

# Interim Committee on Judicial Discipline Comparison of Current Law and Proposed Legislation

Current Law	Proposed Legislation
<b>Confidentiality</b>	
Privately conducts judicial disciplinary hearings until a recommendation for a public disciplinary sanction is made.	Makes judicial misconduct proceedings public at the commencement of formal proceedings. It also clarifies the circumstances in which the commission may release otherwise confidential information and addresses immunity in defamation lawsuits (Concurrent Resolution A).
<b>Penalties</b>	
Misdemeanor penalties may apply to anyone who discloses contents of private disciplinary proceedings currently before the commission.	No proposed legislation. Committee members continuing review whether to either eliminate or modify the criminal penalties to be less harsh.
<b>Procedural Rights for Complainants</b>	
No process to keep complainants apprised of complaint status.	Develops complainant notification procedures to include status updates about case dismissals, completions, hearing schedules, and disposition (Bill B).
<b>Ombudsperson</b>	
No ombudsperson to assist in navigating judicial system related complaints.	Proposed legislation withdrawn but would have created the Office of Judicial Discipline ombudsperson within the Commission on Judicial Discipline. Committee members are continuing to work on the details of this office (Bill C).
<b>Complaint Filing</b>	
Anyone may lodge a written and signed complaint against a judge with the commission via U.S. mail, email, or fax.	Permits any complainant to file a complaint either online or by mail and to have the option of submitting it anonymously or confidentially (Bill B).
<b>Data and Reporting</b>	
Commission files an annual report that is limited in scope and does not provide aggregate information to identify trends or patterns.	Requires additional information about complaints in its annual report and online in a searchable format, including types, numbers, disposition, and reasons for informal remedial actions or dismissals (Bill B).
<b>Rulemaking Authority</b>	
State Supreme Court promulgates rules governing disciplinary procedures, including staff and commission member duties and responsibilities.	Constitutionally creates a rulemaking committee to propose rules for the commission and allows the Supreme Court to approve or reject the proposed rules (Concurrent Resolution A).  Statutorily outlines rulemaking procedures, such as notice and opportunities for public comment, and addresses rules governing certain judicial discipline proceedings (Bill B).
<b>Independent Entity to Adjudicate Formal Hearings and Hear Appeals</b>	
One-tier commission that receives and investigates complaints, brings formal charges, conduct hearings, and either discipline the judges or recommend disciplinary sanctions to a higher body, which is usually the state supreme court.	Creates a new Judicial Discipline Adjudicative Board, made up of an equal number of attorneys, judges, and citizens, to hear more serious judicial discipline cases, as well as appeals of remedial actions issued by the Commission on Judicial Discipline (Concurrent Resolution A).
<b>Tribunal for Cases Involving Supreme Court Justices</b>	
State Supreme Court justices mete out discipline to its own members, without a clear recusal process for conflicts of interest.	Requires a tribunal of seven randomly selected court of appeals judges to review any appeal from a Supreme Court justice who is being disciplined (Concurrent Resolution A).



## **Committee Charge**

Senate Bill 22-201 created the 8-member Legislative Interim Committee on Judicial Discipline and directed the committee to work with judges, lawyers, members of the public, and other interested parties, to:

- review and examine Colorado's system of judicial discipline;
- evaluate other states' models; and,
- make recommendations to the General Assembly for statutory or constitutional reforms during the 2023 session.

The bill also directed the committee to specifically study an array of topics related to judicial discipline, including but not limited to: rulemaking authority; judicial independence; complaint screening; confidentiality; funding; and complainant notifications and procedures.

## **Committee Activities**

During the 2022 interim, the Interim Committee on Judicial Discipline held five meetings. The committee heard presentations from a variety of experts in the fields of judicial discipline and misconduct. These experts gave presentations on judicial discipline commission structure and composition in other states, as well as confidentiality, transparency, reporting, and complainant procedural rights. Representatives of the Judicial Department, the Commission on Judicial Discipline (commission), the Office of the State Auditor, and the Office of Attorney Regulation also presented about Colorado's judicial discipline system and their respective roles in the process.

## **Confidentiality and Associated Penalties**

The committee reviewed confidentiality and transparency in relation to judicial discipline fact-finding hearings. It also discussed associated penalties for disclosing confidential information from these proceedings.

