The worst-kept secret in the courthouse

by CYNTHIA GRAY

Imagine the anxiety of a litigant involved in a custody battle or criminal case, feeling out of place and apprehensive even if represented by counsel. Imagine the litigant's shock if she smells alcohol on the breath of the judge—the person authorized to make decisions that will change her life—or learns from her counsel that the case cannot proceed as scheduled because the judge is impaired, or reads in a newspaper that the judge was arrested for driving while intoxicated. Imagine the litigant's disillusionment if she learns that this is not the first or even 11th time this has happened. Imagine the loss of public confidence in the judiciary that results as she tells her story over and over to her family and friends.

Deciding the appropriate sanction in cases involving impairment requires conduct commissions and courts to weigh the importance of public confidence against the fact that the judge is suffering from a disease.

Restoring public confidence in the judiciary is the duty of state judicial conduct commissions and supreme courts that review their decisions. No judge has ever been disciplined for suffering from alcoholism. But many of the signs and symptoms of alcoholism—hostile behavior, frequent absences, and inappropriate behavior and moods—are also the types of behavior that lead to violations of the code of judicial conduct—violations of the law, delay, and intemperate behavior, for example. Therefore, judicial conduct commissions inevitably receive complaints from litigants and witnesses, if not court staff, attorneys, or other judges, about misconduct that is attributable to alcoholism (and in some cases other addictions or impairments). Deciding the appropriate sanction in such cases requires the commissions and courts to weigh the importance of public confidence against the fact that the judge is suffering from a disease.

Mitigating factor

Although the seriousness of the misconduct is a crucial factor in determining the appropriate sanction in judicial discipline cases—and presiding while intoxicated, for example, is very serious misconduct—state commissions and courts also consider whether there are aggravating or mitigating factors. One of the typical mitigating factors identified in all types of cases is whether the judge has evidenced an effort to change or modify his conduct. In a recent informal survey of the state judicial conduct commissions by the Center for Judicial Ethics, all 22 responding state commissions stated that the majority of their members "would agree with the statement, 'usually, a judge's efforts to receive treatment for an impairment are a mitigating factor when determining the appropriate sanction in a case in which misconduct appeared to be caused by the impairment.'" Thus, while commissions and courts do not accept alcoholism as an excuse for misconduct by a judge, they do recognize that alcoholism is a disease and consider obtaining treatment for the disease a mitigating circumstance when deciding what sanction is appropriate, imposing a sanction less severe than removal of the judge.

For example, the Florida Supreme Court publicly reprimanded a judge who had attempted to commit suicide after drinking alcoholic beverages heavily for three days.[1] After the incident, the judge voluntarily admitted himself to a substance-abuse clinic as an in-patient for a month of examination and therapy. He then entered into a rehabilitation contract with the Florida Lawyers Assistance Program and had complied with all its terms, including continuous monitoring and random testing for substance abuse. He also joined Alcoholics Anonymous and had maintained 345 continuous days of sobriety prior to the hearing before the Judicial Qualifications Commission. At the hearing, many witnesses, including fellow judges, public officials, and practicing attorneys, testified that the judge was now functioning well on the bench. Finding this was a very strong case for mitigation, the court concluded:

> This record overwhelmingly describes a judge who has been an outstanding public servant for some twenty years, generously giving his time and energy for the betterment of this state and its judiciary, whose work is highly regarded by respected citizens, jurists, and attorneys. It shows that the events of March 1990 were an aberration caused largely by an undiagnosed and untreated disease, which now is under medical control and continuing supervision by capable support organizations.

1. *Inquiry Concerning Norris*, 581 So. 2d 578 (Florida 1991).

The New York State Commission on Judicial Conduct considered removing a judge who had driven his automobile into a tree and pleaded guilty to driving while intoxicated, presided over an ex parte request for a temporary order of protection while under the influence of alcohol, having had three glasses of beer at lunch, and confronted two sheriffs officers while intoxicated and demanded to know why his son had been removed from the courthouse.[2] The judge acknowledged to the Commission that he was an alcoholic and sought treatment for his alcohol problems. He maintained that he had not consumed alcohol for over a year before the Commission decision.

Noting that "although serious, the judge's misconduct appears to have been the product of alcoholism for which he has subsequently sought treatment," the Commission concluded that he need not be removed from office, censuring him instead. The Commission also noted that the judge had been a judge for more than 26 years, and his conduct had never before been called into question.

