," and "[f]ostering public confidence in the self-policing system"); Maxine Goodman, *Three Likely Causes of Judicial Misbehavior and How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949, 978 (2013) (citing Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677 (2003)) (criticizing the general purpose of "protecting the public" as vague and suggesting that the purpose should be restated as "preventing judicial misconduct"). As another example of the dissimilarities and (mostly) similarities in states' statements of purpose, see *In re Callaghan*, 238 W. Va. 495, 507, 796 S.E.2d 604, 616 (2017) (quoting in part *In re Gorby*, 176 W.Va. 16, 339 S.E.2d 702 (1985)) ("[T]his Court has held that '[t]he purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice.").

[11] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 (1994). State constitutions and rules list various other bases (beyond code violations) warranting judicial discipline. *See, e.g.*, *In re Johnstone*, 2 P.3d 1226, 1230 (Alaska 2000) (noting that Alaska Statute 22.30.011 provides that the commission shall inquire into an allegation that a judge has committed an act or acts that constitute: (A) wilful misconduct in office; (B) wilful and persistent failure to perform judicial duties; (C) conduct prejudicial to the administration of justice; (D) conduct that brings the judicial office into disrepute; or (E) conduct in violation of the code of judicial conduct").

[12] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994); *see also In re Deming*, 736 P.2d 639, 659, *amended,* 744 P.2d 340 (Wash. 1987) ("To determine the appropriate sanction, we consider the following nonexclusive factors: (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the

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

[13] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT Pmbl. (1994).

[14] The "reprimand" terminology is not unison across states; other words describing the commission's letter or order of reproval, such as "admonishment" or "censure," are often used.

[15] *See generally* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994) ("Removal and suspension are the most serious sanctions that can be imposed by the judicial discipline system. They can be imposed only by the highest court, and their use is appropriate when the respondent's misconduct demonstrates that the respondent is unfit to hold judicial office.").

[16] *See, e.g.*, Keith Swisher, *The Judicial Ethics of Criminal Law Adjudication*, 41 ARIZ. ST. L.J. 755, 763 (2009).

[17] Cal. Commission on Judicial Performance, Response to "Why a Spotlight must be put on the Commission on Judicial Performance," at 1 (April 20, 2016), https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/CJP_Response_to_Court_Reform_LLC.pdf; *see also id*. at 2 ("When the numbers of judges receiving actual discipline arc compared, over the past 10 years, the average number ofjudges disciplined each year as a percentage of closed complaints between 2005-2014 was higher in California (3.4%) than either Arizona (3%) or New York (1%)."); *see generally* Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 408 (2007) ("Most complaints filed with judicial conduct commissions—generally more than 90 percent each year—are dismissed.").

[18] *See, e.g.*, Mary Ellen Keith, *Judicial Discipline: Drawing the Line Between Confidentiality and Public Information*, 41 S. TEX. L. REV. 1399, 1404 (2000) (citing Tex. State Comm'n on Jud. Conduct, 1998 Annual Report 25 (Aug. 31, 1998)) ("Texas had a sanction rate of 6.3%; California 5.1%; New York 3%; Arkansas 5.8%; Wisconsin 5.3%; Michigan .4%, and Washington 3.8%.").

[19] *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).

[20] GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.05, at 20 (5th ed. 2013).

[21] Indeed, many state disciplinary rules contain explicit exclusions for decisions, similar to the federal rule: "[c]omplaints related to the merits of judicial decisions are explicitly outside the scope of judicial discipline." GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.06, at 21 (5th ed. 2013) (citing 18 U.S.C. § 352(b)(1)(A)(ii)).

[22] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2 cmt. (1994) ("Although the commission may be established by the highest court or the legislature, it should be established by constitutional provision to make certain the commission is free from interference from any branch of government."); *see generally* Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 406 (2007) ("The judicial conduct commission has been established by a provision in the state constitution in twenty-eight states, by a statute in sixteen states, and by court rule in seven.").

[23] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2(C) (1994). For each of the members, the ABA recommends four-year, one-time renewable terms. *See id.* R. 2(D); *see also id*.

cmt. (The membership terms should be long enough to provide consistency but short enough to promote new perspectives. In jurisdictions where proceedings are infrequent, the terms may be made longer to ensure continuity and expertise.").

[24] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2(D) (1994) ("The commission members shall not be subject to removal except for cause. Removal shall be by the respective appointing authority.").

[25] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2 cmt. (1994).

[26] Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 406 (2007).

[27] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2(F) (1994) ("The commission shall prepare its own budget, separate from the budget of any other agency or branch of government, and submit it to [legislature]."). The commentary elaborates on the ABA's reasoning:

> To assure the commission's fiscal and operational independence, its necessary expenses should be provided for in a budget separate from that of the judicial branch. This protects the judiciary from the charge that it is withholding funds and thereby hampering the commission in investigating the conduct of its members. The commission should be authorized to prepare and submit its budget independently. It should not have to rely on any other agency for this essential function.
>
> If a jurisdiction is to have a judicial system that has the confidence of the citizens, it must have a judicial discipline system that is independent and effective. The only way to achieve such a discipline system is to fund it adequately so that budgetary constraints do not inhibit the investigation of complaints and presentation of formal charges.

Id. cmt.

[28] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 17 cmt. (1994); *see also id*. Terminology (defining complaint).

[29] *See* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 17 cmt. (1994) ("Disciplinary counsel should consider complaints submitted anonymously in the same manner as other complaints in order to ensure that lawyers, court personnel or litigants can bring misconduct to the attention of the commission without the fear of retaliation."); *see generally* David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 957 (2009) (noting the "need to genuinely consider anonymous complaints and respond to them when the allegations are serious"). Disciplinary counsel may also serve as complainants, although obviously not anonymously.

[30] For example, the Oregon Constitution lists the following bases on which "a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

> (a) Conviction in a court of this or any other state, or of the United States, of a crime punishable as a felony or a crime involving moral turpitude; or
>
> (b) Wilful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties; or
>
> (c) Wilful or persistent failure to perform judicial duties; or
>
> (d) Generally incompetent performance of judicial duties; or
>
> (e) Wilful violation of any rule of judicial conduct as shall be established by the Supreme Court; or

(f) Habitual drunkenness or illegal use of narcotic or dangerous drugs.

OREGON CONST. art. VII, § 8.