**Confidentiality.** The committee learned that Colorado, along with 14 other states, privately conducts judicial disciplinary hearings until a recommendation for a public disciplinary sanction is made. The remaining states allow judicial misconduct proceedings to become public earlier in the process, once charges are filed, or judges have formally responded to allegations. From these conversations, the committee discussed that a discipline system with more transparency improves public confidence in the judiciary.

**Penalties.** Relatedly, misdemeanor penalties may apply to anyone who discloses contents of these private proceedings currently before the commission. The committee heard concerns about this provision being overly punitive, as well as a deterrent to public participation in the judicial discipline process. Suggestions were further made by interested parties to either eliminate or modify the criminal penalties to be less harsh. Committee members agreed that the subject warranted a more in-depth conversation than committee time allowed.

**Committee recommendation.** As a result of its discussions, the committee recommends Concurrent Resolution A, which makes judicial misconduct proceedings public at the commencement of formal proceedings. It also clarifies the circumstances in which the commission may release otherwise confidential information and addresses immunity in defamation lawsuits.

## **Complainant Rights and Procedures**

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The committee focused on complainant-centered approaches to handle and resolve judicial misconduct complaints, which included clear procedures and notifications for complainants and an ombudsperson office.

**Procedural rights for complainants.** A common theme heard throughout committee hearings was the lack of notification and support mechanisms in place for individuals who file a complaint against a judge. Committee members discovered that complainants may not be kept apprised about the status of their complaint, and may not know how to follow the status of their complaints on their own. This may have contributed to underreporting and a distrust of the complaint process.

**Ombudsperson office.** Findings from two independent investigations, described below, reported that Judicial Department employees fear professional retaliation for filing complaints. The reports also noted insufficient avenues for safe and anonymous reporting. Testimony heard during committee hearings further supported uneasiness about lodging complaints against a judge without an official, confidential system in place. The committee discussed whether an ombudsperson office would be an important first step to providing support and resources for employees involved in conflicts with other employees, including judges.

**Committee recommendation.** In response to these concerns, Bill B develops complainant notification procedures to include status updates about case dismissals, completions, hearing schedules, and disposition. In addition, the committee withdrew Bill C. The bill would have created the Office of Judicial Discipline ombudsperson within the Commission on Judicial Discipline. The primary purpose of this office would have been to create an anonymous reporting system for submitting complaints and then helping complainants throughout the process.

## **Commission on Judicial Discipline: Complaint Filings and Reporting**

According to the commission, it receives upwards of 200 complaints per year. The vast majority of these are dismissed as being outside the commission's scope, as it does not have the authority to review a judge's ruling, comment on a case, or order a new trial. Yet, the committee identified data gaps concerning dismissals and associated reasons for the dismissals. Relatedly, it was brought to the committee's attention that barriers exist to filing a complaint. As a result, the interim committee reviewed and made recommendations about commission practices used to receive, investigate, and document complaints.

**Complaint filing.** Anyone may lodge a complaint against a judge with the commission. These complaints must be written and signed and then submitted via U.S. mail, email, or fax. Testimony pointed out issues with this system and suggested ways to streamline the process by making it more user-friendly. Committee members also considered recommendations to allow anonymous and confidential reporting of judicial misconduct in an effort to increase confidentiality and avoid professional retribution.

**Data and reporting.** The commission is required to file an annual report and post it on the commission's website. The committee heard from multiple sources, however, that the report is limited in scope and does not provide enough aggregate information to identify trends or patterns. The committee also discussed accountability and transparency in connection with better data collection.

**Committee recommendation.** As a result of these discussions, the committee recommends Bill B. Bill B permits a complainant to file a complaint either online or by mail and to have the option of submitting it anonymously or confidentially. The bill also requires the commission to include additional information about complaints in its annual report and online in a searchable format, including types, numbers, disposition, and reasons for informal remedial actions or dismissals.

## **Rulemaking Authority**

Some states allow respective judicial discipline commissions to operate independently and adopt their own governing rules. In Colorado, however, the state Supreme Court promulgates rules governing disciplinary procedures, including staff and commission member duties and responsibilities.