Considering treatment for alcoholism as a mitigating factor does not ensure that there will be unanimity on the appropriate sanction, as illustrated by two contrasting opinions from members of the New York Commission. The majority opinion, which censured a judge for presiding while intoxicated, stated:

> We recognize that alcoholism is an insidious disease from which judges are not exempt and we acknowledge respondent's rehabilitative efforts. However, the public is entitled to a judge who does not come to court while under the influence of alcohol, and litigants should not have to wonder whether a judge has fallen off the wagon on a particular court date. There is also the humiliating institutional spectacle of local lawyers and court personnel knowing that a judge has an alcohol problem that he or she cannot control.[3]

One member of the Commission, however, wrote a dissenting opinion in which a second member joined, stating they would have issued a confidential letter of caution. The dissent stated:

> I do not believe a judge, or anyone else for that matter, should be publicly sanctioned because of a one-time isolated failure to control an illness. Under present day medical, social and legal knowledge of this disease, a public sanction is simply unacceptable. . . . In addition, respondent's frank acknowledgment of his illness and his past and present record of commitment to fighting this disease should be taken into consideration in determining an appropriate sanction.

Moreover, a judge's failure to commit to treatment may be considered an aggravating factor. The Oregon Supreme Court suspended for 30 days without pay a judge who drove while intoxicated.[4] He had entered a "diversion" program, and the DWI charges were dropped after three months of weekly substance abuse counseling. While in the diversion program, he attended Alcoholics Anonymous meetings and abstained from alcohol. After completing the program, however, the judge resumed consuming alcohol, although he reduced his intake to one or two glasses of wine a night, and stopped attending AA. The judge had a history of misusing alcohol and admitted that he tends to minimize the facts when discussing his drinking.

The Commission on Judicial Fitness and Disability recommended that the judge be censured. The judge maintained that no official sanction was necessary and suggested that the matter could be handled informally. Noting it shared the Commission's evident concern about the likelihood of a repetition of the misconduct, the court stated that the judge's "position appears to us to so downplay the seriousness of his conduct that it leaves us in substantial doubt that he comprehends the gravity of his recklessness." The court concluded that a 30-day unpaid suspension would serve not only to discourage such behavior generally, but impress upon the judge "an appreciation for the gravity of his conduct."

Similarly, despite a judge's defense of narcolepsy and mental illness, the Arizona Supreme Court removed him for falling asleep during court proceedings, making inappropriate comments and circulating inappropriate materials, some of which were racist, sexist, or obscene, ex parte communications, and other misconduct.[5] The court stated a judge's personal problems do not permit it to ignore its duty to the public and that narcolepsy and possible mental illness provide only minimal mitigation given the judge's failure to seek adequate treatment, his failure to reveal his medical condition until it was exposed in a newspaper article, and his failure to use the assistance provided by the court to help him remain awake during court proceedings.

Probation

As part of the second chance given to a judge who has mitigated his or her misconduct by undergoing treatment for alcoholism, a court or commission may take additional measures to monitor whether the judge's commitment to rehabilitation continues even after the sanction. For example, the Idaho Supreme Court suspended a judge for three months without salary for abuse of alcohol and imposed conditions on the judge, violation of which could result in his removal.[6]

After six years in office, Judge Becker's behavior had changed; he became withdrawn, exhibited episodes of bizarre behavior, began having mood swings, and became less tolerant. Another judge and Judge Becker's law clerk each confronted him concerning his use of alcohol, but he told them he did not have a problem with alcohol. His family knew he had an alcohol problem and tried unsuccessfully to have him control his use.

2. *In the Matter of Purple*, Determination (New York Commission on Judicial Conduct September 29, 1997) (www.scjc.state.ny.us).
3. *In the Matter of Gilpatric*, Determination (New York State Commission on Judicial Conduct December 14, 2005) (www.scjc.state.ny.us).
4. *Inquiry Concerning Norblad*, 39 P.3d 860 (Oregon 2002).
5. *In the Matter of Carpenter*, 17 P.3d 91 (Arizona 2001).
6. *Judicial Council v. Becker*, 834 P.2d 290 (Idaho 1992).

Assisting judges with substance abuse problems

State committees

Several state supreme court or judicial conduct commissions have adopted programs or procedures for assisting judges with substance abuse problems.

