

REMOVAL OF COURT OFFICIALS

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Constitutional provisions

Article IV, Section 17 of the North Carolina Constitution addresses the removal of justices, judges, magistrates and clerks from office. The constitution says nothing about removal of district attorneys and public defenders.

Section 17(1) provides that the General Assembly may remove any judge or justice for mental or physical incapacity by two-thirds vote of all members of each house of the legislature. It also provides that the General Assembly may remove a judge or justice by impeachment. In practice, however, the legislature does not get involved in the discipline or removal of judges. (It appears that the last legislative impeachment of a judge was in 1901.) Discipline occurs, instead, through the statutes enacted pursuant to the authority described below.

Section 17(2) authorizes the legislature to set a procedure for removal of a justice or judge for mental or physical incapacity which interferes with the performance of duties and which is or is likely to become permanent. The section also empowers the legislature to set procedures for removal and censure for these grounds:

- Willful misconduct in office
- Willful and persistent failure to perform the duties of the office
- Habitual intemperance
- Conviction of a crime involving moral turpitude
- Conduct prejudicial to the administration of justice that brings the judicial office into disrepute

Section 17(3) authorizes the General Assembly to set the procedure for removal of a magistrate for misconduct or mental or physical incapacity.

Section 17(4) authorizes the legislature to set the procedure for removal of the clerk of court. The constitution says the removal is to be by the senior resident superior court judge serving the county and that the clerk is to be given at least ten days' notice of the charges.

The statutes implementing the constitutional provisions for removal of judges, magistrates and clerks are discussed below, as are the statutes governing removal of district attorneys and public defenders.

Removal or other discipline of judges

Article 30 of General Statutes Chapter 7A establishes the Judicial Standards Commission and set out the grounds and procedure for removal of judges [the word "judges" is used hereafter to include district and

superior court and Court of Appeals and justices of the Supreme Court]. Generally complaints go to the commission which has thirteen members, a combination of judges, lawyers and lay members. The commission investigates and may issue a private letter of caution on its own. For public reprimand, censure, suspension or removal, the commission recommends action to the Supreme Court.

As discussed at the end of this section, a separate statute empowers the governor to declare a judgeship vacant and appoint a replacement if a judge is disbarred. As also discussed at the end of this section, another statute provides that a judge convicted of certain felonies forfeits all retirement benefits.

Grounds for disciplinary action —

GS 7A-376(a) allows the Judicial Standards Commission to issue a private letter of caution to a judge for any violation of the Code of Judicial Conduct.

Tracking the constitutional provision discussed above, GS 7A-376(b) authorizes the Supreme Court, upon recommendation from the Judicial Standards Commission, to publicly reprimand censure, suspend or remove a judge for:

- Willful misconduct in office
- Willful and persistent failure to perform the duties of the office
- Habitual intemperance
- Conviction of a crime involving moral turpitude
- Conduct prejudicial to the administration of justice that brings the judicial office into disrepute

The preamble to the North Carolina Code of Judicial Conduct specifies that a violation of it may be considered conduct prejudicial to the administration of justice, willful conduct, or otherwise serve as grounds for discipline under the statute. The preamble goes on to say that no other code — such as, for example, the American Bar Association’s Model Code of Judicial Conduct — may be relied upon in interpreting the North Carolina code.

Procedure — The procedure of the Judicial Standards Commission is set out in GS 7A-377. The commission may act on a citizen complaint or on its own. Pursuant to its rules, the commission is divided into two six-member panels, one to investigate complaints and decide whether to proceed to hearing, and the other to conduct the hearing. The chair of the commission sits on both panels, but otherwise membership may not overlap.

All papers submitted to the commission, and its investigation, are confidential and not subject to the public records law, unless waived by the judge being investigated. The commission may issue a private letter of caution which likewise is confidential.

Five members of the commission hearing panel have to agree on a recommendation to the Supreme Court for public reprimand, censure, suspension or removal. The target judge is entitled to submit a brief and argue to the court. The Supreme Court may act by majority vote and can either accept the recommended discipline, remand to the commission for further proceedings, or reject the recommendation and impose its own discipline.