[31] *See, e.g.*, GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.11, at 33 (5th ed. 2013) ("Obviously, a judge who has resigned or otherwise left the bench is no longer subject to removal from office, but other sanctions, including reprimand, censure, loss of benefits, and disqualification from holding office in the future, remain available. . . . For those states extinguishing the jurisdiction of judicial conduct commissions, the former judge's misconduct (if prosecuted at all) might be reviewable in the lawyer disciplinary process. This is, at minimum, suboptimal, because judicial conduct organizations have superior expertise in dealing with judicial (as opposed to lawyer) misconduct.").

[32] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 2 (1994); *see also State ex rel. Nebraska State Bar Ass'n v. Krepela*, 259 Neb. 395, 406, 610 N.W.2d 1, 8 (2000) ("Our conclusion is consistent with the American Bar Association's Model Rules for Judicial Disciplinary Enforcement . . . recommend[ing] that a commission on judicial conduct be created and directs that the commission shall have jurisdiction 'regarding allegations that misconduct occurred *before* or during service as a judge.'").

[33] Cynthia Gray, *The Authority to Discipline to Former Judges*, Judicial Conduct Reporter, vol. 27, no. 4, at 3 (2006); *see also id*. (noting further: "In some states, that authority includes the ability to remove a former judge; in other states, a former judge cannot be removed but can receive a reprimand or similar sanction").

[34] "In most jurisdictions, it is recognized that discipline imposed by a judicial conduct organization against a judge is not necessarily an exclusive remedy, and the bar may therefore impose sanctions [such as disbarment] for the same misconduct." GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.12, at 37 (5th ed. 2013). "A few states, though, take the opposite position." *Id*.

[35] *See, e.g.*, MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 7 (1994).

[36] *Id*. R. 9.

[37] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 16 (1994); *see also id*. cmt. ("Providing notice to complainants of the final disposition in all cases is vital to maintaining public confidence in the judicial disciplinary system. When a complaint has been dismissed, the notification to the complainant should include a brief summary of the facts and reasoning upon which the decision to dismiss was made. When final disposition is by private admonition or deferred discipline agreement, the complainant should be notified that action was taken on the matter without specifying the nature of the disposition.").

[38] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 17 cmt. (1994).

[39] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 17 (1994).

[40] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 17 (1994). Of note, disciplinary counsel is authorized to apply to the court for a grant of immunity to witnesses pleading the Fifth Amendment. *See id*. R. 17(E).

[41] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 18 (1994) ("If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose in any judicial or lawyer disciplinary proceeding against the judge. If additional information becomes known to disciplinary counsel regarding a complaint that has been dismissed before the filing of formal charges, the allegations may be reinvestigated with permission of an investigative panel.").

[42] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 17(C) (1994). It is important that "[d]isciplinary counsel must notify the judge before disciplinary counsel recommends a disposition to the investigative panel, in order to ensure that the investigative panel can consider all the facts, including the judge's statement, before determining whether to file formal charges or offer respondent a deferred discipline agreement or private admonition." *Id*. cmt.

[43] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 17(4) (1994).

[44] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 19 (1994).

[45] *Id*. R. 20.

[46] *Id*. R. 21(A). Similarly, if the judge "should fail to appear when specifically so ordered by the hearing panel or the highest court, the respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance." *Id*. R. 21(B).

[47] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 14 (1994).

[48] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 22(A) (1994).

[49] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 22(A) (1994).

[50] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 22(B) (1994).

[51] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 22(C) (1994).

[52] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 22(F) (1994).

[53] *Id*.

[54] *Id*.

[55] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 23(A) (1994).

[56] *See generally* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 23 cmt. (1994) ("Discipline by consent is beneficial to all participants. It enables the respondent who acknowledges guilt to avoid the personal anguish and expense of a proceeding and it relieves the public and the judicial discipline system of the time-consuming and expensive necessity of a formal proceeding."). This indeed is the way many complaints are resolved in the states.

[57] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 23(A) (1994).

[58] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 23(B) (1994).

[59] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 24(A), (C) (1994).

[60] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 24(C) (1994).

[61] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 24(C) & cmt. (1994) ("A disciplinary proceeding is not a criminal proceeding. The respondent may not decline to testify but may claim the protection of the Fifth Amendment. However, the respondent may be removed from judicial office for failing to respond to questions about the conduct in issue.").

[62] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 24(D) (1994).

[63] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 24(E) (1994).

[64] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 24(G) (1994). States should ensure that their rules and practices are generally consistent with this important reporting provision.

[65] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 24(F) (1994).

[66] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 25(A), (B) (1994).

[67] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 25(B) & cmt. (1994) ("The highest court has the inherent power and final responsibility to regulate the judicial branch of government. These Rules provide for de novo review by the highest court.").

[68] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 25(C), (D) (1994).

[69] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 26 cmt. (1994) ("The highest court is a collegial body. Granting it the authority to discipline its own members would create appearances of impropriety and of conflicts of interest. Under this Rule the commission has the authority to impose a sanction on a member of {highest court} if the commission, the disciplinary counsel and the respondent agree to the sanction. Under any other circumstances the commission does not have the authority to impose a public sanction. If the respondent or disciplinary counsel object, a special supreme court must be appointed to decide the case.").

[70] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 27(A) (1994) ("An incapacity proceeding can be initiated by complaint, by a claim of inability to defend in a disciplinary proceeding or by an order of involuntary commitment or adjudication of incompetency."); *see also generally id*. cmt. ("It is important that incapacity not be treated as misconduct. Willful conduct should be clearly distinguished from conduct that is beyond the control of the judge.").

[71] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 27(B) (1994).

[72] *Id*.

[73] *Id*. R. 27(D).

[74] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 27(E) (1994).

[75] *Id*.

[76] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 27(G) (1994).

[77] The procedure is set out for the most part in Chapter 16 of Title 28 of the United States Code and implementing rules authorized by Chapter 16.

[78] *See, e.g.*, Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 519 (2014) ("One recommendation comes from the 1993 report of the statutorily created National Commission on Judicial Discipline and Removal. The Commission's Report dealt with the fact (without mentioning it explicitly) that the investigatory bodies that implement the Judicial Conduct Act (the special committees, judicial councils, and Judicial Conference) consist exclusively of federal judges.") (footnote omitted); Maxine Goodman, *Three Likely Causes of Judicial Misbehavior and How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949, 976 (2013) ("Unlike the state commissions, these federal councils are composed entirely of judges; thus, in the federal scheme, judges are 'self-regulated.'").

