



# Judging the quality of judicial selection methods: Merit selection, elections, and judicial discipline

by Malia Reddick

The debate over how best to select state court judges has seen a resurgence in recent years. This is due, at least in part, to the “new politics” of competitive elections for state high courts since 2000.<sup>1</sup> These races have seen unprecedented campaign fundraising and spending, with supreme court candidates raising more than twice as much as was raised by their counterparts in the 1990s. At the same time, special interest groups have expanded their efforts to influence the composition of state courts—contributing to candidates’ campaigns, funding television ads, and encouraging candidates to speak publicly about their political views.

Several jurisdictions have been successful in introducing reforms to their judicial selection systems. In 2008, voters in Greene County, Missouri, opted to move from partisan elections to merit selection of judges, and voters in two Alabama counties that choose judges in partisan elections approved the use of merit selection to fill mid-term vacancies on their trial courts. In 2009, the Wisconsin legislature approved public financing for judicial election campaigns, and in 2010, the West Vir-

ginia legislature established both a pilot program for public financing of high court campaigns and a merit selection process for filling interim judicial vacancies. Change may also be on the horizon in Nevada, where voters will decide in November whether to move from nonpartisan elections to a system of merit selection, retention elections, and performance evaluations for all judges. Selection reform proposals are currently being considered in a handful of other states as well.

Some of these reform proposals are aimed at improving judicial elections, while some call for abandoning elections in favor of judicial merit selection. Advocates of the process that has come to be known as “merit selection” characterize it as a process that screens out unqualified applicants and identifies the most qualified.<sup>2</sup> In the traditional merit selection system, a judicial nominating commission composed of both lawyer and lay members evaluates the professional credentials of judicial applicants and submits to the governor the names of those best qualified for the open position. One of these applicants is then appointed by the

governor, sometimes with legislative confirmation.

Merit selection proponents argue that such a system is preferable to popular election of judges because judges are nominated for appointment based on their qualifications and experience, whereas in elective systems judges may not be chosen solely on the basis of their professional credentials. Research has shown that the amount of money spent in judicial election campaigns, candidates’ political party affiliation, name recognition, and ballot position may be important as well.<sup>3</sup> Supporters of merit selection of judges acknowledge that the system does not entirely eliminate politics from the selection process, but they argue

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This research was conducted through a grant from the Open Society Institute.

The author thanks Sara Gray and Nicholas Janing for their assistance with this research.

1. These developments have been chronicled in a series of reports produced by partners in the Justice at Stake Campaign entitled *The New Politics of Judicial Elections*. Reports for 2000, 2002, 2004, and 2006 are available at <http://www.justiceatstake.org/resources/publications.cfm>, and the 2008 report is forthcoming.

2. For a concise summary of how the merit selection process works and its advantages over competitive elections, see the American Judicature Society’s *Merit Selection: The Best Way to Choose the Best Judges*, available at [http://www.judicialselection.us/judicial\\_selection\\_materials/index.cfm](http://www.judicialselection.us/judicial_selection_materials/index.cfm).

that it minimizes the role of political, partisan, and special interests.

Because merit selection places an emphasis on qualifications and experience, while additional criteria often come into play in judicial elections, advocates of merit selection assert that fewer unfit judges are chosen through merit selection than in popular elections. The veracity of this assertion has proven difficult to evaluate, but one way of doing so is undertaken here.

### Measuring judicial quality

Since judicial merit selection was first adopted in Missouri in 1940, scholars have used a variety of approaches in assessing the comparative quality of merit-selected and popularly elected judges. Some studies have compared the expertise and potential for quality judicial work that appointed and elected judges bring to the bench. Glick and Emmert (1987) is representative of this approach, where the authors use quality of education and extent of legal and judicial experience as indicators for expertise and judicial potential. Examining judges of state courts of last resort, they found that the number of years of practicing law and of prior judicial service were roughly equal for judges across all selection systems, while merit-selected and gubernatorial-appointed judges were somewhat more likely than elected judges to have attended prestigious undergraduate or law schools.