If the Supreme Court issues a public reprimand, censures, suspends or removes a judge, the statement of charges, pleadings, commission recommendation and rest of the record becomes public; otherwise, those documents remain confidential.

Options for discipline — As already indicated, the Judicial Standards Commission may issue a private letter of caution. The Supreme Court may publicly reprimand, censure, suspend or remove the judge. Under GS 7A-376(b), if the judge is suspended it is without pay, and removal from office includes the loss of retirement benefits and disqualification from holding any further judicial office.

Physical or mental incapacity — GS 7A-376(c) authorizes the Supreme Court, on recommendation from the Judicial Standards Commission, to suspend a judge for temporary physical or mental incapacity that interferes with the performance of duties, and to remove a judge when the physical or mental incapacity is or is likely to become permanent. A judge suspended for incapacity continues to receive compensation and, if removed, is entitled to any earned retirement benefits but may not sit as an emergency judge.

Case notes — The following cases provide guidance in the discipline of judges:

In re Nowell, 293 NC 235 (1977). The district judge was censured for disposing of two traffic cases on his own without notice to the defendant or prosecutor. The court's holdings included:

- The statutes governing discipline of judges are constitutional.
- The terms “willful misconduct” and “conduct prejudicial to the administration of justice” are not unconstitutionally vague standards.
- The Code of Judicial Conduct is a guide to the meaning of the statutes.
- The standard for the Judicial Standards Commission to apply is clear and convincing evidence. That standard is higher than a preponderance of the evidence and lower than proof beyond a reasonable doubt.
- “Willful misconduct in office is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. . . . A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew of should have known was beyond the legitimate exercise of his authority constitutes bad faith.” At 248.
- “[A] judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. [citation omitted] Likewise, a judge may also commit indiscretions, or worse, in his private life which nonetheless brings the judicial office into disrepute.” At 248-49.
- Disciplinary action does not require that the judge personally benefitted financially.

In re Peoples, 296 NC 109 (1978). The district judge was removed for improper handling of traffic cases, putting them in his “personal file” and disposing of them on his own. Among the court's holdings were:

- A judge's resignation does not make a disciplinary proceeding moot because removal by the Supreme Court results in the additional punishment of the loss of retirement benefits and disqualification from holding further judicial office.
- The standard to be applied by the Judicial Standards Commission is clear and convincing evidence.
- Both the commission and Supreme Court can consider the judge's failure to testify.
- The Supreme Court is not bound by the commission's recommendation, it may decide on its own whether to censure, suspend or remove.
- The judge does not have to benefit personally for conduct to be prejudicial to the administration of justice.
- The Code of Judicial Conduct is the guide to proper behavior.
- Willful misconduct is worse than conduct prejudicial to the administration of justice, and a judge should be removed from office only for willful misconduct.
 - "[H]owever . . . conduct prejudicial to the administration of justice, if knowingly and persistently repeated, would itself rise to the level of willful misconduct in office. . . ." *In re Hunt*, 308 NC 328, 338 (1983).
- The provisions on loss of retirement benefits and disqualification from future judicial office are constitutional.
- The procedure provided by the Judicial Standards Commission according to the statutes and its rules satisfies the requirements of due process.

In re Martin, 302 NC 299 (1981). The district judge was censured and removed from office for attempting to bargain dismissal of defendants' cases in exchange for sexual favors and for presiding over a session in which his own traffic case was pending. The court's holdings included:

- The Judicial Standards Commission may use State Bar employees and district attorneys to prosecute judicial misconduct cases in addition to its statutory authorization to employ special counsel, obtain counsel from the Attorney General, employ investigators and obtain investigators from the State Bureau of Investigation. (The commission now has its own staff to investigate and prosecute cases.)
- Willful misconduct is not limited to actions while the judge is presiding in the courtroom, it may include private conduct.
- "Whether the conduct in question can fairly be characterized as 'private' or 'public' is not the inquiry; the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office." At 316.
- The Judicial Standards Commission and the Supreme Court may consider conduct that occurred in the judge's previous term of office. The end of a term and reelection of the judge does not insulate the prior conduct from discipline when there was no public knowledge of the conduct.