[79] *See* Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 Ariz. L. Rev. 479, 524 (2014) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, STATE COURT ORGANIZATION 2004, tbl. 11 (2004), *available at* http:// www.bjs.gov/content/pub/pdf/sco04.pdf) ("Do the Judicial Conduct Act and the implementing Rules undermine the transparency of the proceedings by providing that the names of judges remain confidential except when the judicial council imposes a sanction other than private censure or reprimand, or when referred to the House of Representatives for possible impeachment, or when the judge authorizes disclosure? By contrast, 38 of the states and Puerto Rico provide for disclosing the judge's identity when the complaint moves to adjudication (akin to submission of a special committee report to the judicial council).") (footnote omitted).

[80] Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 Ariz. L. Rev. 479, 508–09 (2014) ("Data for the period 2011 to 2013 show between 1,200 and 1,400 complaints each year, almost all of which were dismissed by the chief judge or the circuit council on appeal, and a handful in which the chief judge concluded the proceeding. Chief judges appointed one special committee in 2011, four in 2012, and two in 2013."). At then-Chief Justice Rehnquist's request, Justice Breyer chaired the Judicial Conduct and Disability Study Committee, which finished its report in 2006 (*see* 239 F.R.D. 116 or http://www.uscourts.gov/sites/default/files/breyercommreport_0.pdf for the full report). "[T]he Breyer Committee concluded, after reviewing disciplinary complaints filed in the federal system, that while the error rate among all complaints filed was only about two percent to three percent, among high-visibility cases, the error rate ballooned to nearly 30%." GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.06, at 24 (5th ed. 2013); *see also* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 30-31, 79 (1993) (noting a low error rate). For additional critiques, see, e.g., Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 503 (2009) ("To remedy the problem of institutional bias, Congress must rewrite the Act to make the proceedings transparent, afford complainants the same rights as judges, provide for out-of-circuit transfers in high-profile cases where the home circuit's impartiality might be questioned, and provide for mandatory sanctions for specific misdeeds.").

[81] *See, e.g.*, Marcia Coyle, *Judiciary Closes Kozinski Misconduct Probe, Saying It Can't "Do Anything More*," NAT'L L.J., Feb. 5, 2018.

[82] Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 325, 330–31 (2008) (footnotes omitted); *see also generally* Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 216 (2007) (discussing the federal judicial disciplinary system).

[83] *Id*. (citing 28 U.S.C. 352(a)-(b), 353(a)). On the composition of the special committees, see Rule 12(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (2015) ("[A] special committee . . . must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. . . .").

[84] Hellman, *supra* note 82, at 331. The new rules provide a form of review when no tradition complainant exists to pursue review: "If the chief judge so disposes of a complaint that was identified under Rule 5 or filed by its subject judge, the chief judge must transmit the order and memoranda incorporated by reference in the order to the judicial council for review in accordance with Rule 19." Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 11(g)(3)(2015). In addition, and to the Rules' credit, the chief judge's order and most later orders (if any) are made public and posted on the uscourts.gov site. *See id*. R. 11(h), 24. If the matter was dismissed or if the discipline was private, the judge's name will be redacted from the public disclosure. *See id*. R. 24.

[85] Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 20(e) (2015).

[86] Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 325, 332 (2008) (citing 28 U.S.C. § 354).

[87] *See, e.g.*, 28 U.S.C. § 354. Permanently disabled judges may retire with most or all of their salary; if they will not retire, a replacement appointment may be made.

[88] *Id*. (citing 28 U.S.C. § 357(a)).

[89] Cal. Commission on Judicial Performance, Response to "Why a Spotlight must be put on the Commission on Judicial Performance," at 2 (April 20, 2016), https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/CJP_Response_to_Court_Reform_LLC.pdf (noting the significance of "the size of the judiciaries in the respective states — California - 2,200, Texas - 3,700, New York - 3,150 — and its effect on the volume of complaints received").

[90] Scholarship on judicial discipline in other particular states includes: Jonathan P. Nase, *Pennsylvania's Evolving Judicial Discipline System: The Development and Content of the 1993 Constitutional Amendments*, 98 DICKINSON L. REV. 429 (1994); Jack E. Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117, 1124 (1966) (discussing "notable systems of judicial discipline . . . in New Jersey, New York, Illinois, and California"); Hon. James R. Wolf, *Judicial Discipline in Florida: The Cost of Misconduct*, 30 NOVA L. REV. 349, 353–54 (2006) ("Article V, section 12(a)(1) of the Florida Constitution gives the JQC the power to 'recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct demonstrates a present unfitness to hold office.' This section of the constitution also gives the JQC the authority to 'recommend the discipline of a justice or judge whose conduct warrants such discipline.' . . . In cases involving a formal hearing and disputed facts, the supreme court 'determine[s] if [the JQC's findings] are supported by clear and convincing evidence and reviews the recommendation of discipline to determine whether it should be approved. The supreme court has stated that while it 'gives the findings and recommendations of the JQC great weight, 'the ultimate power and responsibility in making a determination rests with [the] Court.' In cases where the judge and the JQC 'enter into a stipulation, [the] Court independently reviews the stipulated facts on which the JQC's findings are based and also determines whether the recommended discipline is appropriate.'") (footnote omitted). And case notes include: Stephen Hobbs, *Judicial Discipline and Due Process in Washington State*—In Re Deming*, 108 Wash.2d 82, 736 P.2d 639 (1987)*, 63 WASH. L. REV. 725 (1988); Benjamin D. Jackson, *Griffen v. Arkansas Judicial Discipline and Disability Commission: An Unclear Opinion on Vagueness*, 58 Ark. L. Rev. 983, 983 (2006).

[91] CAL. COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990-2009 (2012), at v, *available at* https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/Statistical_Report_1990-2009.pdf.

[92] Three judges and two attorneys comprise the remaining members. *See also generally* CAL. COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990-2009 (2012), at v, *available at* https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/Statistical_Report_1990-2009.pdf. ("All members are unpaid for their service, though expenses related to official Commission business are reimbursed. Members serve four-year terms, and can be reappointed subject to a 10-year limit. Annually, the members elect a chairperson and vice-chairperson.").