Committee members heard from national experts that Colorado's rulemaking approach may be perceived as self-monitoring, allowing the court to play a larger-than-necessary role in the process. Looking to other states that allow judicial discipline commissions to operate more independently, the committee deliberated about different, and more autonomous, rulemaking approaches. As a result, the committee put forward constitutional and statutory changes to rulemaking authority and procedures. This includes a ten-member independent rulemaking committee to propose rules on standards and degree of proof, confidential reporting procedures, and complainant rights, among other topics.

**Committee recommendation.** Concurrent Resolution A constitutionally creates a rulemaking committee to propose rules for the commission and allows the Supreme Court to approve or reject the proposed rules. Bill B statutorily outlines rulemaking procedures, such as notice and opportunities for public comment, and addresses rules governing certain judicial discipline proceedings.

## **Commission on Judicial Discipline Structure**

Judicial discipline commissions are primarily structured in one of two ways: as a one-tier or two-tier (bifurcated) commission. One-tier commissions receive and investigate complaints, bring formal charges, conduct hearings, and either discipline the judges or recommend disciplinary sanctions to a higher body, which is usually the state supreme court. Colorado is currently an example of a one-tier system.

A two-tier commission, adopted by a handful of states, is composed of two separate entities. The first entity receives and investigates complaints and then determines whether to proceed to a hearing or dismiss the complaint. If a hearing is held, the first tier also presents charges before the second body, which conducts the hearing and adjudicates the matter presented.

The interim committee compared these various systems of state judicial discipline commissions, and found support in using one board to hear formal proceedings and appeals and another for cases involving Supreme Court justices.

**Independent entity to adjudicate formal hearings and hear appeals.** For serious judicial discipline cases that have reached formal proceedings, the Colorado Supreme Court determines whether to suspend, publicly censure, or remove a judge from the bench. Testimony from national experts and local organizations alike expressed concerns about conflicts of interest in these cases and recommended shifting decision-making power away from the state's high court to an independent board.

**Tribunal for cases involving Supreme Court justices.** The current judicial system discipline system in Colorado allows for the state Supreme Court to mete out discipline to one of its own members, without a clear recusal process for conflicts of interest. Judicial discipline experts and practitioners provided the committee with information about other ways to handle judicial discipline cases involving Supreme Court justices.

**Committee recommendations.** As a result of these conversations, Concurrent Resolution A creates a new Judicial Discipline Adjudicative Board, made up of an equal number of attorneys, judges, and citizens, to hear more serious judicial discipline cases, as well as appeals of remedial actions issued by the Commission on Judicial Discipline. Concurrent Resolution A also requires a tribunal of seven randomly selected court of appeals judges to review any appeal from a Supreme Court justice who is being disciplined.

## Summary of Recommendations

As a result of the committee's activities, the Interim Committee on Judicial Discipline recommended one resolution and one bill to Legislative Council for consideration in the 2023 legislative session. At its meeting on October 14, 2022, Legislative Council approved the resolution and bill for introduction. The approved bills are described below.

### **Concurrent Resolution A – Judicial Discipline Procedures and Confidentiality**

Concurrent Resolution A refers a question to the 2024 general election ballot to ask voters to amend the constitution to change how disciplinary hearings for judges are conducted. The resolution specifically reduces the roles of the Commission on Judicial Discipline and Colorado Supreme Court in formal judicial disciplinary proceedings and transfers responsibilities to a new board. The resolution also creates a different process for when complaints are made public and removes confidentiality during formal disciplinary proceedings. Lastly, the resolution assembles a rulemaking committee, instead of the Supreme Court, to propose rules for judicial discipline proceedings.

- *Judicial Discipline Adjudicative Board.* The resolution creates the Independent Judicial Discipline Adjudicative Board to conduct formal disciplinary hearings and to hear appeals about informal orders from the Commission on Judicial Discipline. The board consists of an equal number of judges without any disciplinary history, attorneys without any disciplinary history, and citizens.

When the Commission on Judicial Discipline orders a formal hearing to discipline a justice or judge, or a justice or judge wants to appeal an order for informal remedial action from the commission, a panel of the Judicial Discipline Adjudicative Board, which includes one judge, one attorney, and one citizen of the board randomly selected by the State Court Administrator, will convene to conduct the hearing. After the formal hearing, the adjudicative panel may dismiss the charges, take informal remedial actions, or impose sanctions, such as the removal, suspension, or censure of a justice or judge.

