

Bifurcated judicial discipline systems

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Judges frequently argue that state judicial discipline systems violate their constitutional due process rights if the commission both investigates and prosecutes complaints and makes the decisions. Based on the U.S. Supreme Court's decision in *Withrow v. Larkin*, 421 U.S. 35 (1975), that argument has been rejected by every state supreme court that has considered it for over 50 years, including as recently as 2022. See, e.g., *In re Hanson*, 532 P.2d 303 (Alaska 1975); *In the Matter of Flournoy*, 990 P.2d 642 (Arizona 1999); *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995); *In re Zoarski*, 632 A.2d 1114 (Connecticut 1993); *In re Kelly*, 238 So. 2d 565 (Florida 1970); *In the Matter of Vaughn*, 462 S.E.2d 728 (Georgia 1995); *In the Matter of Holien*, 612 N.W.2d 789 (Iowa 2000); *In re Rome*, 542 P.2d 676 (Kansas 1975); *Allred v. Judicial Conduct Commission*, 395 S.W.3d 417 (Kentucky 2012); *In re Bowers*, 721 So. 2d 875 (Louisiana 1998); *In re Diener*, 304 A.2d 587 (Maryland 1973); *In re Morrow* (Michigan Supreme Court January 13, 2022); *Commission on Judicial Performance v. Russell*, 691 So. 2d 929 (Mississippi 1997); *In re Elliston*, 789 S.W.2d 469 (Missouri 1990); *Mosley v. Commission on Judicial Discipline*, 22 P.3d 655 (Nevada 2001); *Friedman v. State of New York*, 249 N.E.2d 369 (New York 1969); *In re Nowell*, 237 S.E.2d 246 (North Carolina 1977); *In re Schenck*, 870 P.2d 185 (Oregon 1993); *In re Pirraglia*, 916 A.2d 746 (Rhode Island 2007); *In re Brown*, 512 S.W.2d 317 (Texas 1974); *In re O'Dea*, 622 A.2d 507 (Vermont 1993); *In re Deming*, 736 P.2d 639, as amended by 744 P.2d 340 (Washington 1987).

Although bifurcation of investigative and adjudicative functions is not required by due process, some states have adopted it as a matter of policy.

For purposes of this memorandum, a judicial discipline system is "bifurcated" if (1) the group that decides to investigate a complaint and to file formal charges has different members than (2) the group that makes findings of facts and conclusions of law and sanctions a judge or makes a recommendation to the state supreme court.

Judicial discipline systems may be bifurcated in a variety of ways. This memo divides the systems into 2 categories: 2-tiered states and 2-panel states. Even within a category, the method for bifurcation varies as described below.

2-tiered states. There are 8 two-tier states – **Alabama, Delaware, Georgia, Illinois, Ohio, Oklahoma, Pennsylvania, and West Virginia.** In those states, complaints against judges are investigated by one body (the first tier), and that tier decides whether to file formal charges; the formal charges are heard by a second body that has a different membership (the second tier). The exact structures and procedures vary considerably from state-to-state among those 8 states.

2-panel states: 9 states – **Arizona, Arkansas, Florida, Kansas, North Carolina, South Carolina, Tennessee, Vermont, and Wyoming** – have bifurcated commission functions so that investigative and adjudicative roles are handled by different panels of the commission. This “2-panel” structure differs from the “2-tier” structure because members may play different roles in different cases depending on whether they are assigned to an investigative or an adjudicative panel for that case. The use of 2 panels is based on the American Bar Association [Model Rules for Judicial Disciplinary Enforcement](#) adopted in 1994, although no state has adopted the precise structure suggested by the model rules and each state’s system is different. The model rules propose a commission comprised of an equal number of judge, attorney, and public members (4 each), divided into a 3-member investigative panel and a 9-member hearing panel with rotating membership with an equal number of judge, attorney, and public members on each panel. Under the model rules, Disciplinary Counsel screens complaints, conducts preliminary investigations, and makes recommendations to the investigative panel. The investigative panel authorizes Disciplinary Counsel to conduct full investigations and file formal charges that are heard by the hearing panel, which makes a report and recommendation to the state supreme court.