[93] *Id*. at 1-2 (placing misconduct into twenty-five different categories for administrative purposes). Of potential interest, the most common form of discipline in both decades of the study (namely, 1990-1999 and 2000-2009) was "demeanor/decorum"-related. *Id*. at A-14. The commission is also now running a mentoring pilot project designed in part to address demeanor-related issues. *See* Cal. Comm'n on Judicial Performance, 2016 Annual Report, https://cjp.ca.gov/wp-content/uploads/sites/40/2016/11/2016_Annual_Report.pdf ("In 2016, the commission received a grant from the State Justice Institute to help establish a mentoring program for judges where an investigation has identified problematic treatment of litigants and others appearing before the judge. The program has begun as a pilot program in Northern California. An eligible judge who elects to participate will work for up to two years with a mentor judge who has been trained from a curriculum designed by other judges, ethicists and a counselor. The judge's success or lack of success in

completing the program will be taken into consideration by the commission in determining the appropriate disposition of the matter. Should problems reoccur, the commission may take into consideration that the judge was previously given the opportunity to participate in the mentoring program. Poor judicial demeanor is one of the most common complaints to the commission and most frequently disciplined conduct, yet is rarely sufficiently serious to warrant removal of a judge from office. When removal is ordered, it is often after a succession of disciplinary sanctions that have been to no avail. The commission believes that a mentoring program, supplemented with educational and other resources for skills development, might effectively and efficiently foster changed behavior in judges. This would have the dual benefits of disengaging the judges from the disciplinary system and protecting the public.").

[94] CAL. COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990-2009 (2012), at 3, *available at* https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/Statistical_Report_1990-2009.pdf.

[95] *Id*.

[96] *Id*.

[97] *Id*. In addition, "[p]rivate discipline must be released to requesting appointing authorities if a disciplined judge is being considered for another state or federal judicial office, and it may be released to the Chief Justice of California when a retired judge is being considered for judicial assignment after retirement. *Id*. (citing Rules of the Cal. Comm'n on Judicial Performance R. 102(i), (m)).

[98] In the event the judge wishes to challenge a private or public disciplinary action, the judge may demand a formal proceeding. When formal proceedings are commenced, the commission issues a notice of formal proceedings, which constitutes a formal statement of the charges. Cal. Comm'n on Judicial Performance, 2016 Annual Report, at 6 https://cjp.ca.gov/wp-content/uploads/sites/40/2016/11/2016_Annual_Report.pdf (citing Rules of the Cal. Comm'n on Judicial Performance R. 114, 116).

[99] Cal. Comm'n on Judicial Performance, 2016 Annual Report, at 6 https://cjp.ca.gov/wp-content/uploads/sites/40/2016/11/2016_Annual_Report.pdf (citing Rules of the Cal. Comm'n on Judicial Performance R. 130, 132) ("Upon receipt of the masters' report, the judge and the examiner are given the opportunity to file objections to the report and to brief the issues in the case to the commission. Prior to a decision by the commission, the parties are given the opportunity to be heard orally before the commission.").

[100] CAL. CONST. art. VI, § 18(d) ("[T]he Commission on Judicial Performance may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, or (2) censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or (3) publicly or privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court. Upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge. . . .").

[101] *Id*.

[102] CAL. CONST., art. VI, § 18(d). If the commission disciplines a state supreme court justice, seven members of the appellate court review the decision. *Id*. § 18(f) ("A determination by the Commission on Judicial Performance to admonish or censure a judge or former judge of the Supreme Court or remove or retire a judge of the Supreme Court shall be reviewed by a tribunal of 7 court of appeal judges selected by lot.").

[103] CAL. COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990-2009 (2012), at v, *available at* https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/Statistical_Report_1990-2009.pdf.

[104] *Id*. at 1, 8.

[105] New York State Commission on Judicial Conduct, Mandate and History, http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm.

[106] Robert H. Tembeckjian, *Point of View: Judicial Reform and the Test of Time*, N.Y. ST. B.J., June 2010, at 40, 41.

[107] N.Y. St. Comm'n on Judicial Conduct, 2017 Annual Report, App. D at 41, http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2017annualreport.pdf.

[108] *But see* N.Y. St. Comm'n on Judicial Conduct, 2017 Annual Report, App. D at 42, http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2017annualreport.pdf ("After receiving the judge's answer, the Commission may, if it determines there are no disputed issues of fact, grant a motion for summary determination. It may also accept an agreed statement of facts submitted by the Administrator and the respondent-judge.").

[109] The referee is drawn "from a panel of attorneys and retired judges." New York State Commission on Judicial Conduct, Procedures, http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm.

[110] Robert H. Tembeckjian, *Point of View: Judicial Reform and the Test of Time*, N.Y. St. B.J., June 2010, at 40, 41 ("In *In re Seiffert*, [65 N.Y.2d 278, 491 N.Y.S.2d 145 (1985),] the Commission's standard of proof – preponderance of the evidence – was unequivocally affirmed."); *see generally* CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 5 (2002) (noting that "the standard in most states is 'clear and convincing evidence,' although some states use the lower 'preponderance of the evidence' standard").

[111] Of note, "to ensure that its procedures are fair and convey the appearance of fairness, the Commission bifurcated its staff so as to separate those who investigate and litigate cases from the Clerk of the Commission, who neither investigates nor litigates but assists the Commission in its adjudicatory role in the manner of an appellate law clerk." Robert H. Tembeckjian, *Point of View: Judicial Reform and the Test of Time*, N.Y. St. B.J., June 2010, at 40, 41 (citing 22 N.Y.C.R.R. 7000.13).

[112] Robert H. Tembeckjian, *Point of View: Judicial Reform and the Test of Time*, N.Y. St. B.J., June 2010, at 40, 43 (observing that "in New York, unlike most states, there is no authority for the Commission to suspend a judge. Even the authority of the Court of Appeals to suspend a judge is limited to interim situations, such as when a judge is charged with a felony").

[113] New York State Commission on Judicial Conduct, Procedures, http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm.