In re Kivett, 309 NC 635 (1983). The superior court judge was censured and removed from office for attempting to use his position to persuade the DA to not prosecute a case; treating

a defendant leniently in exchange for sexual favors; having sex in the judge's chambers; granting judicial favors to an individual because the individual assisted the judge with sexual liaisons; sexually assaulting a female probation officer; and attempting to persuade another judge to prevent a grand jury from indicting him. The court held:

- Conduct need not be criminal to be considered willful misconduct for purposes of removal.
- Combining investigative and judicial functions within the Judicial Standards Commission does not violate the judge's due process rights. (The commission now, by rule, is divided into two separate panels, one to investigate complaints and the other to conduct hearings.)
- The commission and Supreme Court may consider conduct that occurred before the judge's last reelection.

Removal based on disbarment — GS 7A-410 empowers the governor to declare and fill a vacancy in office when a judge is disbarred or suspended from the practice of law and all appeals under GS 84-28 have been exhausted. Under GS 7A-410.1 the judge's salary is suspended upon disbarment but is restored retroactively if the disbarment or suspension of the law license is reversed upon appeal.

Forfeiture of retirement benefits — Under GS 135-75.1 and -56 a judge who is convicted of certain specified federal and state felonies, primarily dealing with matters of public corruption, forfeits all state retirement benefits.

Removal of a magistrate

As discussed above, Article IV, Section 17(3) of the North Carolina Constitution authorizes the General Assembly to establish a procedure for removal of a magistrate for misconduct or mental or physical incapacity. The legislature has implemented that provision by enactment of GS 7A-173.

Grounds for removal — GS 7A-173(a) provides that the grounds for removal of a magistrate are the same as for removal of a judge. Thus, the grounds for removal are:

- Willful misconduct in office
- Willful and persistent failure to perform the duties of the office
- Habitual intemperance
- Conviction of a crime involving moral turpitude
- Conduct prejudicial to the administration of justice that brings the judicial office into disrepute

Because the grounds for removal are the same as for a judge, the Code of Judicial Conduct may be consulted to construe the statute. The preamble to the Code of Judicial Conduct says that any violation may be considered conduct prejudicial to the administration of justice or willful misconduct.

Procedure — The procedure for removal is set out in GS 7A-173(b), (c) and (d) and includes these steps:

- The process begins with the filing of “sworn written charges” with the clerk of court. The statute does not limit who may file such charges.
- If the chief district judge determines that the charges, if true, would be grounds for removal, the judge may suspend the magistrate pending a hearing. The magistrate’s salary continues during the suspension.
- If a hearing is ordered, the chief district judge schedules a hearing before a superior court judge and sees that the magistrate is served with written notice of the hearing and a copy of the charges.
- The hearing may be before the senior resident superior court judge or any superior court judge holding court in the district.
- The hearing is to be held not less than ten and not more than 30 days after the magistrate has been given a copy of the charges.
- The hearing is public and must be recorded.
- The superior court judge must make findings of fact and conclusions of law.
- If the judge finds that grounds for removal exist, the judge must remove the magistrate from office and terminate the magistrate’s salary. The statute does not give the judge discretion to order a lesser penalty.
- The magistrate may appeal the removal to the Court of Appeals for legal error. The magistrate is suspended from performing duties during the appeal.
- If the magistrate is restored to office upon appeal the magistrate is entitled to back pay to the time of removal.

Case law — The following cases provide additional guidance on removal of magistrates:

State v. Greer, 308 NC 515 (1983). Enactment of the removal statute does not prevent prosecution of a magistrate for violation of GS 14-230, corruption in office.