Other research has assessed the quality of judges' performance once they attain their seats. A recent example of this approach is Choi, Gulati, and Posner (2010), in which the authors endeavored to develop objective measures of three aspects of the performance of state high court judges—effort, skill, and independence. They reported that elected judges were more productive than appointed judges, as indicated by the number of opinions they wrote; however, appointed judges wrote “better” opinions, as indicated by the number of out-of-state citations. The analysis revealed no clear

differences in the independence of elected and appointed judges, as indicated by their willingness to write opinions in disagreement with judges who shared their party affiliation.

A third approach to evaluating the quality of different judicial selection systems has involved examining rates of judicial discipline for appointed and elected judges. Most of the work done in this area has focused on a single state or jurisdiction,<sup>4</sup> but Goldschmidt, Olson, and Ekman (2009) recently conducted a more comprehensive analysis of 23 states. Their study analyzed the nature and severity of judicial disciplinary actions according to whether the disciplined judges served in states with contestable elections or merit selection. The authors found some differences across selection methods and types of judicial misconduct, but no substantial and consistent differences were found.

Judicial discipline is an appealing measure of judicial quality for a few reasons. First, it is a direct indicator of whether judges are complying with existing standards of conduct, both on and off the bench, and one that is independent of the bases on which judges may have been selected—i.e., their professional and political backgrounds. Second, it captures the extent to which judges are abiding by widely accepted ethical rules. State codes of judicial conduct, which are enforced through the discipline process, prescribe rules for judges regarding upholding the integrity and independence of the courts, avoiding impropriety and the appearance of impropriety, performing their duties diligently and impartially, and refraining from inappropriate political activity. Finally, the determination of “quality,” or whether judges are adequately fulfilling their judicial responsibilities, is made by an entity created for this purpose through a careful, deliberative, and reviewable process, which is described in greater detail below.

A quasi-laboratory for assessing the relative quality of merit-selected

versus elected judges is found in states where both selection systems may be used to choose judges on the same courts. There are 12 states in which trial court judges stand in partisan or non-partisan elections but where vacancies between elections are filled through a merit selection process.<sup>5</sup> Thus there is variation in selection methods for judges who serve on the same courts with the same responsibilities and where the same legal qualifications must be met to serve. This provides an ideal environment for comparing rates of discipline for merit-selected and elected judges.

### Judicial disciplinary processes<sup>6</sup>

In each of the 50 states, there are organizations known generally as “judicial conduct commissions” that are charged with investigating complaints against judges and, if appropriate, imposing or recommending disciplinary action. There are some similarities across the states in the operation of these organizations, but there are also important differences.

One commonality among judicial conduct commissions is their compo-

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3. Regarding the role of money in judicial races, Bonneau and Hall (2009, 51) assert that “well-financed campaigns help to inform voters and motivate them to go to the polls.” As for the significance of party affiliation, Dubois (1980, 92) in his seminal work on judicial elections concludes that “electors respond in a highly partisan fashion both to the campaign efforts of the parties on behalf of their nominees and to the cues of party identification found on the ballot.” Voters may rely on other voting cues in nonpartisan elections, where party ID is not on the ballot. According to Byrne and Pueschel (1974, 784), “sex, place on the ballot, possession or lack of a nickname, and the ethnic background of the last name are important indicators of chances for electoral success” in nonpartisan elections.

4. Zeidman (2004) examined the 25 misconduct cases against New York City judges from 1977-2002 and reported that 80% of the judges involved were elected rather than merit-selected. Research cited in Barnett (2000) found that of the 69 Florida judges disciplined since 1970, 70% had been elected rather than merit-selected, and 83% of the judges who were removed or who retired with charges pending were initially elected to their seats. A 2000 summary of discipline statistics for a 10-year period by California's Commission on Judicial Performance showed that elected judges were disciplined at a higher rate than appointed judges.

5. These states include Florida, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, New York, North Dakota, Oklahoma, South Dakota, and Tennessee.

6. The following discussion is based on *How Judicial Conduct Commissions Work* (1999).

sition. While they range in size from 5 to 28 members, commissions in all 50 states include lay members, along with both judge members and lawyer members in all states but one. There are differences, however, in the appointment of these members. While in eight states the high court selects all commission members, appointing authorities in other states include the governor, the state bar, judges, and legislative leaders. Some states require legislative confirmation of appointees.