[114] *See generally* Robert H. Tembeckjian, *Point of View: Judicial Reform and the Test of Time*, N.Y. St. B.J., June 2010, at 40, 41 ("In most states, the highest court has authority to review all judicial disciplinary decisions. In New York, however, the Court of Appeals may review only those cases that the disciplined judge chooses to appeal."). As of 2010, "[t]he Court has heard 91 such

reviews since 1978, accepting 75 Commission determinations, modifying 14, rejecting one and remitting one for further proceedings." *Id.* The court's powers of review are quite broad. *See Spector v. State Comm'n on Judicial Conduct*, 47 N.Y.2d 462, 465–66, 392 N.E.2d 552, 553 (1979) (citing N.Y. CONST. art. VI, § 22, subds. a, d; JUDICIARY LAW, § 44, subd. 9)) ("Preliminarily, we note that, undoubtedly because we are the only court vested with power to review the commission's determination, the scope of our review is unusually broad, encompassing as it does authority not only to 'review the commission's findings of fact and conclusions of law,' but also to 'impose a less or more severe sanction . . . than the one determined by the commission, or (to) impose no sanction.' Thus, the issues before us include the correctness of the commission's findings of fact and conclusions of law, as well as the appropriateness of the commission's determination that petitioner be admonished, the lowest in the scale of sanctions prescribed for judicial misconduct.") (footnote omitted).

[115] Texas State Commission on Judicial Conduct, Annual Report for Fiscal Year 2017, at 3, http://www.scjc.texas.gov/media/46650/fy-17-scjc-annual-report.pdf.

[116] *Id*.

[117] *Id*.

[118] *Id*. at 4 (quoting TEXAS CONST. art. V, § 1-a(6)A).

[119] *Id*.

[120] *Id*.

[121] *Id*. at 4-5.

[122] *Id*.

[123] Compared to other states, the commission has a relatively large staff, although not necessarily sufficient given the number of judges in the state. In 2017, that staff "included the Executive Director, the Deputy Director, four staff attorneys, three investigators, two legal assistants, a staff services officer, and two administrative assistants. All Commission staff members are full time State employees." *Id*. at 5. That same year, however, staff answered 750 calls concerning judicial ethics. *Id*. Although staff may generally answer these inquiries, the staff may not issue opinions on behalf of the commission. *Id*.

[124] *See also generally* Mary Ellen Keith, *Judicial Discipline: Drawing the Line Between Confidentiality and Public Information*, 41 S. TEX. L. REV. 1399, 1403 (2000) ("A preponderance of the evidence, as in any civil case, is the standard required in Texas for findings of fact. The Commission on Judicial Conduct thereafter makes conclusions of law determining whether the facts support a conclusion that misconduct has occurred. The Commission may dismiss, issue a public sanction, or recommend removal, but it does not have the authority to remove or suspend a judge. The supreme court may suspend a judge during the pendency of the formal proceedings, and only a specially appointed seven-judge appellate tribunal may order removal. The seven-judge tribunal also has authority to forever bar a judge from judicial service in the state.") (footnotes omitted); *see also* TEXAS CONST. art. 5, § 1-a(2)(C) ("Under the law relating to the removal of an active Justice or Judge, the Commission and the review tribunal may prohibit a retired or former Judge from holding judicial office in the future.").

[125] TEXAS CONST. art. 5, § 1-a(10) ("All papers filed with and proceedings before the Commission or a Master shall be confidential, unless otherwise provided by the law.").

[126] Texas State Commission on Judicial Conduct, Annual Report for Fiscal Year 2017, at 6 (citing TEX. GOV. CODE § 33.032), http://www.scjc.texas.gov/media/46650/fy-17-scjc-annual-report.pdf.

[127] Public Statements, http://www.scjc.texas.gov/public-information/public-statements/ (posting nine such statements since 2000).

[128] W. Va. Judicial Investigation Commission, Annual Report 2017, at 2 (citing W. Va. Rules of Judicial Disciplinary Procedure R. 1.1-1.3), http://www.courtswv.gov/legal-community/JIC-annual-reports/2017.pdf.

[129] *Id*.

[130] *See id*. at 14.

[131] W. Va. Judicial Investigation Commission, http://www.courtswv.gov/legal-community/judicial-investigation.html.

[132] W. Va. Judicial Investigation Commission, Annual Report 2017, at 10 (citing W. Va. Rules of Judicial Disciplinary Procedure R. 1.1-1.3), http://www.courtswv.gov/legal-community/JIC-annual-reports/2017.pdf.

[133] West Virginia has somewhat stricter requirements for reviewable complaints: "The complaint must be in writing and must be verified by the Complainant. Any complaint 'filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the Commission.'" *Id*. (citing and quoting W. VA. RULES OF JUDICIAL DISCIPLINARY PROCEDURE R. 2, 2.1, 2.12).

[134] As of 2017, "[t]he Commission has full-time staff consisting of Chief Counsel, Assistant Counsel, and an Executive Assistant," and the "Commission also contracts with three part-time Investigators." *Id*.

[135] *See* W. Va. Judicial Investigation Commission, http://www.courtswv.gov/legal-community/judicial-investigation.html ("Admonishment shall not be administered if: (1) the misconduct involved the misappropriation of funds; (2) the misconduct resulted or will likely result in substantial prejudice to a litigant or other person; (3) the respondent has been disciplined in the last three years; (4) the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years; (5) the misconduct involved dishonesty, deceit, fraud, or misrepresentation by the respondent; (6) the misconduct constituted a crime that adversely reflects on the respondent's honestly, trustworthiness, or fitness as a judge; or (7) the misconduct was part of a pattern of similar misconduct.").

[136] W. Va. Rules of Judicial Disciplinary Procedure R. 3.1.

[137] W. Va. Rules of Judicial Disciplinary Procedure R. 4.12.

[138] *Id*.

[139] *Id*. R. 4.13.

[140] *In re Callaghan*, 238 W. Va. 495, 505, 796 S.E.2d 604, 614 (W. Va. 2017) ("With respect to discipline for violations of the West Virginia Code of Judicial Conduct, [t]he Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings. The independent evaluation of the Court shall constitute a *de novo* or plenary review of the record.") (quotation marks and citations omitted).

[141] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 (1994). In a minority of states, fines or costs may also be imposed along with some or all of the sanctions noted above. Removal is not an option in the federal disciplinary system: "Whereas discipline imposed on judges by the states in commission-based systems may include removal from office, in the federal system the Constitution is generally thought to reserve the removal power to Congress and the impeachment process." GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.06, at 21 (5th ed. 2013).

[142] On the first scenario, the ABA concludes: "Without the necessity of commission action, the highest court may immediately place a judge on interim suspension upon notice of the filing of an indictment, information or complaint charging the judge with a 'serious crime' under state or federal law." MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 15 (1994). The standard for the second scenario is generally: "Upon receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, the highest court may transfer the judge to incapacity inactive status or suspend the judge pending a final determination in any proceeding under these Rules." *Id*. R. 15(3).

