

Sunset Public Hearing Questions for  
**Tennessee Board of Judicial Conduct**  
Created by Section 17-5-201, *Tennessee Code Annotated*  
(Sunset Termination June 2021)

*Enabling Statute, Purpose, and Rules and Regulations*

1. Please provide a brief introduction to the Board of Judicial Conduct, including information about its purpose, statutory duties, and staff.
  - a. The regulation of judicial conduct is critical to preserving the integrity of the judiciary and enhancing public confidence in the judicial system. To this end, the legislature created the Board of Judicial Conduct and the disciplinary system to provide an orderly and efficient method for making inquiry into the physical, mental, and moral fitness of the state's judges; assess a judge's manner of performance; address a judge's commission of an act that reflects unfavorably upon the judiciary or brings the judiciary into disrepute or that may adversely affect the administration of justice; and to provide a process by which appropriate sanctions may be imposed when necessary. T.C.A. § 17-5-101.
  - b. The board has broad powers to investigate, hear, and determine charges sufficient to warrant sanctions or removal of a judge and to otherwise carry out its duties. The board is authorized to administer oaths, to issue process to compel the attendance of witnesses and the production of evidence, to conduct hearings, and to exercise the powers normally exercised by courts of record. The board may also conduct discovery. The Tennessee Rules of Civil Procedure are applicable, and the Tennessee Rules of Evidence govern the presentation of proof. T.C.A. § 17-5-301.
  - c. Staff includes two attorneys hired by the board, disciplinary counsel and assistant disciplinary counsel. T.C.A. § 17-5-301(d).
2. Has the bureau promulgated rules and regulations? If yes, please cite the reference(s).

The board has promulgated four rules related to its annual meetings, selection and duties of the chairperson and vice-chair, confidentiality, and records retention. These rules were promulgated in accordance with the Uniform Administrative Procedures Act. T.C.A. § 17-5-201(5)(f). The rules received a positive recommendation from the Joint Government Operations Committee on June 29, 2020.

*Organization*

3. Please provide a list of the current members of the Board of Judicial Conduct. For each member, please indicate who appointed the member; statutory member representation; the beginning and end of the member's term; and whether the member is serving a consecutive term.

- a. Judge Dee David Gay
  - i. Appointed by: Tennessee Trial Judges Association
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2020
  - iv. Reappointed: July 1, 2020 (3yr term)
- b. Judge G. Andrew Brigham
  - i. Appointed by: Tennessee General Sessions Judges Conference
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2020
  - iv. Reappointed: July 1, 2020 (3yr term)
- c. Chancellor Jeffrey Atherton
  - i. Appointed by: Tennessee Trial Judges Association
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2020
  - iv. Reappointed: July 1, 2020 (3yr term)
- d. Judge H. Allen Bray
  - i. Appointed by: Tennessee Municipal Judges Conference
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2020
  - iv. Reappointed: July 1, 2020 (3yr term)
- e. Judge Bobby Carter
  - i. Appointed by Speaker of the House
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2021
- f. Edwena Crowe
  - i. Appointed by: Speaker of the Senate
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2022
- g. Rita Ellison
  - i. Appointed by: Speaker of the House
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2022
- h. William C. Koch, Jr.
  - i. Appointed by: Speaker of the Senate
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2021
- i. Dr. Albert Mosley
  - i. Appointed by: Speaker of the House
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2022
- j. Benjamin Purser, Jr.
  - i. Appointed by: Speaker of the Senate
  - ii. Began: July 1, 2020
  - iii. Ends: June 30, 2022
- k. Richard Rogers
  - i. Appointed by: Speaker of the House

- ii. Began: July 1, 2019
  - iii. Ends: June 30, 2022
- l. Terica Smith
  - i. Appointed by: Governor
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2021
- m. Judge Camille McMullen
  - i. Appointed by: Tennessee Supreme Court
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2020
  - iv. Reappointed: July 1, 2020 (3yr term)
- n. Dan Springer
  - i. Appointed by: Speaker of Senate
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2022
- o. Judge John Whitworth
  - i. Appointed by: Tennessee Council of Juvenile and Family Court Judges
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2020
  - iv. Reappointed: July 1, 2020 (3yr term)
- p. Robert Wilkinson
  - i. Appointed by: Governor
  - ii. Began: July 1, 2019
  - iii. Ends: June 30, 2021

4. Are there any vacancies on the board? If so, please indicate how long the position has been vacant and explain steps that have been taken to fill any vacancies.