In early 1992, the West Virginia Supreme Court of Appeals created the Judicial Committee on Assistance and Intervention. The Committee has three members, a circuit judge, a magistrate, and a family law master. Proceedings before the committee are non-adversarial, formal, and confidential. Based on the interviews and psychological or medical evaluations, the committee can recommend a program of rehabilitation or retirement in a case of a judge's advancing years and attendant physical or mental incapacity. If a judge complies with the recommendations and rehabilitation is successful, the committee takes no further action, and all records are sealed and kept confidential. The committee refers the matter to the Office of Disciplinary Counsel, however, if a judge refuses to execute a waiver to grant access to psychological/medical records or rejects the Committee's recommendations or if "after a period of rehabilitation and re-evaluation, the committee finds that rehabilitation has not been effective." The West Virginia Code of Judicial Conduct provides that "a judge who has knowledge that another judge is incapacitated or impaired, raising a substantial question as to the judge's fitness for office, shall inform the Committee on Assistance and Intervention of the judiciary."

In 1994, the Kansas Supreme Court created a committee "to provide assistance to any Kansas judge needing help by reason of a mental or physical disability or an addiction to or excessive use of drugs or intoxicants." The Impaired Judges Assistance Committee has three to five members who are active or retired judges. The rule creating the Committee provides that "a judge may approach the committee or one of its members directly on his or her own behalf or any person may suggest the need to intervene on a judge's behalf."

The objectives of the committee are to:

1. identify judges who are impaired from responsibly performing their duties by virtue of addiction or abuse of alcohol or other chemicals, or due to senility, psychiatric disorders, or other reasons;
2. arrange intervention in those identified cases in such a manner that the judges involved will recognize their impairment, accept help from the committee and medical professionals, and be treated and monitored for a period of time so that they may return to their duties when able;
3. recommend avenues of treatment and provide a program of peer support where possible;
4. act as an advocate of judges who are ill and assist them in recognizing their impairment and obtaining effective treatment when possible, and in returning to the responsible performance of their profession; and
5. educate the public and the legal community about the nature of impairments and develop a program which will generate confidence to warrant early referrals and self referrals to the committee so that impairments may be avoided, limited, or reversed.

Committee proceedings and reports are confidential except that the committee may refer the matter to the Commission on Judicial Qualifications if "the judge fails or refuses to address the issues of concern" and if the Commission has referred a judge to the committee, the commission "shall provide progress reports and recommendations to the Commission."

In 2005, the New Mexico Supreme Court established a Committee on Confidential Healthcare to assist judges, their staff, and families deal with stress, depression, or alcohol or other substance abuse. The court directed the committee to develop educational programs and materials to assist judges, staff, and families to identify issues concerning alcohol and/or substance abuse, mental illness, or emotional distress and to understand what resources are available.

Commission programs

In 2001, the Texas State Commission on Judicial Conduct established the Amicus Curiae program to identify judges who have impairments that may be affecting their personal lives and performance on the bench. The program provides a confidential resource for judges to obtain help for treating impairments. If a judge is referred to the program, the judge's actions still remain within the Commission's investigative responsibility. The program monitors and maintains contact with those judges to provide motivation and support. Implementation of the program is discussed by Commission director Seana Willing in the annual meeting transcript (see page 16), and there is more information at

On several occasions, court personnel, law enforcement officers, and other judges smelled alcohol on Judge Becker's breath while he was in the courthouse. Once, in the presence of his court reporter and at least two attorneys, the judge took a bottle of alcoholic beverage out of his desk drawer in his chambers, offered the attorneys a drink, which they declined, and then took a drink directly from the bottle.

After the Judicial Council had commenced its investigations, the judge's family and friends engaged

http://www.scjc.state.tx.us/amicus.php.

The Pennsylvania Judicial Conduct Board has adopted a policy designed to encourage affected judges "to seek help at the earliest possible moment so as to ensure maximum protection to the public against misconduct resulting from their impairment." The policy allows a judge being investigated for misconduct involving substance abuse to petition the Board for permission to enter an approved rehabilitative diversion program prior to the filing of formal charges with the Court of Judicial Discipline. The petition must include a release giving the Board access to all information and records bearing on the rehabilitative program, a stipulation of facts relevant to the investigation with an agreement that the stipulation is admissible in any future proceeding, and consent to testing for drug or alcohol consumption during any probationary period.