In re Ezzell, 113 NC App 388 (1994). The magistrate was removed for sexual harassment. The court’s holdings included:

- It may be that prosecution of a magistrate for removal is not within the constitutional duties of a district attorney, and that the superior court judge was incorrect in requesting the DA to undertake that role, but in this case the magistrate did not have standing to raise the issue and could not show that it affected the result.
- The superior court judge may appoint an independent counsel to prosecute the removal.
- The senior resident superior court judge is not disqualified from hearing the removal proceeding just because the judge appointed the magistrate.

In re Kiser, 126 NC App 206 (1997). The magistrate was removed for aiding and abetting a teenager in unlawfully purchasing alcohol. The court held that although the grounds for removal of a magistrate are the same as for a judge, the court does not have discretion, as with a judge, to censure or suspend the magistrate; rather, by statute, the only option for the court is to remove the magistrate from office.

Note on mootness — A removal proceeding against a judge is not made moot by the judge's resignation because the judge may face punishment in addition to loss of the office — loss of retirement benefits and disqualification from future judicial office — as a result of the removal. Because a magistrate does not face such additional punishment, the resignation of the magistrate would make the removal proceeding moot. A magistrate who is removed is not disqualified from being subsequently appointed to the office.

Removal of the clerk of court

As discussed above, Article IV, Section 17(4) of the North Carolina Constitution provides for removal of the clerk of court by the senior resident superior court judge for misconduct or mental or physical incapacity. The statute implementing the constitutional provision is GS 7A-105. A separate statute provides for forfeiture of retirement benefits if a clerk is convicted of certain specified felonies.

Grounds for removal — Following the language of the constitution, GS 7A-105 provides that a clerk of court may be removed for willful misconduct or mental or physical incapacity. The statute does not further define those terms.

Procedure — GS 7A-105 specifies that the procedure for removal of a clerk is the same as for removal of a district attorney except for where the removal petition is filed and who hears the removal proceeding. The procedure for removal of a district attorney is described below. When the proceeding is for removal of a clerk, the sworn affidavit which alleges the grounds for removal is filed with the chief district judge rather than with the clerk. The removal hearing for a clerk is heard by senior resident superior court judge of the district. In practice, the senior resident judge often will recuse and another judge will have to be assigned to hear the matter. The senior resident may suspend the clerk pending the hearing, if there is probable cause to believe the charges are true, and may appoint an acting clerk during the suspension.

Forfeiture of retirement benefits — Under GS 135-75.1 and -56 a clerk who is convicted of certain specified federal and state felonies, primarily involving matters of public corruption, forfeits all state retirement benefits.

Removal of the district attorney

The North Constitution is silent on removal of a district attorney, but GS 7A-66 sets out the grounds for removal and the procedure.

As discussed at the end of this section, a separate statute empowers the governor to declare a vacancy and appointment a replacement when a district attorney is disbarred. Yet another statute, also discussed at the end of this section, provides that a district attorney forfeits all retirement benefits upon conviction of certain specified felonies.

Grounds for removal — The grounds for suspension or removal of a district attorney as specified in GS 7A-66 are:

- Mental or physical incapacity interfering with the performance of duties that is, or is likely to become, permanent
- Willful misconduct in office
- Willful and persistent failure to perform the duties of the office
- Habitual intemperance
- Conviction of a crime involving moral turpitude
- Conduct prejudicial to the administration of justice which brings the office into disrepute
- Knowingly authorizing or permitting an assistant district attorney to commit any act which would be grounds for removal

Procedure — The procedure for removal, as set out in GS 7A-66, includes these steps:

