



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Procedures for Judicial Discipline.

Attached is a report from the Committee on Procedures for Judicial Discipline concerning suspension as a mode of judicial discipline. The report is co-sponsored by the Committee on the New York State Constitution.

In 1978, the New York State Constitution was amended to remove authority from the Commission on Judicial Conduct and the Court of Appeals to suspend judges as a final disciplinary remedy.¹

The report examines considerations surrounding potential amendment of the New York State Constitution to reinstate suspension as a mode of judicial discipline, providing a state-by-state comparison of modes of judicial discipline, a review of the Commission on Judicial Conduct's position on this matter, and a survey of organizational support for reinstatement of suspension as a mode of judicial discipline.

The report also reviews the ABA Model Rules for Judicial Disciplinary Enforcement, which permit a state's highest court to suspend a judge on an interim basis if the judge is charged with a "serious crime" or if there is sufficient evidence to demonstrate that a judge poses a substantial threat of serious harm to the public or to the administration of justice.²

The report ultimately recommends a proposed amendment to the New York State Constitution to restore the Commission's authority to suspend a judge for up to six months without pay as a final mode of discipline.

The report also recommends a proposed amendment to expand the circumstances under which the Court of Appeals may suspend a judge on an interim basis, similar to the standards set forth in the ABA Model Rules for Judicial Disciplinary Enforcement.

¹ The Constitution presently permits the Court to suspend a judge on an interim basis under limited circumstances. See N.Y. Const. art. VI § 22€

² See

https://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement/contents/.

The proposed constitutional amendments to Article VI § 22 of the New York State Constitution are outlined at Appendix A to the report.

This report was submitted to the Reports Group in June 2022. The Judicial Section has submitted comments concerning the report.

The report will be presented to the House of Delegates by Justin S. Teff, chair of the Committee on Procedures for Judicial Discipline.



NEW YORK STATE
BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Committee on Procedures for Judicial Discipline and Committee on the New York State Constitution**

November 2022

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

New York State Bar Association Committee on Procedures for Judicial Discipline Report Regarding Suspension as a Mode of Judicial Discipline

The New York State Commission on Judicial Conduct has been the agency primarily responsible for the investigation and discipline of New York’s judges since its establishment in 1974.¹ Prior to 1978, the Commission possessed the authority, in addition to other leviable sanctions, to suspend a judge from office for up to six months as a mode of final discipline.² As a result of a 1978 amendment to New York’s Constitution, neither the Commission nor the Court of Appeals may suspend a judge as a final remedy, though the Court is permitted to suspend a judge on an interim basis under limited circumstances.

While the precise rationale for the elimination of the suspension power was not perfectly recorded, the move is thought to have been grounded in concerns over efficient court administration, as well as the sentiment that if misconduct was egregious enough to warrant suspension, “public confidence in the integrity of that judge was probably irretrievably compromised, thus requiring removal.”³ Yet in the ensuing decades, the Commission and other organizations have suggested reinstatement of the suspension option, owing particularly to its utility in ensuring proportional punishment. Indeed, New York is now among the minority of states that do not allow for suspension of a judge as a final sanction,⁴ and the Commission has several times noted that it felt constrained by this lack of authority, which it would otherwise have employed.⁵

At its January 14, 2019 meeting, the New York State Bar Association Committee on Procedures for Judicial Discipline resolved to undertake a study of the judicial suspension issue for future consideration. The Committee adopted a preliminary version of this report and proposed amendment at its January 2020 meeting. At a subsequent meeting held May 6, 2022, following consultation with the NYSBA Committee on the New York State Constitution, the Judicial Discipline Committee adopted the annexed revised proposal. The Committee on the State Constitution approved of the revised proposal at its meeting on May 13, 2022.

¹ In 1974 a temporary commission was created by the Legislature, followed by the establishment in 1976 of a permanent Commission on Judicial Conduct via state constitutional amendment. See, Gerald Stern, *New York’s Approach to Judicial Discipline: The Development of a Commission System*, 54 *Chicago-Kent Law Review* 137 (1977).