There are no vacancies on the board.

5. How many times did the board meet in the last two fiscal years? How many members were present at each meeting? Please note meetings where the board did not have a quorum.

- a. The board has met the fourth Tuesday in February and the fourth Tuesday in July for the last two fiscal years.
- b. Attendance
  - Feb. 2019: 15 board members attended
  - July 2019: 15 board members attended
  - Feb. 2020: 12 board members attended
  - July 2020: 13 board members attended via Zoom
- c. The board has had a quorum at each meeting.

*Financial Information*

6. What were the revenues and expenditures for the Board of Judicial Conduct for the last two fiscal years? Does the board carry a reserve balance? If yes, please provide additional relevant information regarding the reserve balance.

The board is fully (100%) funded by general fund state appropriations and does not generate any revenues. The board's expenditures for the last two fiscal years, FY 2019 and FY 2020, were \$255,042.76 and \$185,469.65 respectively. The board does not carry a reserve balance.

7. Is the Administrative Office of the Courts (AOC) responsible for submitting the board's budget?

Yes. The board and AOC work jointly to create the board's budget, with the board providing information about its financial needs to the AOC. The AOC then submits the budget.

8. Does the AOC provide staff to support the operations of the Board of Judicial Conduct (e.g., compiling meeting minutes, processing reimbursements for board members, scheduling board meetings, etc.)?

As the board has no administrative or technical staff, AOC staff provide assistance with processing reimbursements for board members, the processing of invoices for disciplinary counsel, handling board meeting logistics, maintaining and updating the board's webpage, and providing technical support and guidance on legislative matters when needed. As noted in question seven, the AOC also submits the board's budget.

9. Do board members receive per diem allowances or travel reimbursements for expenses they incur? How much was paid to individual board members in the last two fiscal years?

Members of the board are volunteers who receive no compensation for their services, though they are reimbursed for food, lodging, and travel expenses pursuant to policies and guidelines promulgated by the Supreme Court. Tennessee Supreme Court, Administrative Office of the Courts, Administrative Policies and Procedures 1.01. All expenses for which reimbursement is allowed are submitted by the members of the board to the administrative office of the courts. T.C.A. § 17-5-201(h).

During the last two fiscal years, FY 2019 and FY 2020, individual board members were reimbursed a total of \$2,360.09 and \$3,395.41 respectively for travel and expenses incurred.

10. Does the board collect fees? If so, indicate whether these fees were established through rule or are codified in statute, as well as the source of the fees.

The board does not collect fees.

*Sunshine Law, Public Meetings, and Conflict of Interest Policies*

11. Is the Board of Judicial Conduct subject to Sunshine law requirements (Section 8-44-101 et seq., *Tennessee Code Annotated*) for public notice of meetings, prompt and full recording of minutes, and public access to minutes? If so, what procedures does the board have for informing the public of meetings and making minutes available to the public?

The board is required by rule to give members notice of meetings ten business days before they are scheduled to occur. The notice of the meeting is published on the AOC's website in the event members of the public wish to attend. For example, at the most recent meeting on July 28, 2020, ten members of the public attended via Zoom. Minutes of the prior meeting are generally distributed at the beginning of each meeting for review and approval. Beyond that, the minutes are available at any time to anyone upon request.

12. Does the board allow public comment at meetings? Is prior notice required for public comments? If public comment is not allowed, how does the board obtain feedback from the public and those they regulate?

- a. Yes, public comment is allowed at board meetings.
- b. No, prior notice is not required to attend or make comments at board meetings.

13. Does the board have policies to address potential conflict of interest by board members, employees, or other state employees who work with the board?

The board's policy and procedure to address conflicts is as follows:

- a. An attorney member of the board may not sit on an investigative or hearing panel if the attorney has ever appeared before the judge against whom the complaint is filed.
- b. A current or former judge who serves on the board and is the subject of a full investigation by the board or is a party to a hearing before the board must recuse himself or herself from the board pending the completion of such action.
- c. A current or former judge who is subject to a deferred discipline agreement must recuse himself or herself from the board for the duration of the agreement.
- d. A citizen member of the board must recuse himself or herself to avoid any impropriety, appearance of impropriety, or conflict of interest relating to the person's duties as a board member and matters that may come before the board.
- e. If a member recuses himself or herself or is dismissed pursuant to T.C.A. § 17-5-201(d)(5), all board matters may be heard by the remaining members of the board or, at the option of the members, a temporary replacement may be designated from the board by a majority vote of such members to sit on any investigative or hearing panel the recused or dismissed member was on. T.C.A. § 17-5-201(4)-(5).