[143] The ABA comments: "In determining whether to proceed on a disciplinary complaint when criminal charges have been filed, disciplinary counsel and the commission should consider the effect that a disciplinary investigation might have on the criminal investigation. Where it is appropriate, disciplinary counsel should consult with the criminal prosecutor or law enforcement authority before proceeding." MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 15 cmt. (1994). Later the Model Rules generally suggest that a stay might be the appropriate course of action: "A stay of the proceedings may be appropriate when there is an ongoing civil or criminal action against the judge, so as not to interfere with the expeditious litigation of the court action." *Id*. R. 17 cmt.

[144] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 15(4) (1994) ("A judge suspended or transferred to incapacity inactive status may apply to the highest court for reconsideration of the order."). Given the high due process concerns with suspending a judge in the rapid fashion characteristic of interim suspensions, often with little-to-no notice or opportunities to be heard in advance, states should afford judges clear procedural avenues to object and move to reconsider such suspensions promptly.

[145] The ABA describes and limits such agreements as follows: "A deferred discipline agreement is a confidential agreement between the judge and an investigative panel of the commission for the judge to undergo treatment, participate in education programs or take other corrective action. It is only available as a response to misconduct that is minor and can be addressed through treatment or a rehabilitation program. A deferred discipline agreement can only be entered into prior to the filing and service of formal charges." MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 6 cmt. (1994). Each jurisdiction, of course, decides if and under what circumstances it will use such agreements.

[146] 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) (noting "a number of informal methods of judicial discipline: circuit judicial council orders, informal communications from chief circuit and district judges, appellate court orders of reversal and mandamus, and peer judge influence. None of these so-called 'disciplinary' mechanisms is solely or even primarily disciplinary by design. Still, all are occasionally, and in some cases commonly, used to address judicial misbehavior and disability. Of all the disciplinary mechanisms evaluated here, the least formal—communications from chief and peer judges—appear to be utilized the most frequently and successfully").

[147] Honorable James R. Wolf, *Judicial Discipline in Florida: The Cost of Misconduct*, 30 NOVA L. REV. 349, 354–55 (2006) (footnotes omitted).

[148] GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 15.01, at 1 (5th ed. 2013) (citing American Judicature Society, Guidelines for Cases Involving Judicial Disability, Guideline 1 (1985)); *see also id.* (noting further that "[j]udicial disability may be temporary or permanent, and may or may not be accompanied by willful misconduct."); *The Harder They Fall: A Hand Up for Impaired Judges*, 90 Judicature 16 (2006).

[149] GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 15.02, at 2 (5th ed. 2013).

[150] *See, e.g.*, GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 15.08, at 23 (5th ed. 2013) ("As a general matter in dealing with cases of judicial disability the same procedures should be followed as in cases of judicial discipline, although there should not be a reluctance to depart from those procedures where there are other procedures that are more appropriate for disability cases."); American Judicature Society, Guidelines for Cases Involving Judicial Disability, Guidelines 1, 4 (1985) (asserting that judicial conduct commissions should have authority over judicial disability cases and that the commissions should generally follow the same procedures for both types of matters).

[151] MODEL CODE OF JUDICIAL CONDUCT R. 2.14 (2007); *see also* W. VA. CODE OF JUDICIAL CONDUCT Canon 3D(3) (similar).

[152] CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 7 (2002).

[153] *See* Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 414 (2007) ("Judges frequently argue that the judicial discipline systems violate their constitution- al due-process rights if the commission not only investigates and prosecutes complaints but also makes the decisions. They are also concerned that evidence gathered during the investigative phase that is not admitted at the hearing phase (for example, because it violates one of the rules of evidence) will nonetheless taint the members' view of the judge. These arguments have been rejected by all of the more than twenty state high courts that have considered it because the decisions of the commission are reviewed by the supreme court."). Another type of bias can be alleged in systems in which judges comprise the majority, or an otherwise large portion, of the commission. The concern, in essence, is that judges will not adequately discipline fellow judges. *Cf.* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2011); Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453 (2008).

[154] As the ABA explains:

> The Rules seek to separate the investigative and adjudicative functions of commission members. No matter how fair individual members can be, the system cannot convey the appearance of fairness when members have full access to investigative materials, formulate their decisions to file charges in reliance on the investigative files and then make adjudicative decisions based on the evidence presented in formal proceedings. This process is in conflict with the fundamental division of investigative and adjudicative responsibilities that is a hallmark of our judicial system. The indicting grand jury does not hear and determine the evidence presented at trial.
>
> Such a process could not be regarded as fair by a defendant who is indicted and convicted by the same body.
>
> The commission divides itself into panels so that no member of the commission is involved both in deciding whether to file formal charges and in hearing the case on those charges. . . .

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

[155] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 3(1) (1994). Appropriately, interested members must recuse themselves. *See id.* R. 3(F) ("A member of the commission shall recuse himself or herself in any matter in which recusal would be required of a judicial officer under the {code of judicial conduct}.").

[156] *See, e.g.*, MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 3 cmt. (1994) ("The commission appoints disciplinary counsel and commission counsel but disciplinary counsel can be

removed only with the concurrence of the commission and the highest court. . . . The commission can delegate [certain functions] to either disciplinary counsel or commission counsel."). On the ABA's distinction between disciplinary and commission counsel, see *id*. R. 4 cmt. ("The duties of disciplinary counsel and commission counsel should be clearly defined and separated: the commission counsel is legal counsel to the commission. Disciplinary counsel receives and screens complaints, conducts investigations and presents formal charges. Disciplinary counsel should not participate in commission deliberations, draft decisions, orders or other documents, or otherwise serve as legal counsel to the commission. . . .").