There is also variation across the states in the grounds for which judges may be disciplined. In some states, disciplinary action may be taken if it is determined that a judge has violated the state's code of judicial conduct. Other states, however, also require proof of willful misconduct or conduct that is "prejudicial to the administration of justice." Other grounds for disciplinary action may include persistent failure to perform the duties of the office and conviction of a felony. The burden of proof that must be met varies to some extent as well. While most states require judicial misconduct to be proven by clear and convincing evidence, some states only require proof by a preponderance of the evidence.

Although there is some consistency among the types of sanctions that may be imposed if discipline is found to be warranted, not all sanctions are available in every state. Common sanctions include reprimand, admonishment, censure, fine, cease-and-desist order, suspension, and removal. In addition, some commissions have the option of imposing private sanctions, which may be used if the misconduct is relatively minor and an isolated occurrence and the judge acknowledges the problem and agrees to address it. Private sanctions are confidential, though some commissions report the number of such actions taken without identifying the sanctioned judges.

Perhaps the most substantial differences among state judicial conduct commissions are found in the disciplinary process itself. Most judicial discipline proceedings begin with the filing of a complaint with the commission, though many commissions may also act upon information from other sources. During the investigation of the complaint, the judge is notified and given the opportunity to respond. At the conclusion of the investigation, the complaint may be dismissed or formal charges may be filed. If formal charges are filed, a hearing resembling a civil trial is held, with the questioning of witnesses and the presentation of evidence.

In some states, the full commission participates in the investigation of the complaint, determines whether charges should be filed, presides over the hearing, and imposes or recommends sanctions. In other states, to protect the due process rights of judges, the investigation of complaints and the filing of charges is independent of the hearing and the determination of whether sanctions are appropriate. This independence is accomplished either by creating separate panels within the commission or creating separate entities to perform these functions.

Some commissions are authorized to impose disciplinary sanctions, subject to supreme court review. In other states, commissions are empowered to reprimand or censure judges, subject to review, but only the supreme court may suspend or remove judges. Finally, some commissions may only recommend to the supreme court that sanctions be imposed.

Table 1 displays the variation that exists in judicial discipline systems among the states included in this analysis. For example, Kentucky is alone in allowing judges to be privately admonished or censured. In Oklahoma, only two disciplinary sanctions may be imposed—censure and removal, while there are 11 possible sanctions in Nevada. Three states—Florida, Oklahoma, and Tennessee—have bifurcated processes in

which the investigative and hearing stages are conducted by separate panels or entities.

### **Discipline rates for merit-selected vs. elected judges**

In comparing the quality of merit-selected and elected judges, this study adopts an approach similar to that of Goldschmidt et al. (2009), in that the indicator of judicial quality is whether judges comply with ethical standards of conduct. However, this analysis differs from, and may improve upon, Goldschmidt's work in three important ways. First, this study examines judicial discipline on a state-by-state rather than aggregate basis, recognizing that there are meaningful differences in disciplinary processes across the states and perhaps even, as Goldschmidt notes, in "the zealotry with which each state enforces its judicial conduct code" (2009, 478). Second, Goldschmidt's analysis categorizes judges by the formal selection method of the state in which they serve, while this study takes into account the fact that some judges in elective states initially attain their seats through an appointive process. Finally, disciplinary rates for merit-selected and elected judges are examined in relation to the rates at which all judges in the analyzed states are merit-selected and elected.

The dataset for this study includes all instances of public judicial discipline involving trial court judges in the 12 states with both merit-selected and elected judges for a 15-year period, 1994 to 2008.<sup>7</sup> For each of the 171 instances in which public disciplinary sanctions were imposed, the means through which the disciplined judge initially reached the bench was identified. As Table 2 shows, 28 percent of all disciplined judges were merit-selected.