- Note that, depending on the state, procedures may be different in cases in which the judge receives a private sanction, in which the judge consents to discipline, in which there are allegations of a disability, or in which the charges are against a supreme court justice.
- Note that in most states, there is also supreme court review so there are more than 2 levels.
- Note that the list does not include states in which the commission has a unitary structure, but the supreme court review may be de novo or allow for the admission of additional evidence, which could be considered a second level.
- Note that in some states, oversight of the investigation is delegated to one commission member (called a presenter in Colorado, for example) or a separate body (the Judicial Inquiry Board in Maryland, for example), but the decision whether to file formal proceedings and, subsequently, whether to sanction or recommend a sanction following a hearing remains with the entire commission and, therefore, the structure is not bifurcated as defined by this memo.
- Note that this list does not include states that bifurcate proceedings by having 1 or more masters, who are not members of the commission, appointed to conduct the hearing each time formal proceedings are commenced against a different judge; following the hearing, the masters file a report with the supreme court, and the commission and judge can file objections to the report with the court, which makes the final decision.
- Note that this list does not include several states where proceedings are bifurcated in some circumstances in a way that does not fit within any of the other categories or is similar to any other state.

2-tier states

Alabama

The [Judicial Inquiry Commission](#) has 9 members: 4 judges, 2 attorneys, and 3 public members. The Commission investigates complaints and, if “a reasonable basis exists,” files a formal complaint that is heard and decided by the [Court of the Judiciary](#). The Court of the Judiciary has 9 members: 4 judges, 2 attorneys, 3 public members. Following a public hearing, the Court of the Judiciary may remove, suspend with or without pay, or censure a judge. Decisions of the Court of the Judiciary are final unless appealed to the **Alabama Supreme Court**, which “review[s] the record of the proceedings on the law and the facts.” Under its precedent, if the Supreme Court concludes that misconduct was proven by clear and convincing evidence, it will not change the sanction imposed by the Court of the Judiciary. The Judicial Inquiry Commission and the Court of the Judiciary were created by an amendment to the constitution in 1973.

Delaware

The [Court on the Judiciary](#) has 10 members, all judicial officers: the Chief Justice, the 4 other justices of the Supreme Court, the Chancellor, the President Judge of the Superior Court, the Chief Judge of the Family Court, the Chief Judge of the Court of Common Pleas, and the Chief Magistrate of the Justice of the Peace Court. The Court on the Judiciary designates a Clerk, who reviews each complaint and provides the Chief Justice with those that comply with the rules. The Chief Justice, with the unanimous agreement of a panel of the Supreme Court, may dismiss any complaint that is frivolous, is not filed in good faith, is based on a litigant’s disagreement with the ruling of a judge, or is a matter subject to appellate review. If a complaint is not dismissed, the Chief Justice refers the complaint to a panel of the **Preliminary Investigatory Committee**. The Committee has 12 members who are appointed by the Chief Justice with the concurrence of a majority of the members of the Court. 8 members are attorneys, and 4 members are non-lawyers. The Chief Justice refers a complaint to a panel of 1, 2, or 3 members; if the panel has 2 or 3 members, at least 1 person must be a non-lawyer. If after a preliminary investigation the panel finds that there is probable cause to believe that the judicial officer may be subject to sanction or if the Chief Justice sua sponte determines that there is probable cause, the Court on the Judiciary appoints a **Board of Examining Officers** with 1 or more members who are active or retired judge. The Board issues a “show cause order why the judicial officer should not be sanctioned or retired” and appoints a presenting counsel who conducts an investigation and presents evidence on the formal charges at a non-public hearing. If the Board finds no misconduct, the matter is concluded, and the complaint is dismissed unless the Court on the Judiciary, sua sponte, requires further proceedings. If the Board finds misconduct or if the Court on the Judiciary requires further proceedings, the Court on the Judiciary designates an attorney to uphold the report or the Court’s determination to proceed sua sponte. The Court on the Judiciary holds a non-public hearing, takes evidence, and disposes of the case. The Court on the Judiciary may censure, remove, or retire a judge. All proceedings are confidential except a final order of removal or retirement. The Court on the Judiciary was created by the state constitution in 1979; the Preliminary Investigatory Committee and the Board of Examining Officers were created by rules adopted by the Court on the Judiciary.