[157] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 5 cmt. (1994) ("It is crucial to the perception of fairness that the commission keep separate the tasks of investigation and prosecution, which are performed by disciplinary counsel, and the tasks of conducting the hearing and determining the recommended disposition of the complaint, which are performed by the hearing panel of the commission. To do so, the commission cannot allow the hearing panels to obtain help or advice from disciplinary counsel on any procedural or substantive matters such as those relating to discovery, the manner of holding the hearing, the disposition of the complaint or the drafting of the findings of fact and recommended disposition."). A similar sentiment can be seen in the ABA's critical view of executive directors who perform both investigative- and adjudicative-stage functions for the commissions. *See generally id*. R. 4 cmt. ("Most states provide for an 'executive director' of the commission. The concept of executive director . . . is too closely aligned with the commission members who exercise discretion in post-charge proceedings. Too many states rely on the executive director to conduct investigations, present evidence and provide advice and services to the commission members in their post-charge, decision-making capacity. Some states have taken informal steps to prevent executive directors from performing the inconsistent roles of prosecutor and advisor, but in the absence of clear rules, the perception persists that the executive directors continue to carry out such conflicting roles. One alternative, equally flawed, is for the commission's executive director to conduct the investigation, retain outside counsel to present evidence on formal charges and then advise the commission in its deliberative and adjudicative functions. Although not constitutionally mandated, prosecutorial and adjudicative functions should be separated as much as possible to avoid unfairness and the appearance of unfairness.").

[158] For example, is disciplinary counsel in a separate office (both geographically and nominally) or simply next door to the commission's executive director? Who is disciplinary counsel's boss, and what protections, if any, promote disciplinary counsel's investigations and prosecutions?

[159] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 3 cmt. (1994) ("The commission may appoint a hearing officer or a subpanel of the hearing panel in cases where taking evidence would be burdensome on a hearing panel. Hearing officers could be members of the hearing panel or lawyers or former judges who are not members of the commission. If a subpanel of the hearing panel is used, there should be equal representation of categories of members: one lawyer, one judge and one non-lawyer member. The hearing officer or subpanel makes findings of fact and submits a report to the full hearing panel with a time provided for the disciplinary counsel and the respondent to file objections. The hearing panel then reviews the report and record and makes its own findings, conclusions and recommendations to the highest court for sanction or dismissal. If a subpanel of the hearing panel conducts the hearing, the members of the subpanel may sit with the full hearing panel when it reviews the report of the subpanel. If hearing officers are used, they should have knowledge of the principles of judicial ethics and discipline.").

[160] *See* Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 414-15 (2007).

[161] For example, certain states rules provide disciplinary counsel with a measure of protection from removal. *See, e.g.*, W. Va. Rules of Judicial Disciplinary Procedure R. 5.2 ("Judicial Disciplinary Counsel shall not be removed except upon concurrence of the Judicial Investigation Commission and the Supreme Court of Appeals.").

[162] *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).

[163] For example, some commissions (over)state on their websites and forms that no conduct relating to a legal ruling is disciplinable and that a judicial disciplinary order is irrelevant for disqualification purposes. Others make the complainant effectively certify, through a written statement, that the complaint does not involve a legal ruling or decision. If, for instance, the judge had just issued a "legal ruling" against the complainant ordering the complainant to drink "toxic sludge," duct-taping shut the complainant's mouth, or sentencing the complainant to jail on an offense for which probation is required (all actual examples), the complainant likely has a meritorious complainant and should submit it for review notwithstanding the commission's broad warnings against complaints relating to the merits or to legal rulings.

[164] *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.5(A) (2007) ("A judge shall perform judicial and administrative duties, competently and diligently."); *see also id.* R. 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.").

[165] As the authors note in Judicial Conduct and Ethics:

> Because judicial independence is an integral part of our legal system, the argument that it is threatened by a system of judicial discipline cannot be lightly dismissed. However, the nature of the judicial disciplinary system that has been established is designed to minimize the threat to judicial independence. First, the system operates essentially through judicial self-regulation. In every system, judges are included in the composition of judicial conduct commissions, and in some states, judges constitute a majority of the commission membership. Second, the decisions of the commissions ordinarily are appealable to a court, which has the final say as to what constitutes judicial misconduct. Third, the system of judicial discipline that has been installed is designed to safeguard judicial independence. . . . Modern judicial discipline is directed primarily at promoting what was previously described as "behavioral" accountability, and not "decisional" accountability that can raise legitimate judicial independence concerns.

GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.05, at 19 (5th ed. 2013) (footnotes omitted); *see also generally* Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 74 (1998) (noting that "the most important issue is the protection of 'decisional' integrity").

[166] It is not technically a structural independence concern, because in most states the commissions are within the judicial branch. Thus, the state high courts are not encroaching on another branch's prerogatives. But some states give their commissions a measure of independence, in actuality or at least in appearance, and other states should perhaps give their commissions more independence in rendering and in later reviewing their decisions.

[167] Although the review is de novo and although the courts occasionally disagree with the commissions, the actual divergence should not be overstated: the courts agree with the commissions most of the time (and for the many agreements for discipline by consent, the rate of commission-court agreement is even higher). *See generally* Cynthia Gray, *How Judicial Conduct Commissions Work*, 28

JUST. SYS. J. 405, 417 (2007) ("The high court independently evaluates the record and reviews the recommendation or decision de novo, but the commission recommendation or decision regarding sanction is given deference. The reviewing court independently fashions an appropriate remedy and is not limited merely to approving or rejecting the commission's recommendation but may impose either a higher or lower sanction.").

[168] *See, e.g.*, *supra* note 27 (noting the ABA's recommended treatment of the budget).

[169] Albeit in the context of a different type of judicial commission, a good example of such a code is IAALS's MODEL CODE OF CONDUCT FOR JUDICIAL NOMINATING COMMISSIONERS (2016), http://iaals.du.edu/sites/default/files/documents/publications/model_code_of_conduct_for_judicial_nominating_commissioners.pdf.

[170] *See* GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.13, at 38 (5th ed. 2013); *see also generally* Marla N. Greenstein, *A Day in the Life of a Judicial Ethics Counsel*, 56 JUDGES' J. 40 (2017) (noting that "there is no single 'typical' day for those of us who staff judicial conduct commissions. Our Commission's rules allow me to provide informal ethics advice to judges in addition to my obligation to investigate complaints of ethical misconduct"); Jennifer M. Perkins, *Current Developments in Arizona Judicial Ethics*, 4 PHOENIX L. REV. 667, 667 & n.2 (2011) (noting that "[f]orty-three states and the District of Columbia have judicial ethics advisory committees in place" and that Arizona's judicial ethics advisory committee is, for the most part, separate from the commission on judicial conduct, except that the commission provides staff support to the advisory committee).

[171] Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 408 (2007).