The analysis is necessarily more complex than simply comparing the percentages of disciplined judges who were merit-selected and elected, as it cannot be assumed that merit-selected and elected judges are equally represented in these states. It is essential to have as a baseline the

7. This data was provided by Cynthia Gray, Director of the American Judicature Society's Center for Judicial Ethics.

**Table 1: Important features of judicial discipline systems in states of interest**

State	Commission Membership <sup>1</sup>	Appointing Authorities	Available Sanctions		Bifurcated System? <sup>2</sup>
			By commission subject to supreme court review	By supreme court after commission recommendation	
Florida	15: 6J, 4L, 5NL	Judges, state bar, governor		Public reprimand Fine Suspension with or without pay Removal Retirement for disability Lawyer discipline	Two-panel
Georgia	7: 2J, 3L, 2NL	Supreme court, state bar, governor		Public reprimand Public censure Suspension with or without pay Removal Retirement for disability	
Kentucky	6: 3J, 1L, 2NL	Judges, state bar, governor	Private admonition Private reprimand Public reprimand Public censure Suspension Removal Retirement		
Minnesota	10: 4J, 2L, 4NL	Governor		Public reprimand Public censure Civil penalty Suspension with or without pay Limitations or conditions Removal Retirement Lawyer discipline	
Nevada	7: 2J, 2L, 3NL	Supreme court, state bar, governor	Public censure Fine Suspension Removal Probation pursuant to conditions Attend training or education Follow remedial course of action Issue public apology Conditions or limitations Seek medical, psychiatric, or psychological care Agree not to seek office in the future		
New York	11: 4J, 1L, 2NL, 4 L or NL	Governor, high court, legislative leaders	Public admonishment Public censure Removal		
North Dakota	7: 2J, 1L, 4NL	Judges, state bar, governor		Public censure Suspension Removal Retirement Other disciplinary action	
Oklahoma	3: 2L, 1NL 9: 8J, 1L 9: 8J, 1L	Legislative leaders, state bar Judges, state bar Judges, state bar	Suspension Removal		Two-tier <sup>3</sup>
Tennessee	15: 9J, 3L, 3NL	Supreme court, state bar, legislative leaders, governor	Suspension with pay Limitations and conditions Cease and desist Deferred discipline Recommendation of removal to legislature		Two-panel

Note: The information in this table is derived from How Judicial Conduct Commissions Work (1999), with the exception of "Available Sanctions" which comes from Appendix I of A Study of State Judicial Discipline Sanctions (2002).

1 J=Judge; L=Lawyer; NL=Non-lawyer.

2 Bifurcated systems are those in which the prosecutorial and adjudicatory functions are separate. This is accomplished either by creating separate panels within the commission (two-panel system) or by creating separate entities (two-tier system) to perform these functions.

3 The three-member Council on Judicial Complaints investigates complaints and determines whether to proceed; the nine-member Court on the Judiciary – Trial Division holds hearings to determine whether disciplinary action is warranted; the decision may be appealed to the nine-member Court on the Judiciary – Appellate Division.

**Table 2: Selection of disciplined judges vs. selection of all judges**

States	Disciplined judges			Sampled judges			z-score
	Elected	Merit-selected	Total	Elected	Merit-selected	n	
Florida	70.0% (35)	30.0% (15)	50	43.9% (69)	56.1% (88)	157	-6.59*
Georgia	50.0% (1)	50.0% (1)	2	44.9% (53)	55.1% (65)	118	-1.11
Kentucky	57.1% (12)	42.9% (9)	21	58.6% (65)	41.4% (46)	111	.032
Minnesota	22.7% (5)	77.3% (17)	22	4.2% (3)	95.8% (69)	72	-7.83*
Nevada	100.0% (5)	0.0% (0)	5	65.9% (27)	34.1% (14)	41	-4.61*
New York	90.6% (58)	9.4% (6)	64	96.4% (186)	3.6% (7)	193	4.33
North Dakota	100.0% (1)	0.0% (0)	1	69.0% (20)	31.0% (9)	29	-3.61*
Oklahoma	100.0% (3)	0.0% (0)	3	50.6% (43)	49.4% (42)	85	-9.11*
Tennessee	100.0% (3)	0.0% (0)	3	63.3% (38)	36.7% (22)	60	-5.90*
<b>Total</b>	<b>71.9% (123)</b>	<b>28.1% (48)</b>	<b>171</b>	<b>58.2% (504)</b>	<b>41.8% (362)</b>	<b>866</b>	<b>-8.17*</b>