- *Appeals of disciplinary orders.* The resolution allows a justice or judge or the Commission on Judicial Discipline to appeal a Judicial Discipline Adjudicative Board's disciplinary order or dismissal to the Supreme Court or a tribunal consisting of seven court of appeals judges if the disciplinary action involves a Supreme Court justice.
- *Confidentiality.* The resolution allows judicial disciplinary proceedings to be public at the commencement of formal proceedings. The resolution also allows the Commission on Judicial Discipline to release information about the status of an evaluation, investigation, or proceeding to the victim of misconduct or the complainant; release information about a complaint that resulted in discipline to specified government agencies; and to make aggregate information on complaints publicly available.

- *Rulemaking committee.* The resolution creates the ten-member rulemaking committee to propose rules for the Commission on Judicial Discipline. The Supreme Court must approve or reject each rule proposed by the committee and the court may promulgate specific rules governing proceedings before the Judicial Discipline Adjudicative Board

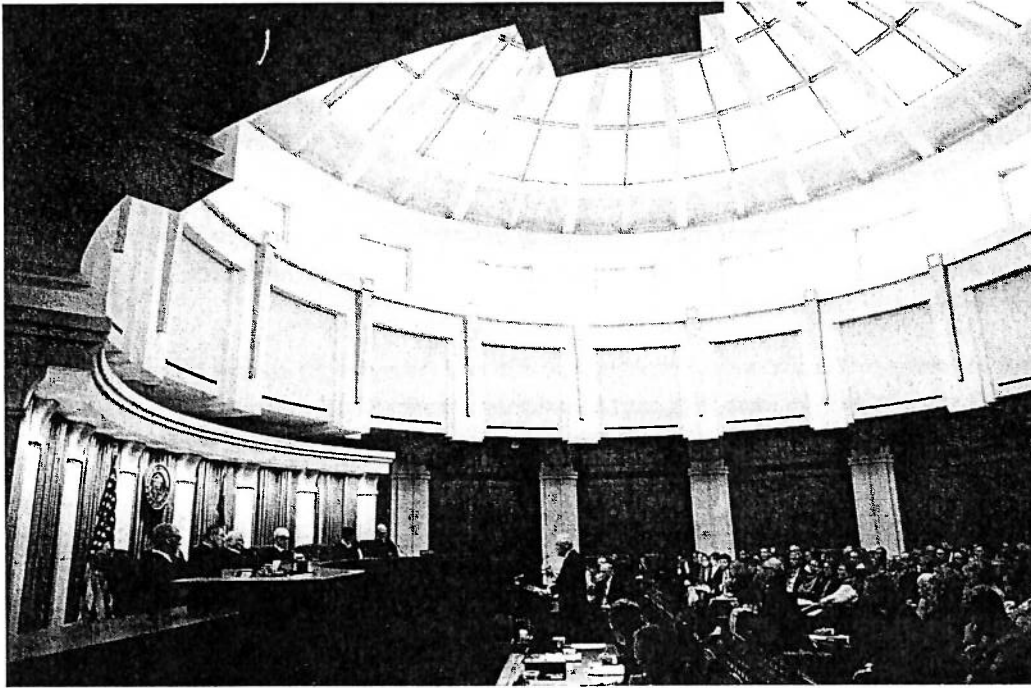
### **Bill B – Judicial Discipline Procedures and Reporting**

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Bill B requires the Commission on Judicial Discipline to report more information in its annual report and online about the allegations, investigations, and complaints it receives and the type of discipline imposed or recommended. Additionally, the bill allows a person to submit a complaint of judicial misconduct either by mail or online, through a form developed by the commission, and also allows a person to submit a confidential or anonymous complaint. Further, the commission, upon receipt of a complaint, is required to explain to the complainant the judicial discipline process and to designate a point of contact to keep a complainant apprised of the complaint status. Finally, the bill outlines judicial rulemaking procedures to notify the public and give them an opportunity to submit comments.