[172] *See* Judicial Ethics Committee, *in* ANNOTATED MODEL CODE OF JUDICIAL CONDUCT App. A at 557 (2d. ed. 2011).

[173] *Id.* at 558.

[174] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 834 (1978); *see also* Appendix (cataloging the various state approaches to the extent and timing of confidentiality in judicial proceedings).

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

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

[177] Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 410 (2007) (citing conflicting cases).

[178] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 11 (1994).

[179] *Id*. R. 11 cmt.

[180] *Id*. The only exception for the ABA would be: "If the judge wishes to have such information disclosed, the judge may release the information." *Id*.

[181] MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 11 cmt. (1994).

[182] *See, e.g.*, Robert H. Tembeckjian, *Judicial Disciplinary Hearings Should Be Open*, 28 JUSTICE SYS. J. 419, 424 (2007) (citing Cynthia Gray, "AJS Adopts Policy on Confidentiality," JUDICIAL CONDUCT REPORTER, vol. 17, no. 4 & vol. 18, no. 1, at 10); MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 11 (1994).

[183] *See generally* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT R. 3 cmt. (1994) ("Educating the public, bar and judiciary should be an integral part of the enforcement function. Distribution of a detailed annual report is essential to this purpose. To fulfill its educational function,

the annual report should contain: a description of the commission's purpose and function, basic statistics, descriptions of proper and improper judicial conduct, a discussion of the cases decided during the year including private sanctions (without identifying the judges), an explanation of any recommendations for changes in procedure or in the code of judicial conduct and an explanation of how to bring a matter before the commission. The annual report should be widely distributed and available, upon request, free of charge."); Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 513–14 (2014) ("Another barrier to public understanding of the Act's operations is the failure of circuits that post orders to identify the nature of the orders. They simply list each order by date and case number only, making no distinction between the few nonroutine orders and the great majority of routine orders. Sifting through extensive lists of chaff to identify the relatively small amount of wheat (the few substantive orders) is a major task.") (footnote omitted).

[184] *See* Joan Biskupic, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wrap*, CNN, Jan. 26, 2018, finding that:

- Very few cases against judges are deeply investigated, and very few judges are disciplined in any way. In many years, not a single judge is sanctioned.
- None of the actual complaints (more than 1,000 are filed annually) are made public. In the public judicial orders, claims are sparingly summarized, and accused judges' names rarely appear. Some orders refer to "corrective action" by a judge without saying what happened.
- Judicial orders are dumped onto circuit court websites as a series of numbered files with no indication of the allegations, person complaining or outcome. The practice makes it even more difficult to identify the most serious misconduct cases hidden among the opaque lists of documents because each order must be opened and individually read to gain even minimal information about the nature of the complaint.

[185] CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 83 (2002).

[186] *Id*. ("Commission decisions should also be available on- line. Many commissions have already begun to make their decisions available on web-sites.").

[187] Robert H. Tembeckjian, *A Role for Disciplinary Agencies in the Judicial Selection Process*, 34 FORDHAM URB. L.J. 501, 502 (2007) (citing N.Y. Judiciary Law § 45 (McKinney 2006)) ("In New York, the Commission on Judicial Conduct plays a limited role, required by statute under certain circumstances to reveal information pertaining to candidates under consideration for appointment by the governor or being rated by such entities as a bar association evaluation committee for election or appointment. . . . This approach appears to be rooted in the notion that disciplinary entities, while not necessarily oriented toward identifying those best or most qualified for judicial office, are likely to have useful information as to candidates that may be ill-suited for the bench.").

When confidentiality ceases in judicial discipline proceedings±

Revised 2017

NCSC
NATIONAL CENTER FOR STATE COURTS
Center for Judicial Ethics

Fact-finding hearing is public (34 states)			Fact-finding hearing is confidential (16 states + D.C.)	
Proceedings public when formal charges are filed (26)	**Proceedings public when answer to formal charges is filed or due (6)**	**Hearing is public (2)**	**Proceedings confidential until recommendation for public discipline is filed (13)**	**Proceedings confidential until court orders public discipline (4)**
Alabama	Arizona	Oregon[5]	Colorado	Delaware
Alaska	Kentucky	Rhode Island	Idaho	D.C.
Arkansas	Maryland		Iowa	Hawaii
California	Massachusetts[3]		Louisiana	North Carolina
Connecticut	Minnesota		Maine[6]	
Florida	South Carolina[4]		Mississippi[7]	
Georgia*			Missouri**	
Illinois			New Mexico	
Indiana*			New York**	
Kansas			South Dakota**	
Michigan			Utah	
Montana			Virginia	
Nebraska			Wyoming	
Nevada				
New Hampshire				
New Jersey*[1]				
North Dakota*[2]				
Ohio				
Oklahoma				
Pennsylvania				
Tennessee				
Texas				
Vermont*				
Washington*				
West Virginia*				
Wisconsin				

*** Public after service of charges on the judge**

**** Hearing may be public at judge's request**

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1. **New Jersey:** "If the Committee files a formal complaint against the judge, the complaint and all further proceedings thereon shall be public except that the Committee may apply to the Supreme Court for permission to retain confidentiality in a matter involving special circumstances, such as when the Committee determines that the privacy interests of a witness or other person connected with the matter outweigh the public interest in the matter."
2. **North Dakota:** "Formal hearings . . . are open unless for good cause shown upon the request of the complainant, upon the request of the respondent judge or upon motion of the Commission all, or part, of the hearing is ordered closed by the Commission."
3. **Massachusetts:** "Notwithstanding any other provision of this chapter to the contrary, proceedings pursuant to this chapter may remain confidential, even after a finding of sufficient cause, if the judge, the commission, and the complainant, if any, all concur."
4. **South Carolina:** "When formal charges are filed regarding allegations of misconduct, the formal charges and any answer shall become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer . . . ."
5. **Oregon:** Press releases are issued 14 days before the public hearing on formal charges.
6. **Maine:** "Upon request of the person whose conduct is being investigated, or by majority vote of the Committee, after giving that person an opportunity to express his views on the question, any hearing held pursuant to paragraph 7 of this order shall be public."
7. **Mississippi:** "All proceedings before the Commission shall be confidential, except upon unanimous vote of the Commission, as prescribed in Section 177A of the Mississippi Constitution of 1890."

± Many states have exceptions to confidentiality (for example, to allow reporting to law enforcement or bar authorities) that are not reflected in this chart.