Note: For a one-tailed test,  $z_{\alpha} = 1.65$ .

proportion of merit-selected and elected judges that may be subject to

8. For 3 of the 12 elective states with interim merit selection systems—Idaho, Montana, and South Dakota, no disciplinary sanctions were imposed against trial court judges during the period of study. For the remaining nine states, a sample was drawn for each trial court, so that there are samples for Florida’s circuit court and county court; Georgia’s superior court and state court; Kentucky’s circuit court and district court; Minnesota’s district court; Nevada’s district court; New York’s supreme court, county court, surrogate court, and family court; North Dakota’s district court; Oklahoma’s district judges and associate judges; and Tennessee’s trial court.

9. The rates at which trial court judges in these elective states first reach the bench via merit selection vary substantially, from 3.6% in New York to 95.8% in Minnesota.

10. This approach is based on the assumption that the rates at which judges in individual elective states are initially appointed to their seats do not fluctuate substantially from year to year, or even over a 15-year period. In other words, it is assumed that the proportion of merit-selected judges in each state in 2009-10, when this data was collected, is consistent with the proportion of merit-selected judges in these states from 1994 to 2008. The author is unaware of any systemic factors that would cause significant variation in these trends over time.

discipline. To provide this baseline, an estimate is needed of the number of judges in these elective states who were first appointed. To attain this estimate, a second dataset was compiled consisting of a sample of judges serving in states where trial court judges may be merit-selected or elected.<sup>8</sup> For each state and each level of court, a random sample was drawn with a sampling error of  $\pm 10$  percent at the .95 confidence level, and for the judges in the sample, the method by which they initially attained their seats was ascertained. As indicated in Table 2, 41.8 percent of the judges in the sample were initially merit-selected.<sup>9</sup>

To determine whether merit-selected judges were disciplined less often than elected judges, the percentage of disciplined judges who were merit-selected was compared to the percentage of all judges who

were merit-selected. The following hypotheses were tested:

$$H_0: P_p = P_s$$

$$H_1: P_p \leq P_s$$

where  $P_p$  is the proportion of disciplined judges who were merit-selected and  $P_s$  is the sample proportion of all judges who were merit-selected.<sup>10</sup>

To test these hypotheses, the following difference-of-proportions test was calculated:

$$z = (P_s - P_p) / s$$

$$\text{where } s = \sqrt{(P_p(1-P_p) / n)}$$

For a one-tailed test, the null hypothesis is rejected at  $z_{\alpha} = 1.65$ .

For each of the nine states in the analysis, Table 2 presents the percentage of disciplined judges who were elected and merit-selected, and the percentage of all judges who were elected and merit-selected. Table 2 also displays the z-scores calculated through the difference-of-

proportions tests. For all judges (Total), the percentage of disciplined judges who were merit-selected (28.1 percent) is significantly smaller than the percentage of merit-selected judges (41.8 percent). This also holds true for judges in six of the nine states in the analysis, though it must be pointed out that the number of disciplined judges was relatively small in four of these states—Nevada, North Dakota, Oklahoma, and Tennessee. For one state—New York—the percentage of disciplined judges who were merit-selected was higher than the percentage of merit-selected judges.

Table 3 provides a breakdown of the severity of disciplinary actions taken against merit-selected and elected judges. For each state, potential sanctions were ranked according to severity.<sup>11</sup> In addition, for all disciplined judges, possible sanctions were grouped as least severe, moderately severe, and most severe (i.e., removal). Disciplined judges who were merit-selected were substantially more likely than all disciplined judges to receive the least severe sanction (in most states, a reprimand or admonishment); while 58.5 percent of all disciplined judges received the least severe sanction, 77.1 percent of merit-selected judges received the least severe sanction. Merit-selected judges were also less likely than all disciplined judges to receive the most severe sanction; while 14.6 percent of all judges subject to discipline were removed from the bench, only 4.2 percent of merit-selected judges who were disciplined were removed from office.