## Opinion: Coloradans will have the chance to reform judicial discipline



RJ Sangosti, The Denver Post

In this 2014 file photo, the Colorado Supreme Court justices hear oral arguments in a case about school vouchers. Colorado's judicial system and the Supreme Court members who oversee it was rocked by a scandal that has led state lawmakers to call for reforms.

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By **MIKE WEISSMAN** and **TERRI CARVER** | Guest Commentary

October 11, 2022 at 10:37 a.m.

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Independent oversight is key to the maintenance of trust in any institution, especially public institutions.

Reporting in The Denver Post and other news outlets raised serious issues regarding the judicial discipline process. As members of the legislature, we found that Colorado's decades-old judicial discipline system did not meet the modern standards of independence and public accountability necessary for public trust.

We, along with our legislative colleagues, have worked to change that. In our 2022 legislative session, we passed a bi-partisan bill, Senate Bill 201, that established independent funding for the Commission on Judicial Discipline. The bill passed the legislature with 94 “yes” votes out of 100. It requires the judicial branch to share key information with the commission and requires the commission to report to the legislature for purposes of ongoing oversight.

Finally, because legislators of both parties agreed that issues of judicial discipline are serious and complex enough to warrant additional study, SB 201 also created an interim committee to examine how to improve our judicial discipline system and to propose recommendations to the general assembly next year.

This summer and fall, a bipartisan group of legislators – four Democrats and four Republicans – have taken testimony from witnesses, consulted experts from non-partisan research organizations, and studied judicial discipline laws and systems from other states. After careful deliberation, the interim committee unanimously approved two measures that will make extensive and important changes to our system of judicial discipline in Colorado.

The first measure is a concurrent resolution that, if approved by two-thirds of the legislature next year and then approved by voters in the November 2024 election, will make several key changes to our constitutional framework for judicial discipline.

First, instead of remaining confidential and out of public view until near the end of the process, judicial discipline matters would be open (as most other court proceedings are) once formal proceedings commence. This change would move Colorado out of a small minority of states whose judicial discipline proceedings are as closed as ours are now.

Second, a new Independent Judicial Discipline Adjudicative Board would be created, consisting of equal numbers of judges, lawyers, and non-lawyers. This new independent board would act like a “court” for formal judicial discipline proceedings and determine what sanctions are appropriate.

The Adjudicative board would largely replace the role of “special masters” – judges appointed by the Colorado Supreme Court – and the supreme court itself in imposing sanctions. Other states have long since enacted similar approaches to create more separation between those potentially subject to discipline and those imposing discipline. There is a limited appellate review of the Adjudicative Board’s decision.

Third, in situations when Colorado Supreme Court justices are potentially involved in disciplinary proceedings, they would be removed from their usual role in the appellate review process and replaced by seven randomly selected judges of the Colorado Court of Appeals.

Finally, while preserving the confidentiality of complainants, witnesses, and judges not yet sanctioned through formal proceedings, our constitution would make it clear that the public has a right to know aggregate, non-identifiable data about what is going on in our judicial discipline system and that complainants have a right to be kept informed about ongoing investigations. These latter provisions are similar to the provisions of the Victims Rights Amendment to our state constitution, long ago approved by voters.

The second measure is a companion bill that would give effect to the proposed constitutional changes. The bill would enhance reporting by the commission to the legislature and the public, explicitly allow both confidential and anonymous judicial discipline complaints to be made, and require the commission to update complainants at key stages throughout the judicial discipline process. The purpose of these provisions is to increase information available to public about judicial discipline matters and to make the process more “user-friendly” for individuals who lodge complaints. Interim committee testimony established that our current system is deficient in both of these respects.

Finally, the interim committee invested significant time in researching and discussing the role that an ombuds office could play in supporting complainants in the judicial discipline process. Ultimately the committee did not propose a specific bill on this subject, but legislators of both parties have committed to continue to work on the issue in the 2023 session.

We hope that our colleagues will support these bipartisan measures next year, and we urge voters of all parties to support the proposed constitutional changes in 2024. Our state needs and deserves a more modern, conflict-free process for resolving judicial discipline complaints.

*Rep. Mike Weissman (D-Aurora) served as the chair of the Interim Committee on Judicial Discipline. Rep. Terri Carver (R-Colorado Springs) served as the vice-chair of the Interim Committee on Judicial Discipline.*

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