² See *id.*; also New York State Commission on Judicial Conduct (SCJC) 1981 Annual Report, at 64; New York State Commission on Judicial Conduct, Policy Statement June 21, 2017: *Suspension*, available at: <http://www.cjc.ny.gov/Policy.Statements/suspension.htm> (last visited December 21, 2019). The suspension power was utilized five times between 1976 and 1978.

³ SCJC June 21, 2017 Policy Statement, *supra* note 2.

⁴ Cynthia Gray, *A Study of State Judicial Discipline Sanctions* 24 (2002).

⁵ SCJC 2017 Annual Report, at 22.

For reasons set forth, the report recommends a proposed amendment to article VI, section 22 of New York's Constitution that would restore the Commission's suspension capability, as well as expand the Court of Appeals' authority viz. interim suspension.

State-by-State Comparison

New York is presently among the minority of states that do not permit suspension as a mode of final judicial discipline.⁶ It has been observed that New York has had a comparatively high number of judges removed from office, relative to its sister states, and suggested that the absence of the suspension authority may be one reason for this phenomenon.⁷ Gray's *Study of State Judicial Discipline Sanctions* notes that between 1990 and 2001, 41 judges were removed in New York, and comments, "[p]articularly considering the possibility of judges agreeing to suspension to avoid removal, it is likely that some of the 41 removals in New York would have been suspensions had that option been available."⁸

The Commission's Position

It was not long after the 1978 revision that the effects were realized on an institutional level. As early as its 1981 Annual Report, the SCJC recommended that the Legislature "reconsider the merits of a constitutional amendment providing suspension as an alternative sanction available to the Commission."⁹ The Commission's report explains (as do subsequent reports) that in several recent decisions, the Commission would have chosen this as the appropriate sanction had it been available.¹⁰ The Commission on Judicial Conduct repeated this recommendation in its annual reports filed in 1995 (p. 72), 1997 (p. 36), 2002 (p. 28-9), 2005 (p. 29), 2006 (p. 25-6), 2007 (p. 21-2), 2009 (p. 18), 2010 (p. 19), 2011 (p. 19), and 2017 (p. 21-2).

The SCJC also recommended in its 2000 (p. 26-8), 2006 (p. 24-5), 2007 (p. 20-1), 2009 (p. 16-8), 2010 (p. 17-9), 2011 (p. 17-9), and 2017 (p. 20-1) annual reports that the authority of the Court of Appeals to suspend a judge on an interim basis be expanded beyond its present limitations. Under article VI, section 22, the Court of Appeals may suspend a judge with or without pay on an interim basis only if: (a) there is a pending determination by the commission on judicial conduct for his or her retirement or removal; (b) the judge or justice has been charged with a felony by indictment or information; or (c) the judge or justice has been charged with "any other crime which involves moral turpitude."¹¹ As explained by the Commission, "there are any number of misdemeanor charges that may not be defined as involving 'moral turpitude' but that, when brought against a judge, would seriously undermine public confidence in the integrity of the judiciary."¹²

⁶ Gray, *supra* note 4, at 24. As of 2002, it was one of only 14 states in which suspension was not among the disciplinary options.

⁷ See *id.*, at 1, 7, 24.

⁸ See *id.*, at 24.

⁹ SCJC 1981 Annual Report, *supra* note 2, at 64.

¹⁰ See *id.*

¹¹ N.Y. Const., Article VI, Section 22 (e), (f), (g); N.Y. Jud. Law § 44(8).

¹² SCJC 2000 Annual Report, at 26.

ABA Model Rules for Judicial Disciplinary Enforcement

The American Bar Association Model Rules for Judicial Disciplinary Enforcement address both of the situations under consideration. Pursuant to section II, rule 6 of the Model Rules – which also sets forth the grounds for discipline – suspension is available as a final sanction, but may only be imposed by the state’s highest court.¹³ The Model Rules also permit the state’s highest court to suspend a judge on an interim basis if the judge is charged with: (a) a “serious crime,” separately defined as “any felony or lesser crime that reflects adversely on the judge’s honesty, trustworthiness or fitness as a judge in other respects” or “any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a ‘serious crime’”; or (b) any other misconduct for which there is “sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice...”¹⁴

The commentary to the later section explains, “The integrity of the judicial system demands prompt action whenever a judge has been formally charged with a serious crime.”¹⁵ The commentary further notes:

Certain misconduct poses such an immediate threat to the public or the administration of justice that the judge should be suspended from the bench immediately, pending a final determination of the ultimate discipline to be imposed. Interim suspension is also appropriate when the judge’s continuing conduct is causing or is likely to cause serious harm to the administration of justice. In such cases, it may be necessary for the highest court to impose an interim suspension or transfer to incapacity status to maintain public confidence in the judiciary.