When a judge satisfactorily completes an approved in-patient rehabilitation program, the Board will continue the matter for a 12-month probation, which may be conditioned on the judge's continued participation in a recovery program. If the Board deems the probation satisfactorily completed, "the Board will refrain from filing charges in the Court of Judicial Discipline and will dismiss the Complaint ...." However, if the Board determines that the judge "has abandoned the recovery program, or has violated the terms in any substantial way, the Board may direct the filing of charges before the Court of Judicial Discipline, or take such other action as may be appropriate in the circumstances."

— Cynthia Gray

in an intervention. As a result, the judge agreed to participate in a 30-day in-patient alcohol abuse treatment. The judge admitted that he resumed drinking after this in-patient treatment.

The court stated that while the judge's conduct detracted from the integrity of the judiciary, his addiction to alcohol, which had been the source of his misconduct, is a disease that cannot be cured but can be treated and controlled, and that the judge's removal would deprive the judicial system of an experienced judge who was elected by the voters in the district and who could be a good judge if he can control his addiction.

The court imposed conditions requiring the judge to (1) refrain from drinking any alcohol; (2) submit to weekly blood tests; (3) participate in at least two Alcoholics Anonymous sessions each week; (4) participate in relapse prevention therapy; and (5) participate in an after-care program weekly. The conditions also specified procedures for verifying compliance. The court stated that if it determined that the judge consumed any alcohol, it would immediately order his removal.

In addition to censuring two judges who had presided while intoxicated, the New York Commission authorized its staff to periodically observe the judges' public court sessions, noting that it would consider a new investigation and additional charges upon any observation that suggested that either judge was presiding while under the influence of alcohol.[7] Both judges had submitted evidence that their conduct was the result of alcoholism and that they had undertaken a detoxification program, abstained from alcohol, and performed their duties without impairment for many months prior to the Commission's decision.

The Pennsylvania Court of Judicial Discipline suspended a judge for six months and placed him on probation for one year during which he would be required to report monthly to the Judicial Conduct Board. The Board was required to file a monthly written report with the Court advising whether, to its knowledge, the judge had complied with the code of judicial conduct.[8]

The court had found that the judge repeatedly drank to the point of extreme intoxication in bars close by his office, often during the hours of the normal work day when members of his community could reasonably expect that he would be conducting his duties. The court also found that, on these occasions, the judge was aggressive, confrontational, and abusive, resulting on one occasion in a fistfight in a local bar, and on more than one occasion in local law enforcement officers being summoned and required to make decisions as to whether to charge the judge before whom, presumably, they regularly appeared.

Removal

Unfortunately, there are examples of cases in which the judge's misconduct was so persistent and severe, or the mitigation was inadequate or failed, and the judge was removed from office for misconduct even though it was the product of alcoholism.

In 1996, the Pennsylvania Court of Judicial Discipline suspended a judge for six months without pay and placed the judge on probation for the remainder of his term of office after finding that the judge had been visibly impaired by and under the influence of alcohol when he arrived one night to preside over night court.[9] The probation was subject to the judge's immediately entering a sobriety monitoring program contract with the Pennsylvania Bar Association's Lawyer's Assistance Committee, which contract would be approved by the court. Just over 11 months later, the Pennsylvania Court of Judicial

7. *In the Matter of Bradigan*, Determination (New York State Commission on Judicial Conduct March 10, 1995) (www.scjc.state.ny.us); *In the Matter of Gilpatric*, Determination (New York State Commission on Judicial Conduct December 14, 2005) (www.scjc.state.ny.us).

8. *In re McCarthy*, Order (Pennsylvania Court of Judicial Discipline July 14, 2003), *aff'd*, 839 A.2d 182 (Pennsylvania 2003).