Georgia

The [Judicial Qualifications Commission](#) has a 7-member investigative panel comprised of 2 judges, 3 attorneys, and 2 citizen members and a separate 3-member hearing panel that consists of 1 judge, 1 attorney, and 1 citizen member. If the Executive Director of the Commission determines that information in a complaint or from other sources would constitute judicial misconduct if true, the Director conducts a preliminary investigation and makes a recommendation to the investigative panel. The investigative panel may dismiss the complaint or authorize a full investigation by the Executive Director. After a full investigation, if the investigative panel finds that there is reasonable cause to believe the judge committed misconduct, it may, with the judge's consent, privately admonish the judge, implement a deferred discipline agreement or an agreement to resign or retire, direct the Director to dismiss the complaint, or direct the Director to file formal charges. If formal charges are filed, a public hearing is conducted by the hearing panel, and that panel decides whether to dismiss the charges or file a recommendation with the Supreme Court. The Court may accept, reject, or modify in whole or in part the findings and conclusions of the hearing panel, dismissing the case or reprimanding, censuring, suspending without pay, or removing the judge. The bifurcation was established by statute in 2017 after a constitutional amendment abolished the commission then in place and gave the legislature the authority to create a new commission.

Illinois

The [Judicial Inquiry Board](#) has 9 members: 2 judges, 3 attorneys, and 4 public members. The Board investigates complaints against judges and, if it determines a reasonable basis exists, files and prosecutes complaints with the **Courts Commission**. The Commission has 5 judge members (including a supreme court justice) and 2 citizen members. The Commission holds a public hearing on a complaint filed by the Board and has the authority to remove, suspend with or without pay, censure, or reprimand a judge. The decision of the Commission is final. The Board and the Commission were created by the state constitution in 1971.

Ohio

Grievances against judges can be filed with either the [Disciplinary Counsel](#) or [Certified Grievance Committees](#) organized by the state bar or local bar associations. If either Disciplinary Counsel or a committee determines that there is substantial credible evidence of misconduct by a judge, a draft formal complaint is presented to a probable cause panel of the [Board of Professional Conduct](#). The Board has 28-members (7 judges, 17 attorneys, and 4 public members). The Board has 2 **probable cause panels** with 3 members each, designated by the chair. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board. Hearings are then conducted by a 3-member **hearing panel** of the Board selected at random. If the hearing panel finds a violation, it makes a recommendation to the **Ohio Supreme Court**, which makes the final decision regarding misconduct and issues the sanction. The same procedures are used for grievances against attorneys. The Board of Commissioners on Grievances and Discipline was established by court rule in 1957 and renamed the Board of Professional Conduct in 2014.

Oklahoma

The [Council on Judicial Complaints](#) has 3 members: 2 attorneys and 1 public member. If the Council finds that a complaint should be the subject of proceedings, the Council forwards its findings and all information to the Supreme Court, the Chief Justice, the governor, the attorney general, the board of directors of the Oklahoma Bar Association, or the House of Representatives. That person or entity, in its discretion, may file a petition invoking the jurisdiction of the **Court on the Judiciary**. The Court on the Judiciary has both a trial and an appellate division. The **Trial Division** has 9 members: 8 judges and 1 attorney. The Trial Division conducts a hearing on the petition. The Trial Division's judgement can be appealed by the judge or the prosecutor to the 9-member **Appellate Division** (8 judges and 1 attorney). The decision of the Appellate Division is final. The only sanctions available to the Court on the Judiciary are removal or permanent retirement. However, if the Council on Judicial Complaints finds evidence of misconduct that does not warrant removal or retirement, it may refer the matter to the **Chief Justice** who may forward the investigative report to the other members of the Supreme Court, and, after considering the complaint and judge's response, the Court may impose appropriate discipline. The Council was created by statute in 1974, following a scandal in the Oklahoma Supreme Court. Originally, the Council was an office within the judicial branch, but it became an executive branch agency in 1999.