Organizational Support

Beyond the SCJC itself, other legal organizations have made similar recommendations. In 2018, the Institute for the Advancement of the American Legal System published a report entitled, “Recommendations for Judicial Discipline Systems,” based in part upon the work of a 21-person committee of judicial conduct commissioners, commission staff, judges, lawyers, and scholars.¹⁶ The report concluded, relative to the issue of appropriate sanctions, that each “state should consider adopting a full array of sanctions and remedies seeking an optimal fit between conduct and remedy.”¹⁷ The IAALS report added: “Suspension without pay is a useful alternative,

¹³ ABA Model Rules for Judicial Disciplinary Enforcement, section II, rule 6.

¹⁴ ABA Model Rules for Judicial Disciplinary Enforcement, section II, rule 15.

¹⁵ See id.

¹⁶ Available at:

https://iaals.du.edu/sites/default/files/documents/publications/recommendations_for_judicial_discipline_systems.pdf (last visited December 21, 2019).

¹⁷ See id., at 9

particularly in cases of serious misconduct in which there are significant mitigating factors such as the judge's lack of a disciplinary record, and thus we recommend that states ensure that commissions and supreme courts have suspension without pay as an available sanction in appropriate cases."¹⁸

The topic of judicial suspension was also addressed as part of a 2009 New York County Lawyers' Association Task Force on Judicial Independence report on the Judicial Conduct Commission.¹⁹ The NYCLA report recommended expansion of the range of sanctions for judicial misconduct to include a final determination of suspension.²⁰ It explained: "The Subcommittee received many comments, including some from persons formerly affiliated with the Commission, suggesting that the absence of additional, intermediate sanctions between censure and removal unfairly limited the Commission's choice of punishments, resulting in some dispositions that were disproportionately harsh or lenient for the misconduct in question."²¹

Recommendations

This report recommends that the Committee on Judicial Discipline and New York State Bar Association support a proposed constitutional amendment (see Appendix A) which would restore the authority of the SCJC to impose suspension without pay for up to six months as a final mode of discipline, as well as expand the power of the Court of Appeals to suspend judges on an interim basis when necessary to safeguard the integrity of the judiciary. While valid concerns may have existed in 1978, it is probable that the exponential advances in technology over the past four decades will diminish the potential burden on colleagues and court administration resulting from a judge's absence. Moreover, absent the prospect of a world without judicial discipline, it seems that a judge restored to office following a period of suspension poses no greater threat to the public's confidence in its judiciary than news of one altogether removed from the bench.

The report recommends that as a final mode of discipline, suspension be without pay and limited to a maximum duration of six months. As noted by Gray, "[o]ne of the advantages of suspension as a sanction is that the possibility of suspension for days, weeks, months, or even years gives commissions and courts flexibility to create sanctions that reflect proportionality."²² However, it has also been fairly observed that suspension of a judge can place increased strain on fellow judges as well as court administration, and as such, the report does not recommend that the SCJC be empowered to impose suspension greater than six months as a final discipline.

The report also recommends expansion of the Court of Appeals' power to suspend a judge on an interim basis to include circumstances beyond those presently permissible. The report recommends that this power be delineated in a manner similar to that set forth in the ABA Model

¹⁸ See *id.*, at 10.

¹⁹ Available at: https://www.nycla.org/siteFiles/News/News115_0.pdf (last visited December 21, 2019).

²⁰ See *id.*, at 8, 31.

²¹ See *id.*, at 30-31.

²² Gray, *supra* note 4, at 30.

Rules for Judicial Disciplinary Enforcement. It concurs with the sentiments of the SCJC and other legal organizations that many offenses beyond those set forth in New York's constitution have the potential to seriously erode the public's confidence in the judiciary and/or pose significant risk to the continuing administration of justice and thus warrant provisional cessation of duties.