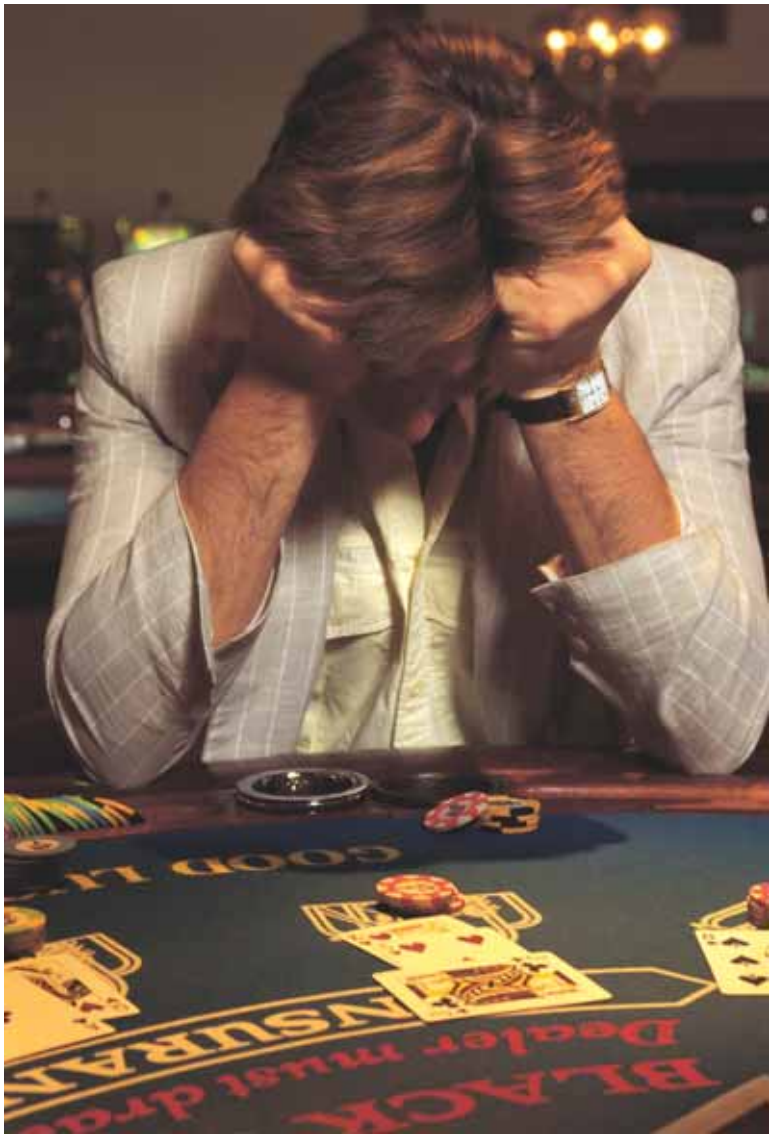
9. *In re Timbers*, 674 A.2d 1221 (1996). The judge smelled of alcohol and had glassy, bloodshot eyes; slurred speech; an unsteady walk; and a disheveled appearance. He could not comprehend the instructions a staff member gave as to how to conduct a preliminary arraignment. When another judge arrived at court to discuss an office matter with him, he called her a "fat fucking bitch."

Discipline removed the judge because he had violated the conditions of probation set forth in the contract.[10]

Finally, in a very sad case that illustrates the potential tragedy, in 2004 the Louisiana Supreme Court removed a judge for persistent intoxication while performing judicial duties and for failure to perform work in a timely manner.[11] At the Judiciary Commission hearing, numerous witnesses testified that the judge was a good judge when he was not drinking, but that he had appeared visibly intoxicated on the bench and in chambers, and slurred his speech, was disoriented, unable to focus, shaky, and walked in an unsteady manner. Due to the judge's intoxicated state, court had to be canceled on some days. One morning, the judge's staff cleared the public from the hallways outside his courtroom so he could be carried out of his office by sheriff's deputies. Despite his staff's efforts, the public saw the judge as he was escorted from the courthouse.

The judge admitted that he was an alcoholic and had been for more than 30 years and that his illness had interfered with his ability to properly perform his judicial duties. He had sought treatment several times and at one time had maintained sobriety for approximately 11 years. In 2000, the judge started drinking to relieve pain caused by an undiagnosed medical condition. The drinking soon spiraled out of control even after the pain was cured by surgery. The judge was, sometimes involuntarily, hospitalized or admitted to various treatment programs six times between December 2000 and May 2003. The Commission stipulated that the judge had been sober since February 28, 2003.

The judge argued that his constituency accepted his alcohol problem because he had been re-elected after his alcoholism was made public. Noting it was unclear that the general public knew the extent of the judge's battle with alcoholism, the court concluded that general public awareness would not change the court's exclusive jurisdiction for the discipline of judges and declined to find that a judge is not subject to discipline if his constituency condones his behavior.