14. Did any member(s) of the board recuse themselves from a case under consideration by the board in the last two fiscal years because of a conflict of interest?

No board member has had to recuse themselves in the last two fiscal years because of a conflict of interest. Avoiding such conflicts is likely due to the board's practice of not assigning cases to investigative panels whose members are from the same part of the state as the judge being investigated.

15. Does the board have a website? If so, please provide the web address. What kind of public information is available on the website?
- a. Yes, the board does have a website. The web address is: [tncourts.gov/board-of-judicial-conduct](http://tncourts.gov/board-of-judicial-conduct)
  - b. The website contains:
    - i. an explanation about the board, its composition, and history
    - ii. directions for filing a complaint and a complaint form
    - iii. contact information for disciplinary counsel and assistant disciplinary counsel
    - iv. an explanation of how a complaint is reviewed
    - v. pleadings in public cases beginning in 2009
    - vi. a list of public disciplinary actions and copies of the discipline beginning in 2008
    - vii. a list of officers and members
    - viii. board rules
    - ix. monthly and quarterly reports
    - x. frequently asked questions
    - xi. historical information

#### *Review Process and Oversight Responsibilities*

16. Please provide the number of cases reviewed by the Board of Judicial Conduct in the last two fiscal years.

For fiscal years July 1, 2018, through June 30, 2020, the board received 760 complaints.

17. Please describe how the board ensures the integrity of judges in Tennessee. Please provide any information on financial disclosure requirements and how the board encourages and enforces ethical conduct by members of the judiciary.

The board ensures the integrity of judges by enforcing the ethical rules within the framework established by the legislature. This framework is set out in Tennessee Code Annotated sections 17-5-101 through 17-5-314. The ethical rules themselves are set out in Supreme Court Rule 10. As far as financial disclosure, the rules include a financial disclosure requirement pertaining to compensation received for extrajudicial activities, gifts, and other things of value. The AOC sends disclosure forms to the judges annually. The judges complete and file the

forms with the clerk of court where the judge presides and with the AOC. *See* Tenn. Sup. Ct. R 10, RJC 3.15.

Aside from enforcing the rules through disciplinary proceedings, the board's disciplinary counsel regularly gives presentations to the various judicial conferences on ethics matters. The board's chairperson has presented at these conferences as well. These educational efforts, which are a point of emphasis for the board, are designed to not only make judges aware of the ethical rules and requirements themselves, but also to discuss ways judges can proactively prevent ethical issues and problems from arising in the first place.

Finally, disciplinary counsel is always available to judges who have questions regarding their conduct, and it is not unusual for judges to contact disciplinary counsel seeking such guidance. This proactive approach to avoiding ethical problems is encouraged.

**18. Please describe how the board evaluates complaints.**

Disciplinary counsel evaluates all information coming to disciplinary counsel's attention by complaint, upon the request of any member of the board, or from any other credible source that alleges judicial misconduct or incapacity within fourteen days of the date of a written complaint being filed, a request being submitted, or the receipt of information from a credible source alleging judicial misconduct or incapacity.

Any complaint submitted must be in writing, must contain the name of the complainant, must be signed by the complainant, and must allege specific facts relating to the alleged misconduct or incapacity of the judge in question.

If in the judgment of disciplinary counsel the complaint establishes probable cause that the conduct complained of occurred and shows willful misconduct relating to the official duties of the office; willful or persistent failure to perform the duties of office; a violation of the Code of Judicial Conduct; a violation of the Tennessee Rules of Professional Conduct applicable to judges; a persistent pattern of intemperate, irresponsible, or injudicious conduct; a persistent pattern of discourtesy to litigants, witnesses, juror, court personnel, or lawyers; a persistent pattern of delay in disposing of pending litigation; and any other conduct calculated to bring the judiciary into public disrepute or to adversely affect the administration of justice, disciplinary counsel conducts a preliminary investigation, subject to review by an investigative panel of the board. The preliminary investigation must be completed within sixty days of the receipt of the complaint, unless the chair of the board authorizes additional time for the completion of the investigation. If disciplinary counsel believes the complaint fails to establish probable cause that either the conduct occurred or the conduct constituted a violation, disciplinary counsel recommends dismissal of the complaint or, if appropriate, refers the matter to another agency. The recommendation for dismissal is subject to review by the investigative panel.