APPENDIX A

Proposed Amendment to Article VI, § 22

[Commission on judicial conduct; composition; organization and procedure; review by court of appeals; discipline of judges or justices]

§22. a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured, suspended without pay for up to six months, or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his or her duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his or her judicial duties. The commission shall transmit an[y] such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

b. (1) The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.

(2) The persons first appointed by the governor shall have respectively one, two, three, and four-year terms as the governor shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three, and four-year terms as the governor shall designate. The person first appointed by the temporary president of the senate shall have a one-

year term. The person first appointed by the minority leader of the senate shall have a two-year term. The person first appointed by the speaker of the assembly shall have a four-year term. The person first appointed by the minority leader of the assembly shall have a three-year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him or her for such appointment. Membership shall also terminate if a member attains a position which would have rendered him or her ineligible for appointment at the time of appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

c. The organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law. Unless the legislature shall provide otherwise, the commission shall be empowered to designate one of its members or any other person as a referee to hear and report concerning any matter before the commission.

d. In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, suspend without pay for up to six months, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

e. The court of appeals may suspend a judge or justice from exercising the powers of his or her office while there is pending a determination by the commission on judicial conduct for his or her removal, suspension, or retirement, or upon receipt of sufficient evidence demonstrating that a judge or justice poses a substantial threat of serious harm to the public or to the administration of justice, or while the judge or justice is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one. The suspension shall continue upon conviction and, if the conviction becomes final, the judge or justice shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, suspended, removed, or retired pursuant to subdivision a of this section.

f. Upon the recommendation of the commission on judicial conduct or on its own motion, the court of appeals may suspend a judge or justice from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any ~~other crime which involves moral turpitude~~ serious crime. A serious crime is any crime that reflects adversely on the judge's or justice's honesty, trustworthiness or fitness as a judge or justice in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit a serious crime. The suspension shall continue upon conviction and, if the

conviction becomes final, the judge or justice shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, suspended, removed, or retired pursuant to subdivision a of this section.

g. A judge or justice who is suspended from office by the court of appeals pursuant to paragraphs E or F shall receive his or her judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that the judge or justice shall be paid his or her salary for such period of suspension.

h. A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office.

i. Notwithstanding any other provision of this section, the legislature may provide by law for review of determinations of the commission on judicial conduct with respect to justices of town and village courts by an appellate division of the supreme court. In such event, all references in this section to the court of appeals and the chief judge thereof shall be deemed references to an appellate division and the presiding justice thereof, respectively.

j. If a court on the judiciary shall have been convened before the effective date of this section and the proceeding shall not be concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond the effective date of this section to conclude the proceeding. All matters pending before the former commission on judicial conduct on the effective date of this section shall be disposed of in such manner as shall be provided by law.



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 ☉ PH 518.463.3200 ☉ www.nysba.org

JUDICIAL SECTION

2022 -2023 Officers

HON. JOANNE D. QUIÑONES

Presiding Member
Supreme Court, Kings County
320 Jay Street
Brooklyn, NY 11201
347/296-1366

October 3, 2022

HON. GREGORY R. GILBERT

Assistant Presiding Member
Supreme Court, Oswego County
25 East Oneida Street
Oswego, NY 13126
315/207-7578

Sherry Levin Wallach, Esq.
President, NYSBA
One Elk Street
Albany, New York 12207

HON. TANYA R. KENNEDY

Secretary
Appellate Division, First Judicial Dept
27 Madison Avenue
New York, NY 10010
212/340-0400

HON. BRIAN D. BURNS

Treasurer
Supreme Court, Otsego County
197 Main Street
Cooperstown, NY 13326
607/322-3140

Dear President Wallach:

The Judicial Section has received and considered the Report Regarding Suspension as a Mode of Judicial Discipline drafted by the Committee on Procedures for Judicial Discipline (Committee). The Committee adopted a proposal to support an amendment to Article VI, section 22 of the New York State Constitution that will authorize the New York Court of Appeals to suspend a judge without pay on an interim basis for an indeterminate period of time. The proposed constitutional amendment also authorizes the New York State Commission on Judicial Conduct (CJC) to impose a suspension, without pay, as a final disposition in a judicial disciplinary action.