Pennsylvania

The [Judicial Conduct Board](#) has 12 members: 3 judges, 3 attorneys, and 6 public members. If the Board finds probable cause, it files formal charges with the [Court of Judicial Discipline](#). The Court of Judicial Discipline has 8 members: 4 judges, 2 attorneys, and 2 public members. The Court holds a public trial and renders a decision. The Court may dismiss the charges or reprimand the judge, suspend the judge with or without pay, or remove the judge from office. A judge may appeal a decision to the **Pennsylvania Supreme Court**; "on the law, the scope of review is plenary; on the facts, the scope of review is clearly erroneous; and, as to sanctions, the scope of review is whether the sanctions imposed were lawful." The Board may appeal the dismissal of charges to the **Supreme Court**, but the appeal is limited to questions of law. The Board and the Court of Judicial Discipline were created by an amendment to the state constitution in 1993, succeeding the Judicial Inquiry and Review Board.

West Virginia

The [Judicial Investigation Commission](#) has 9 members: 6 judges and 3 public members. Complaints filed with the Commission are referred to **Judicial Disciplinary Counsel**, who initially reviews each complaint and refers the matter to an investigator, asks the judge to respond, or sends it directly to the Commission for consideration. If the Commission determines that there is probable cause but that formal discipline is not appropriate, the Commission publicly admonishes the judge unless the judge timely objects. If the Commission determines that there is probable cause and formal discipline is appropriate or if the judge objects to the notice of public admonishment, the Commission files formal charges with the **Judicial Hearing Board**. The Board has 9 members: 6 judges and 3 public members. Following a public hearing, the Board files findings of fact, conclusions of law, and a recommended disposition with the **Supreme Court of Appeals**. The Court can admonish, reprimand, censure, suspend without pay

for up to 1 year, fine up to \$5,000, or involuntarily retire a judge. The Commission and the Board were created by court rule in 1976.

2-panel states

Arizona

The [Commission on Judicial Conduct](#) has 11 members: 6 judges, 2 attorneys, and 3 public members. After a preliminary investigation, a 3-member **investigative panel** appointed by the chair determines whether to conduct a full investigation; the panel is “whenever possible” comprised of 1 judge member of the Commission, 1 attorney member, and 1 public member. If the investigative panel authorizes formal charges after a full investigation, the public hearing is held before a **hearing panel** comprised of the 8 members of the Commission who were not on the investigative panel or before a **hearing officer**. The hearing panel can impose an informal sanction; recommend censure, which is final unless the judge or disciplinary counsel files a petition; or recommend other formal sanctions that are subject to review by the **Arizona Supreme Court**, by petition or on the Court’s own motion. The Commission was created by the state constitution in 1970; the bifurcation was accomplished by rule amendments adopted by the Court effective 2002.

Arkansas

The [Commission on Judicial Discipline and Disability](#) has 9 members: 3 judges, 3 attorneys, and 3 public members; each member also has an alternate. The Commission chair appoints 3 **investigation panels** from the 9 members and 9 alternates; each investigation panel has 1 judicial member, 1 attorney member, and 1 public member. All complaints that are not summarily dismissed by the executive director are presented to an investigation panel; the investigation panel dismisses a complaint or directs the staff to investigate. After an investigation, the investigation panel dismisses a complaint or directs the filing of a formal statement of allegations. The hearing on the formal charges is before a 9-member **hearing panel** comprised of the members of the Commission – 3 judges, 3 attorneys, and 3 public members – who did not serve on the investigation panel for the complaint. If the hearing panel finds misconduct, it may admonish the judge, direct professional treatment, counseling, or assistance, or impose conditions on the judge or recommend to the **Arkansas Supreme Court** that the judge be reprimanded, censured, suspended, or removed. The Commission was created by constitution in 1989; bifurcation was accomplished when the Court amended the Commission’s procedural rules in 2008.

