

## **JUDICIAL DISCIPLINE**

### **Recent League Activity**

The League will continue to work to retain confidentiality of the complaint and investigation of charges of misconduct but to open the hearing to the public after the Commission on Judicial Conduct has found basis for bringing formal charges and will continue to oppose separation of the Commission on Judicial Conduct's investigative and adjudicative functions.

### **Past League Activity**

The study on judicial selection and tenure also resulted in a position, adopted in 1966, calling for a commission to handle the discipline and removal of judges.

In 1972, the League was instrumental in introducing a bill in the Legislature to establish a Commission on Judicial Conduct and interested Governor Nelson Rockefeller in the concept. Success came in a relatively short period of time. A temporary Commission on Judicial Conduct was established by statute in 1974 pending the approval of the constitutional amendment to make it permanent.

The Legislature gave first passage in 1974 and second passage in 1975, and the Commission on Judicial Conduct was approved by the voters that fall. In 1976, the League supported a new constitutional amendment to streamline the disciplinary process by eliminating the special Court on the Judiciary and consolidating the investigative and adjudicative functions within the commission subject to review by the Court of Appeals.

This amendment, which was approved by the voters in 1977, established the Commission on Judicial Conduct in its present form. Until the formation of the commission, judicial discipline lay entirely within the judiciary itself, leaving decisions to discipline most judges in the hands of the Appellate Divisions. To remove high court judges, it was necessary either to impeach them through the Legislature or call a special Court on the Judiciary; both methods were cumbersome and seldom used. In fact, in the previous 100-year period in which responsibility for disciplining judges was left to the judiciary, only 23 judges were removed from office for misconduct. Since 1975 when the Temporary Commission commenced operations, 102 judges have been removed. The old system discouraged complaints from lawyers, who might have to appear before a judge against whom they lodged a complaint, and from the general public who had difficulty finding the proper avenue for complaints under obscure procedures. The Temporary Commission, and later the permanent Commission on Judicial Conduct, provided for disciplinary procedures partially independent of the judiciary, kept its proceedings confidential to protect judges from unfounded charges, and gave citizens a clear path for lodging complaints.

During every session, the League has vigorously opposed efforts to weaken the authority of the commission in disciplining judges. In 1987, the commission came under heavy criticism from the Chief Judge of the Court of Appeals, primarily for focusing too much time and attention on town and village court justices, many of whom are nonlawyers. This prompted the Assembly Judiciary Committee to hold public hearings to evaluate the commission's ten years of operation. The League testified in support of the commission.

As a result of the hearings, the chairman, G. Oliver Koppell, sponsored a number of bills concerning the commission in the 1988 legislative session, some at the request of the commission. One proposal, supported by the League, became law: creation of an ethics panel to issue advisory opinions on judicial conduct. This legislation authorizes the Office of Court Administration to appoint an advisory panel to give specific interpretations of the state Code of Judicial Conduct. The Commission on Judicial Conduct considers judges who adhere to the panel's advice as having acted ethically in any subsequent investigation; i.e., opinions issued by the panel would be considered binding on the commission in any future investigation.

Another Assembly proposal creating an office of judicial inspector general was introduced in 1988 and reintroduced every session through 1993. In 1989 and 1991, legislation passed in the Assembly but died in the Senate. The legislation was calendared in the 1993 session but never reached the Assembly floor for a vote. The proposed bill would separate the investigative and adjudicative responsibilities of the commission. An independent inspector general, appointed by the commission for a four-year term, with removal only for cause, would investigate and bring charges against judges' accused of misconduct. The commission would decide whether the charges merited sanctions.

The League opposed this bill because the state constitution gives the commission the authority to "receive, initiate, investigate and hear complaints . . . and may determine that a judge or justice be admonished, censured or removed from office . . ." (Article VI, Section 22). This arrangement is called the "one tier" system in which the investigative and limited adjudicative functions are combined within the same agency. New York is one of 42 states with a one-tier system. The one-tier system is consistent with American Bar Association standards, which do not recommend the use of multiple bodies to handle matters of judicial conduct. (Commentary to ABA Standards 1.5.) The system has worked well since the present commission was established in 1977.

A one-tier structure does not mean that the courts are removed from the judicial disciplinary process. The Court of Appeals has the power to review commission disciplinary determinations, and the commission is subject to the jurisdiction of the federal and state courts on procedural and other matters raised by judges and others. In over 100 challenges, the state's highest court has never found the commission's powers, practices, or procedures, to be too broad, unfair, or unconstitutional.

Furthermore, in commission proceedings, the investigative and judicial functions are separated where appropriate. Members of the staff who investigate or try cases against a judge are prohibited from later assisting the commission in rendering a decision. The commission prohibits its investigative and litigating personnel from assisting or advising the commission in its deliberations at any stage of formal proceedings. The clerk of the commission, who does not participate in any investigative or adversarial capacity, in any case, assists the commission and referees.

### **Confidentiality and Public Hearings**

In 1977, voters approved a constitutional amendment, which established broad outlines for the present Commission on Judicial Conduct. In 1978, when the specific legislation to implement the amendment was considered, the League took the position that the whole process should be confidential in order to protect judges from unfavorable publicity arising from unfounded or frivolous charges. At that time, the commission was not operational, and there was no way to foresee the comprehensive nature of the investigative process.

The 1988 Annual Report of the Commission on Judicial Conduct recommended legislation to open to the public the hearing stage of the disciplinary process. At present, the initial complaint, the investigation, and the hearings are closed to the public by state law. The public becomes aware only when disciplinary action is taken to remove, censure, or admonish judges. The commission's proposal, if adopted by the Legislature, would retain confidentiality of the complaint and the investigation. Only after probable cause has been found and formal charges preferred would the subsequent hearing be open to the public.

The LWVNYS State Board voted at its March 1988, meeting to support the commission's proposal to retain confidentiality of the complaint and investigation but to open the hearing to the public after the commission has found basis for bringing formal charges.

The state League board decision to support open hearings was based on the following reasons:

- Judges are adequately protected from unjust or frivolous complaints because confidentiality remains throughout both the filing of complaints and the investigation. The process becomes open only when the 11-member commission finds there is sufficient evidence, or "probable cause," to warrant filing formal charges. Most judges who are charged are either disciplined or removed. They have the right to appeal to the Court of Appeals, although the high court has never dismissed any of the cases where disciplinary measures were decided in the hearings but has raised or lowered some penalties.
- Public confidence in the integrity of the process would be enhanced if the hearings were open to the public. At present, the closed nature of the entire process may fuel speculation and rumor to the detriment of judicial reputations and public trust. Action of the commission becomes public only at the end of the process when the commission has already judged the judge. Public proceedings would make the commission more accountable, defusing some judge's claims that the commission acts as a star chamber.

Also, as noted in the commission's Annual Report, under the present law there can be no evaluation of the commission's work regarding matters it dismisses. It is impossible for the Legislature and the public to know whether the commission ever improperly dismissed a case.

In 1989, a bill opposed by the League proposed creating the office of judicial inspector general. This bill, which only passed the Assembly, originally contained a provision for opening the formal hearing to the public. It was amended both in the Assembly and Senate to delete that provision, but the bill never reached the Senate floor for a vote

CRIMINAL JUSTICE