### Discussion

Caution should be exercised in relying solely on an aggregate analysis of disciplinary rates, rather than also examining individual states, as the variation in judicial discipline processes—e.g., option for private sanctions, availability of particular sanctions, burden of proof required—may be related to whether disciplinary action is ultimately taken, or at least reported to the pub-

**Table 3: Severity of disciplinary sanctions against elected and merit-selected judges**

		Type of discipline			
		Fine	Suspension	Removal	
<b>Florida</b>	<b>Reprimand</b>				
	All	70.0% (35)	4.0% (2)	8.0% (4)	18.0% (9)
	Elected	60.0% (21)	5.7% (2)	8.6% (3)	25.7% (9)
Merit-selected	93.3% (14)	—	6.7% (1)	—	
<b>Georgia</b>	<b>Reprimand</b>		<b>Censure</b>	<b>Suspension</b>	<b>Removal</b>
	All	50.0% (1)	—	—	50% (1)
	Elected	—	—	—	100% (1)
Merit-selected	100.0% (1)	—	—	—	
<b>Kentucky</b>	<b>Reprimand</b>		<b>Censure</b>	<b>Suspension</b>	<b>Removal</b>
	All	61.9% (13)	—	33.3% (7)	4.8% (1)
	Elected	58.3% (7)	—	33.3% (4)	8.3% (1)
Merit-selected	66.7% (6)	—	33.3% (3)	—	
<b>Minnesota</b>	<b>Reprimand</b>		<b>Censure</b>	<b>Suspension</b>	<b>Removal</b>
	All	86.4% (19)	4.5% (1)	4.5% (1)	4.5% (1)
	Elected	100.0% (5)	—	—	—
Merit-selected	82.4% (14)	5.9% (1)	5.9% (1)	5.9% (1)	
<b>Nevada</b>	<b>Reprimand</b>		<b>Fine/Censure</b>	<b>Suspension</b>	<b>Removal</b>
	All	—	60% (3)	—	40.0% (2)
	Elected	—	60% (3)	—	40.0% (2)
Merit-selected	—	—	—	—	
<b>New York</b>	<b>Admonishment</b>		<b>Censure</b>	<b>Removal</b>	
	All	45.3% (29)	42.2% (27)	12.5% (8)	
	Elected	46.6% (27)	41.4% (24)	12.1% (7)	
Merit-selected	33.3% (2)	50.0% (3)	16.7% (1)		
<b>North Dakota</b>	<b>Censure</b>		<b>Suspension</b>	<b>Removal</b>	
	All	100% (1)	—	—	
	Elected	100% (1)	—	—	
Merit-selected	—	—	—		
<b>Oklahoma</b>	<b>Suspension</b>		<b>Removal</b>		
	All	—	100.0% (3)		
	Elected	—	100.0% (3)		
Merit-selected	—	—			
<b>Tennessee</b>	<b>Reprimand</b>		<b>Cease &amp; desist</b>	<b>Suspension</b>	<b>Removal</b>
	All	66.7% (2)	—	33.3% (1)	—
	Elected	66.7% (2)	—	33.3% (1)	—
Merit-selected	—	—	—	—	
<b>Total</b>	<b>Least severe</b>		<b>Moderately severe</b>	<b>Most severe</b>	
	All	58.5% (100)	26.9% (46)	14.6% (25)	
	Elected	51.2% (63)	30.1% (37)	18.7% (23)	
Merit-selected	77.1% (37)	18.8% (9)	4.2% (2)		

lic. At the same time, in addition to the aggregate figures, disciplinary rates for merit-selected and elected judges in six of the nine states examined support the hypothesis that merit-selected judges are disciplined less often than elected judges.

It must also be noted that this study is limited in scope. States

11. There were several instances in which sanctions were combined—e.g., a judge was both reprimanded and suspended, or reprimanded and fined. In these instances, the most severe of the imposed sanctions was coded.

where judges on the same courts may be either merit-selected or elected provide a quasi-laboratory for evaluating the quality of judicial selection systems, but this has allowed an examination of the quality of selection systems in only nine states. It is no doubt the case that judicial merit selection systems in some states are more effective than others in screening applicants and identifying the most qualified candidates, as well as that factors such as money and party affiliation play a lesser role in judicial elections in some states than others.

Even with these caveats in mind, these findings suggest that merit selection systems may produce fewer unfit judges than judicial elections and provide some support to one of the claims advanced by merit selection proponents. ❧

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