Florida

The [Judicial Qualifications Commission](#) has 15 members: 6 judges, 4 attorneys, and 5 public members. Each year, Commission members are assigned to either a 9-member **investigative panel** (composed of 4 judges, 2 attorneys, and 3 public members) or a 6-member **hearing panel** (2 judges, 2 attorneys, and 2 public members). The investigative panel conducts investigations and then dismisses the complaint or submits formal charges to the hearing panel. The hearing panel holds a public hearing on the formal charges and makes a recommendation to the **Florida**

Supreme Court. The Commission was created in 1966 by the state constitution; the bifurcation was accomplished through a constitutional amendment effective in 1996.

Kansas

The [Commission on Judicial Conduct](#) has 14 members: 6 judges, 4 attorneys, and 4 public members. The Commission is divided into two 7-member panels (designated **Panel A** and **Panel B**), each consisting of 3 judges, 2 attorneys, and 2 public members. Complaints are assigned to either Panel A or Panel B for initial review and inquiry. Sitting as an inquiry panel, a panel may dismiss complaints, issue letters of caution or informal advice, issue a cease-and-desist order to a judge, or refer the complaint for formal proceedings. If one panel refers a complaint for formal proceedings, the other panel sits as the hearing panel. Following a public hearing, the hearing panel may terminate the proceedings, admonish the judge, issue a cease-and-desist order, or recommend that the **Kansas Supreme Court** censure, suspend, remove, or retire the judge. The Commission was created by Court rule in 1974; the bifurcation was accomplished by a court rule effective 1999.

North Carolina

The [Judicial Standards Commission](#) has 13 members: 5 judges, 4 attorneys, and 4 non-public members. The chair (who is the court of appeals member of the Commission) divides the members into two 6-member panels (designated **Panel A** and **Panel B**), each comprised of 2 judges, 2 attorneys, and 2 citizens. The panels meet in alternating months. The Commission chair chairs both panels. Complaints are assigned to either Panel A or Panel B for initial review and investigation. The assigned panel may dismiss the complaint or authorize a preliminary or formal investigation. After an investigation, the panel may dismiss a complaint, issue a private letter of caution, or file a statement of charges if it finds that there is probable cause to believe that the judge engaged in conduct that warrants public reprimand, censure, suspension, or removal. A non-public hearing is held before the panel that did not act as the investigation panel. After the hearing, the hearing panel can dismiss the charges (which may include a private letter of caution) or recommend that the **North Carolina Supreme Court** reprimand, censure, suspend, or remove the judge. The Court independently reviews whether the Commission's findings of fact are supported by clear and convincing evidence and whether the findings support the conclusions of law and exercises its independent judgment about the sanction. The Commission was created by statute in 1973; bifurcation was accomplished by rules adopted by the Commission in 2007. In 2013, the statute was amended to make all proceedings confidential unless and until the Supreme Court publicly sanctions, suspends, or removes the judge; prior to that amendment, hearings on statements of charges were public.

South Carolina

The [Commission on Judicial Conduct](#) has 26 members: 14 judges, 4 attorneys, and 8 public members. The chair divides members (other than the chair, the vice chair, and the public members) into 4 panels with 6 members each (3 judges, 1 attorney, 2 public members). The chair designates whether a panel will serve as an investigative panel or a hearing panel; if the panel is assigned to serve as an investigative panel, the chair adds either the chair or the vice chair to increase its membership to 7. **Disciplinary Counsel** screens complaints. After an

investigation, if Disciplinary Counsel believes there is evidence supporting the allegations against a judge, Disciplinary Counsel may propose an agreement for discipline by consent to the judge; recommend to an investigative panel that the matter be concluded with a letter of caution or a confidential admonition; or recommend to an investigative panel that formal charges be filed. If the investigative panel directs Disciplinary Counsel to file formal charges, a public hearing is held before a panel designated as a hearing panel. The hearing panel submits a report to the **South Carolina Supreme Court**, which can accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the hearing panel and dismiss the case, issue a letter of caution, publicly reprimand or admonish a judge, or remove or suspend a judge. The Commission was created by court rule in 1976; bifurcation was accomplished by a court rule effective 1997.