COMSTOCK

The court recognized that the judge suffered from a disease, but held that alcoholism is not a defense but a mitigating factor in disciplinary proceedings, stating the judge was "not being sanctioned for being an alcoholic; he is being sanctioned for his inappropriate behavior on the bench." The court recognized the judge's attempts to achieve and maintain sobriety as mitigating factors. However, emphasizing that "the public has a right to a decision by a sober decision-maker," the court concluded that the judge's persistent intoxication on the bench and in chambers resulted in an irretrievable loss of public confidence in his ability to properly carry out his judicial responsibilities. Stating it must focus on the position, not on the individual, the court explained:

> This behavior violates the sacred trust placed in judges to make decisions which affect the lives of citizens and places our system of justice at risk. A judge must hold himself to high standards so as to command respect for the office which he holds and the entire judicial system he serves. Although we feel compassion for Judge Doggett's struggle to maintain sobriety, we must, first and foremost, consider the grave implications which this misconduct casts upon the judiciary.

10. *In re Timbers*, 692 A.2d 317 (Pennsylvania Court of Judicial Discipline 1997).
11. *In re Doggett*, 874 So. 2d 805 (Louisiana 2004).

Disciplinary responsibilities

Canon 3D(1) of the ABA Model Code of Judicial Conduct requires a judge who has "knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office . . . inform the appropriate authority." The model code also provides that "a judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action." Most jurisdictions have similar provisions. Commentary to the Alaska code explains:

> A judge who learns that another judge is suffering from alcohol or drug addiction might direct that other judge to counseling or might seek the help of the other judge's colleagues or friends. On the other hand, if the other judge refuses to admit the problem or submit to ameliorative measures, and if the other judge's intoxication is interfering with his or her judicial duties (so as to constitute a violation of Canon 1 and Section 3A), then a judge who knows of this problem may be obliged to report it to the Commission on Judicial Conduct.

The Arizona advisory committee addressed a hypothetical in which a judge, with the understanding and cooperation of his or her colleagues, takes an authorized leave of absence for three to six months, or longer, for health-related reasons such as alcohol rehabilitation or cancer treatment. *Arizona Advisory Opinion 03-3*. The committee noted that the question under these circumstances was "difficult and sensitive because it typically arises in a situation where a colleague is grappling with a serious illness or is earnestly trying to reform his or her life and is seeking support and understanding." The committee also noted that other judges may have an "unspoken fear" that by informing on a colleague, "they may set in motion a process that could result in the suspension or removal of an experienced judge and trusting friend." However, the committee concluded "that an illness, recuperation or rehabilitative period that results in an extended absence from judicial duties must be reported to the Commission on Judicial Conduct." The committee noted that the Commission is sensitive to such problems and has indicated its willingness to "keep the information confidential and monitor the judge's progress until he or she returns to active service."

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has, in its final draft report, proposed the following new rule:

RULE 2.19: DISABILITY AND IMPAIRMENT

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs, alcohol, or other mental, emotional, or physical condition shall take appropriate corrective action, which may include a confidential referral to a lawyer or a judicial assistance program.

COMMENT

1. "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question to correct the problem. Depending on the circumstances, appropriate action may include, but is not limited to, speaking directly to the impaired person, notifying the individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

2. Taking or initiating corrective action by way of referral to an assistance program can fulfill several laudable purposes. For example, an intervention can be the first step toward a successful recovery program. That action alone may satisfy the mandates expressed in this Rule. Depending on the gravity of the conduct that has come to the judge's attention, the judge may be required to take action in addition to or in lieu of a referral to a relevant assistance program.

The Joint Commission's proposals will be submitted to the House of Delegates in February 2007.

— Cynthia Gray

Other impairments

Although abuse of alcohol is the most common problem that commissions have addressed, other addictions or impairments have occasionally been the subject of discipline proceedings. For example, judges or former judges suffering from gambling addictions have been disciplined for being regularly absent during normal working hours to gamble in a casino,[12] or receiving loans from attorneys who regularly appeared before them.[13]

Sleep disorders have also been at issue in several cases. The Alabama Court of the Judiciary censured and suspended a judge for misconduct, although not for sleeping during court proceedings.[14] Noting that the judge suffered from sleep apnea and circadian rhythm disorder, the court found that, even when a judge has an involuntary physical condition without fault on the part of the judge, the judge must be held to the same standard as one who is not disabled. The court noted that the judge's disorders were medically recognized sleep disorders, and he had sought remedies in the past.

12. *In re Lallo*, 768 A.2d 921 (Rhode Island 2001))
13. *Office of Disciplinary Counsel v. Cox*, 770 N.E.2d 1007 (Ohio 2002)).
14. *In the Matter of Cothren* (Alabama Court of the Judiciary January 22, 1998).