- The process begins with the filing of a sworn affidavit charging the district attorney with specific grounds for removal. The affidavit may be filed by any person. It is filed with the clerk of court of the county where the DA lives.
- The clerk is to bring the affidavit to the attention of the senior resident superior court judge immediately.
- The senior resident judge is to review and act upon the charges within 30 days or refer the matter within that time to another superior court judge who either lives in the district or is holding court there.
- The judge reviewing the charges may, but is not required to, suspend the DA pending a hearing if the judge determines that the charges would indeed be grounds for removal if true and that there is probable cause to believe the charges are true. The DA's salary continues during the suspension.
- If the judge determines that the charges are not grounds for removal, or that there is no probable cause to believe they are true, the judge is to dismiss the proceeding.
- The DA is to be given written notice of the hearing with a copy of the charges. The statute does not specify who is responsible for giving the notice. In the absence of other direction, the superior court judge who sets the hearing should direct that the notice be served.
- The hearing is to be held not less than ten and not more than 30 days after the notice is served.
- The hearing may be before the superior court judge who reviewed the charges or any other superior court judge who lives in or is holding court in the district.
- The hearing is required to be public and must be recorded.
- The judge is to make findings of fact and conclusions of law. The judge must order removal and terminate the DA's salary upon finding that grounds for removal exist.
- The DA may appeal a removal order to the Court of Appeals for error of law. The DA may not perform duties of the office while the appeal is pending. A DA who is reinstated upon appeal or remand is entitled to back pay to the time of removal.

Appointment of acting district attorney — GS 7A-62 authorizes the governor to appoint an acting district attorney whenever the DA becomes “for any reason unable to perform his duties” That statute would allow the appointment of an acting DA when the DA is suspended pursuant to GS 7A-66.

Case law — The following cases provide guidance in the removal of the district attorney:

In re Spivey, 345 NC 404 (1997). The district attorney was removed from office for using a racial epithet while drunk at a bar. Among the court’s holdings were:

- The constitution gives the General Assembly the authority to set the procedure for removal of a district attorney. A district attorney is not subject to removal by impeachment.
- The racial epithet used by the DA amounted to fighting words which are not subject to First Amendment protection and thus may be the basis for removal.
- The trial court may appoint a lawyer to prosecute the removal of the DA. Independent counsel is necessary to afford due process, to avoid the judge having to both present and decide the case.
- The removal proceeding is an inquiry, it is neither a civil suit nor a criminal prosecution.

In re Hudson, 165 NC App 894 (2004). The superior court judge dismissed a proceeding for removal of the district attorney, and the Court of Appeals upheld the decision. The court’s holdings included:

- There is no appeal from a superior court judge’s decision dismissing a removal proceeding.
- The person submitting the affidavit is not a party to the removal proceeding and thus has no right to appeal the dismissal.

In re Cline, ___ NC App ___, 749 SE2d 91 (2013). The district attorney was removed from office for statements she made about the senior resident superior court judge that falsely accused the judge of corruption, those statements bringing the office of DA into disrepute. The Court of Appeals upheld the removal and its holdings included:

- The 30-day time limit in the statute for holding the removal hearing is mandatory.
- The DA is not entitled to discovery (but the trial court’s limitation of the scope of the inquiry enabled her to prepare adequately).
- Some of the DA’s statements were protected by First Amendment free speech rights, and the DA had qualified immunity for some, but statements made with malice were not protected, and some statements were not subject to qualified immunity.

Removal based on disbarment — GS 7A-410 empowers the governor to declare and fill a vacancy in office when a district attorney is disbarred or suspended from the practice of law and all appeals under GS 84-28 have been exhausted. Under GS 7A-410.1 the DA’s salary is suspended upon disbarment but is restored retroactively if the disbarment or suspension of the law license is reversed upon appeal.

Forfeiture of retirement benefits — Under GS 135-75.1 and -56 a district attorney who is convicted of certain specified federal and state felonies, primarily dealing with matters of public corruption, forfeits all state retirement benefits.

Removal of a public defender

GS 7A-498.7(h) says that a public defender or assistant public defender may be suspended or removed from office for the same reasons and under the same procedure as a district attorney. See the section above about removal of the district attorney.

Removal of the appellate defender

The appellate defender is appointed by the Commission on Indigent Defense Services for a four-year term. GS 7A-498.8(a) empowers the commission to suspend or remove the appellate defender for cause by a two-thirds vote of all members. The commission must give written notice of the cause and provide a hearing. A decision to suspend or remove is subject to appeal to Wake County superior court.

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