Disciplinary counsel may conduct interviews and examine evidence to determine whether the facts alleged are true and, if so, whether the facts establish probable cause that an ethical violation has occurred; however, disciplinary counsel may not issue a subpoena to obtain testimony or evidence until the investigative panel authorizes a full investigation.

If disciplinary counsel believes there is evidence supporting the allegations against the judge, disciplinary counsel recommends to the investigative panel assigned to the case that the panel authorize a full investigation. Disciplinary counsel may also recommend a full investigation when disciplinary counsel believes there is evidence that would establish probable cause that a violation has occurred and such evidence could be obtained by subpoena or further investigation. In all other cases, disciplinary counsel must recommend that the matter be dismissed. Disciplinary counsel shall make the recommendation to the investigative panel within fourteen days of the disciplinary counsel's completion of the preliminary investigation. T.C.A. § 17-5-303.

The Board is divided into five investigative panels of three members of the Board. These investigative panels are responsible for reviewing the recommendations of disciplinary counsel after a preliminary investigation and either authorize a full investigation or dismiss the complaint. The investigative panels also review the recommendations of disciplinary counsel after a full investigation and approve, disprove, or modify the recommendations for sanctions. A complaint can only be dismissed upon a unanimous vote by the investigative panel. T.C.A. § 17-5-201(d).

19. Please describe the process by which the board receives complaints and how many complaints were received in the last two fiscal years. Are judges afforded full due process rights and what is the process for presenting evidence against a judge if the complaint is found to have merit?
  - a. Please see the answers to questions 16 and 18 regarding the number of complaints and the process for receiving them.
  - b. Judges are entitled to due process. Specifically, if a full investigation is authorized by an investigative panel, disciplinary counsel must give the following notice to the judge by certified mail:
    - i. A statement of the allegations being investigated and the canons or rules allegedly violated, with the provision that the investigation can be expanded, if appropriate;
    - ii. The judge's duty to respond;
    - iii. The judge's opportunity to meet with the disciplinary counsel and;
    - iv. The name of the complainant, unless the investigative panel determines that there is good cause to withhold such information. T.C.A. § 17-5-303(d)(1).

- c. If formal charges are filed, disciplinary counsel must give the judge written notice of the formal charges by certified mail. The judge has fourteen (14) days from the date of receipt of the written notice to file an answer with the board and serve a copy on disciplinary counsel. T.C.A. § 17-5-306.

The matter must be set for hearing within thirty (30) days from the date the answer is filed. The hearing is a full evidentiary hearing at which the judge is entitled to due process, including the right to be represented by counsel, the right to compulsory process to secure the attendance of witnesses, the right of confrontation and of cross-examination of witnesses, and the right to a speedy and public trial. Generally, the trial must be conducted in the county of the judge's residence. A majority of the hearing panel constitutes a quorum, and a quorum of the hearing panel is required to hold a hearing. The decision of the hearing panel is a decision of the board. Charges of misconduct must be established by clear and convincing evidence. *See* T.C.A. §17-5-307. The Tennessee Rules of Civil Procedure are applicable, and the Tennessee Rules of Evidence govern the presentation of proof. T.C.A. § 17-5-301(b).

20. Are judges allowed to appeal an adverse ruling to a state court? If so, which court hears those cases?

Following the filing of formal charges and a hearing, the aggrieved judge may, within fourteen days, appeal the board's decision to the Tennessee Supreme Court. T.C.A. § 17-5-309.

21. Does the board refer cases to the district attorney for prosecution? If so, how many were referred in the last two fiscal years?

- a. The board may refer cases to the district attorney for criminal matters. T.C.A. § 17-5-301(e)(1).
- b. The board has not had to refer any criminal matters to a district attorney in the last two fiscal years.

22. Does the Board of Judicial Conduct employ its own attorneys to provide investigative assistance to the board? Does the board ever contract with private attorneys to provide investigate services in cases under consideration by the board?