The Delaware Court on the Judiciary censured a magistrate and suspended him for three months without pay for displaying a weapon in a fashion that made two court clerks feel that their personal safety was threatened and persistently carrying his weapon while at work in a way that it was clearly visible to the public and employees.[15] The court found that the judge had been "overwhelmed by a disability, *i.e.*, chronic sleep deprivation, that was likely exacerbated by the change in his schedule and a personal crisis unfolding at the time" and significantly interfered with his ability to carry out the duties of his office. Noting that there were legitimate concerns about the judge's current and future mental and physical status, the court stated the judge may be restored to judicial duties only after he has demonstrated fitness to return to judicial office. The court ordered that the judge continue regular treatment for existing medical conditions during his suspension and be evaluated for any substance abuse or sleep disorder problem and follow treatment recommendations, and that his treatment providers report on his compliance with these conditions and his ability to perform his duties.

Mental illness was addressed in two cases in Minnesota. The Minnesota Supreme Court reprimanded a judge, suspended him for 60 days without pay, and ordered him to abide by several conditions after the judge acknowledged that on multiple occasions over a period of several years, he had responded in an angry and undignified manner to staff members who were innocent of any significant dereliction of duty.[16] The judge's treating physician had testified that the judge had been diagnosed with a bipolar disorder and had been hospitalized for several periods relative to the disorder, that the medical management of his condition posed no adverse risk regarding his day-to-day responsibilities, and that the judge had taken responsible steps to deal with his unacceptable behavior.

The conditions imposed on the judge required that his conduct be monitored by a person or persons satisfactory to the Board on Judicial Standards; that the judge continue under psychiatric care at his own expense and notify the Board if his psychotherapy was terminated; that the judge authorize those who provide him with psychiatric and psychotherapy services to disclose to the Board, at the Board's request, all information relative to the judge's fitness to perform his duties; and that the judge be placed on probation under the supervision of the Board, preserving jurisdiction in the Board to seek from the supreme court additional or different sanctions, including removal from office, if warranted by his future behavior.

The Minnesota Supreme Court removed a judge from office for dismissing charges in three criminal cases without hearing from the prosecution; retaliating against attorneys who filed complaints with the Board; urging a defendant in an animal cruelty case to pick a sheriff's deputy with whom to fight; pleading guilty to criminal charges arising from his assault of a juvenile who had hidden his son's bike; and being convicted of criminal charges after he scratched the hood of a car with his keys in a confrontation in a parking lot.[17] The court also ordered the judge's disability retirement due to mental illness and suspended his license to practice law for one year. The judge had not argued that his illness should mitigate any discipline imposed for his misconduct.

In response to the Board's request, however, the court articulated standards to be used to determine whether mental illness or similar disability should mitigate the discipline otherwise appropriate. Applying the same standards established for lawyers, the factors identified by the court were: (1) proof of a serious mental illness that (2) caused the misconduct, coupled with (3) proof of treatment that (4) has abated the cause of the misconduct such that (5) the misconduct is not apt to recur. The court noted that when a judge asserts mental illness or other disability as an affirmative defense to mitigate discipline, the judge has the burden of proof to establish the requirements by clear and convincing evidence.

THE POSSIBILITY OF PUBLIC DISCIPLINE SEEMS AN IMPORTANT COMPONENT OF THE SOLUTION TO THE PROBLEM OF IMPAIRED JUDGES.

****

Although sympathetic intervention and treatment are necessary to assist judges who are struggling with a disease that is destroying their physical health and personal as well as professional lives, the possibility of public discipline seems an important component of the solution to the problem of impaired judges because the threat to the judge's profession may be a strong incentive for a judge to be committed to getting treatment sooner rather than later. It is clear from the cases that the judicial conduct commissions and the courts that review their decisions do not find these cases easy but are committed to a flexibility and innovation that will balance concerns for the public interest and the judge.

CYNTHIA GRAY
is director of the American Judicature Society Center for Judicial Ethics.
(cgray@ajs.org)

15. *In re O'Bier*, 833 A.2d 950 (Delaware Court on the Judiciary 2003).
16. *In re Complaint Concerning Rice*, 515 N.W.2d 53 (Minnesota 1994).
17. *Inquiry Into Ginsberg*, 690 N.W.2d 539 (Minnesota 2004).