The Judicial Section **opposes** the proposed constitutional amendment in its entirety.

A. The Judicial Section of NYSBA opposes the proposed constitutional amendment that expands the power of the Court of Appeals to suspend a judge without pay for ill-defined conduct and for an indeterminate period of time.

First, the constitution already authorizes the Court of Appeals to suspend a judge without pay when the judge is charged with a crime punishable as a felony. Art. VI, § 22 (f) and (g).

Second, the language in the proposed expansion of power is vague and ambiguous:

- (i) It authorizes the Court of Appeals to suspend a judge without pay “*pending a determination*” by the CJC for the removal, suspension or retirement of a judge. When is a determination by the CJC pending? Does it begin the moment a complaint is filed? If

so, as historically demonstrated, a judge under investigation could be denied pay for months, if not years, before any allegations are proven, let alone explored.

(ii) It authorizes the Court of Appeals to suspend a judge without pay “*upon receipt of sufficient evidence* demonstrating that a judge or justice poses a **substantial threat of serious harm** to the public or to the *administration of justice*.” “Receipt” of evidence by whom? The CJC? The judge? What is “evidence?” What constitutes “sufficient evidence?” What constitutes a “substantial threat?” What is meant by “serious harm?” What is a substantial “threat to the administration of justice?”

Third, the proposed constitutional amendment affords no due process protections to a judge against whom any disciplinary allegation has been lodged prior to suspension without pay. Thus, a judge merely accused of wrongdoing could be deprived of all compensation without first having an opportunity to be heard, an opportunity to challenge any evidence presented against the judge, or indeed without any of the other procedural safeguards afforded private citizens or other public servants.

Fourth, the proposed constitutional amendment contains no provision protecting the privacy of judges under investigation. Where suspension is imposed, allegations against a judge necessarily will become public, causing great embarrassment and irreparable harm to the judge and his or her reputation, based on untested and unproven allegations.

Fifth, the proposed constitutional amendment does not provide a mechanism for expungement of any suspension in the event the judge is cleared of any allegations of misconduct, dereliction of duties or a threat to the administration of justice.

Sixth, the proposed constitutional amendment does not provide for the judge to receive back pay for the period of suspension upon a determination clearing the judge of any wrongdoing or upon imposition of a lesser sanction like admonishment or censure.

Seventh, the proposed constitutional amendment contains no provision for the employment security of the judge’s chambers staff during any interim suspension.

Eighth, the proposed constitutional amendment provides insufficient justification for suspension, without pay, as opposed to a temporary administrative reassignment. If the goal of suspension pending a CJC determination is to remove a judge from performing his or her regular duties, the proposed constitutional amendment is unnecessary. The Administrative Judge in each judicial district has existing authority to “reassign” a sitting judge or justice who is the subject of potential disciplinary action. The Administrative Judge also may prohibit the judge under investigation from presiding over some or all pending matters and from entering all court facilities, including the judge’s own chambers.

Ninth, the proposed constitutional amendment grants the Court of Appeals, the ultimate arbiter, power to deprive a judge of any compensation, for an *indefinite* period of time, before any allegation of misconduct is proven, let alone explored. Investigations by the Judicial Conduct Commission are lengthy, at times taking years to complete.

Thus, under the proposed constitutional amendment, a suspended judge could be deprived of compensation for many months or years. An indefinite suspension of pay without any proof of wrongdoing would have a devastating financial impact on a judge and his or her family, and the judge might have no choice but to resign.

B. The Judicial Section also opposes that portion of the proposed constitutional amendment that seeks to authorize suspension without pay for up to six months as a final remedy.

The amendment, as proposed, contains no guidelines or parameters for when that punishment would be appropriate. The CJC has authority to admonish or censure judges for “lesser” offenses, and it is hard to imagine a circumstance where suspension for six months would ever be an appropriate remedy. If a judge has engaged in conduct that warrants suspension without pay for up to six months, most certainly the judge would no longer be able to serve with the requisite honor and respect.

For all these reasons, we urge the NYSBA House of Delegates to vote against the proposed constitutional amendment.

Very Truly Yours,

Hon. Joanne D. Quiñones
Presiding Member
NYSBA Judicial Section