- a. The board employs disciplinary counsel and assistant disciplinary counsel who provide investigative assistance to the board and perform other duties at the request of the board. T.C.A. § 17-5-301.
- b. The board does not contract with private attorneys to provide investigative services in cases under consideration by the board.

23. Does the board receive investigatory assistance from law enforcement agencies, such as the Tennessee Bureau of Investigation, local police departments, sheriff's offices, or district attorneys general offices?

The board has received assistance from district attorneys, the Board of Professional Responsibility, the FBI, and the Department of Justice when requested.

*Reports, Major Accomplishments, and Proposed Legislative Changes*

24. What reports does the Board of Judicial Conduct prepare concerning its activities, operations, and accomplishments? Who receives copies of these reports? Please provide a link to any such reports issued in the last two fiscal years.

- a. Pursuant to statute, the board compiles monthly and quarterly reports. These reports contain monthly and year-to-date totals for the following:
  - i. The number and category of complaints opened;
  - ii. The number and category of complaints closed;
  - iii. The disposition of the complaints closed by category of offense alleged;
  - iv. The number of complaints pending;
  - v. The number of complaints for which probable cause has been found;
  - vi. The number of complaints for which formal charges have been filed based on a recommendation by an investigative panel, including the nature of the charge, the names of the complainant or complainants, and the judge against whom the complaint is filed;
  - vii. The nature of any complaint filed;
  - viii. The type of judge against whom a complaint is filed; and
  - ix. A list of votes taken by each board member.
- b. These reports are transmitted to the judiciary committee of the House of Representatives and the judiciary committee of the Senate. In the interest of transparency, these reports are also published on the AOC's website: <http://tncourts.gov/node/1708609>.

25. What were the board's major accomplishments during the last two fiscal years?

- The board has received and investigated 760 complaints during the last two fiscal years. During this period, the board has met every statutorily imposed time requirement for conducting and disposing of cases. This is no small matter considering that the board has no physical office, no administrative staff, and board members are all volunteers, most of whom have full-time jobs and other commitments.
- The newly reconstituted board hired disciplinary counsel.
- The board's website and forms have been updated and made more user-friendly, especially for self-represented persons.
- The operating rules adopted by the newly reconstructed board were approved by the legislature.
- All six board members up for reappointment after the first year, on June 30, 2020, were reappointed by their respective appointing authorities for three-year terms.
- The 2020 budget request by the board to the legislature to fund the legislative mandate for the new board for 2020 was included in this year's budget proposal

from the Governor but was removed when the pandemic took precedence over the budget.

26. Please describe any items related to the board that require legislative attention and your proposed legislative changes.

The board operates with no physical location to conduct its operations, store records, or meet with judges or the public. In addition, the board has no administrative, investigative, or technical staff. The board respectfully requests that the legislature provide the funding necessary to enable the board to most effectively fulfill its mission and protect the public's confidence in the judiciary. The board submitted its budget to the legislature for this fiscal year but, like many such proposals government-wide, was not approved due to the pandemic. The board will be re-submitting its proposed budget for the next fiscal year beginning July 1, 2021. Part of that proposed budget will include making disciplinary counsel and assistant disciplinary counsel state employees.

27. Should the Joint Government Operations Committee recommend an extension of the sunset date for the Board of Judicial Conduct? To what extent and in what ways would the absence of the board affect the public welfare of the citizens of Tennessee?

Yes, the Joint Government Operations Committee should extend the sunset for the board. The regulation of judicial conduct is critical in preserving public confidence in the legal system and, apart from the board, there is no mechanism in place for regulating judicial conduct and holding judges accountable for their conduct.

28. Please identify of the appropriate agency representative or representatives possessing substantial knowledge and understanding of the responses provided to the sunset review questions.

- a. Judge Dee David Gay – chairman of the board
- b. Marshall Davidson – disciplinary counsel for the board

29. Please identify the appropriate agency representative or representatives who will respond to the questions at the scheduled sunset hearing.

- a. Judge Dee David Gay – chairman of the board
- b. Marshall Davidson – disciplinary counsel for the board

30. Please provide the office address, telephone number, and email address of the agency representative or representatives who will respond to the questions at the scheduled sunset hearing.

- a. Judge Dee David Gay  
Sumner County Criminal Court

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- b. Marshall Davidson  
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