Tennessee

The [Board on Judicial Conduct](#) has 16 members: 8 current or former judges, 2 attorneys, and 6 public members. The presiding judge divides the court into 3-member **investigative panels** and 5-member **hearing panels**. After Disciplinary Counsel conducts a preliminary investigation, an investigative panel reviews their recommendation and dismisses the complaint or authorizes a full investigation. After a full investigation, the investigative panel reviews Disciplinary Counsel's recommendation and may direct the filing of formal charges or propose to the judge a private reprimand, a deferred discipline agreement, a public reprimand, suspension with pay, or imposition of limitations and conditions on the performance of judicial duties, including a cease-and-desist order. If the judge does not consent, the investigative panel may direct the Disciplinary Counsel to dismiss the complaint or file formal charges. If formal charges are filed, a public hearing is held by one of the hearing panels. After the hearing, the hearing panel may dismiss the charges, publicly reprimand or censure the judge, or recommend removal. The judge may appeal a decision to impose a sanction to the **Tennessee Supreme Court** where the review is de novo on the record with no presumption of correctness of the judgment or the findings of the hearing panel. If the Court affirms a removal, the matter is referred to the legislature for removal proceedings; neither the Court of the Judiciary nor the Supreme Court may remove a judge. The Judicial Standards Commission was created by statute in 1971 and replaced by the Court of the Judiciary in 1978; the statute was amended to bifurcate proceedings in 1995. The Court of the Judiciary was replaced by the Board on Judicial Conduct in 2012.

Vermont

The [Judicial Conduct Board](#) has 9 members: 3 judges, 3 attorneys, and 3 lay persons. Following a preliminary investigation, a recommendation is presented either to the Board or to a 3-member **investigative panel** consisting of 1 judge, 1 attorney, and 1 lay member, appointed by the chair. If the Board or the investigative panel believes that there is probable cause, a formal complaint is filed, and a public hearing is held before a **hearing panel** of at least 5 members of the Board, at least 1 of whom is a lay member. The hearing panel may impose limitations or conditions on the performance of judicial duties, issue a public reprimand, or suspend a judge. If no appeal from a hearing panel order is filed within 30 days, and the **Vermont Supreme Court** does not order review on its own motion, an order of the panel other than an order imposing a

suspension becomes final; even if no appeal is filed, an order of suspension becomes final only upon issuance of an order of the Court. Neither the Board nor the Court may remove a judge. The Board was created by a court rule in 1978; the bifurcation was accomplished by an amendment to the rule effective 2002.

Wyoming

The [Commission on Judicial Conduct and Ethics](#) has 12 members: 3 judges, 3 attorneys, and 6 public members. The executive director establishes investigatory panels of 3-5 members and adjudicatory panels of 3-5 members, with each panel including members from each category of membership. Membership rotates between the 2 types of panels, but no member may sit on both the investigatory and adjudicatory panel in the same proceeding. If after an investigation, an **investigatory panel** finds reasonable cause to support a finding that the judge engaged in misconduct, the investigatory panel may issue a letter of correction, enter a deferred disciplinary agreement, issue a stipulated private censure, or institute formal proceedings before an **adjudicatory panel**. Following a non-public hearing, if the adjudicatory panel finds misconduct, it submits its findings to the **disciplinary panel**, that is, “all members of the Commission with the exception of the investigatory panel on any proceeding.” The disciplinary panel imposes private discipline or makes a recommendation of censure, removal, or retirement to the **Wyoming Supreme Court**. The Commission was created by the state constitution in 1973; the bifurcation was accomplished in a constitutional amendment adopted in 1996.

