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# The Role of Alcoholism in Judicial Discipline Decisions

*Candice Goldstein\**

## I. INTRODUCTION

Alcoholism afflicts about ten percent of the general population,<sup>1</sup> and members of the judiciary are not immune from this disease. When a judge's drinking, or misbehavior precipitated by drinking, becomes the subject of complaint, judicial conduct commissions and the courts must respond.<sup>2</sup> Nevertheless, courts and commis-

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1. See Asma, *Alcoholism and Drug Abuse—A National Health Problem*, 73 ILL. B.J. 24, 25 (1984).

2. The first state judicial conduct commission was established in California by constitutional amendment in 1960. See I. TESITOR & D. SINKS, *JUDICIAL CONDUCT ORGANIZATIONS* v (2d ed. 1980). Fifty states and the District of Columbia now have some kind of mechanism for receiving, investigating, and adjudicating complaints against judges. AMERICAN JUDICATURE SOC'Y, *JUDICIAL CONDUCT ORGANIZATIONS GOVERNING PROVISIONS* ix (1984). Prior to the development of modern judicial conduct commission systems, the usual method for dealing with judicial misconduct was impeachment and recall by the legislature. See W. BRAITHWAITE, *WHO JUDGES THE JUDGES?* 12 (1971).

The organizations that exist to handle complaints alleging judicial misconduct and disability vary from jurisdiction to jurisdiction in the extent of their authority. In Illinois, for example, a nine-member Judicial Inquiry Board has authority to receive and investigate complaints and, when "a reasonable basis exists," to charge a judge with misconduct or disability and prosecute the charges before the Illinois Courts Commission. ILL. CONST. art. IV, § 15. The Commission, consisting of five judges, has the power to remove, discipline, or retire a judge for misconduct or disability. *Id.*

In California, the power to remove, formally discipline, or retire is in the supreme court. CAL. CONST. art. VI, § 18. The nine-member Commission on Judicial Performance is authorized to receive and investigate complaints of judicial misconduct and disability and to recommend appropriate action. *Id.* In New York, complaints of judicial misconduct are initially heard by the State Commission on Judicial Conduct. N.Y. CONST. art. VI, § 22. The Commission issues a determination containing findings of fact, conclusions of law, and a recommendation for the sanction deemed warranted. *Id.* If the Commission decides that either removal from office or involuntary retirement is warranted, the sanction is not final and the case must proceed to the New York Court of Appeals, the highest state court. *Id.* The court need not accept the Commission's sanction unless the judge involved fails to appeal. *Id.* A case may also reach the court by way of appeal when a judge seeks review of a censure or admonishment which the Commission has imposed, but such a sanction is final unless appealed by the judge. N.Y. JUD. LAWS § 44 (McKinney Supp. 1983).

Judicial conduct commissions in all jurisdictions except Massachusetts, New Hampshire, and Oregon have authority to proceed against a judge on an allegation of serious

sions vary considerably in their approaches to disciplinary proceedings for judges charged with violations of judicial conduct standards because of alcohol-related conduct.<sup>3</sup> This lack of uniformity results from differing philosophies regarding the extent to which a disciplinary authority should become involved in a judge's rehabilitation after a complaint has been received.

The manner in which a judge's alcohol-related misbehavior should be sanctioned has been the subject of much controversy.<sup>4</sup> Despite recognition by the medical profession that alcoholism is a disease,<sup>5</sup> courts and commissions generally do not regard complaints alleging alcoholism or alcohol-induced behavior as allegations of a disability for which the judge should be retired from office.<sup>6</sup> Instead, they view charges of alcoholism or alcohol-induced behavior as allegations of misconduct.<sup>7</sup> Jurisdictions which

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physical or mental disability. I. TESITOR & D. SINKS, *supra* note 2, at 40-43. Voluntary disability retirement takes place outside the disciplinary system.

3. Constitutional and statutory provisions that establish judicial conduct commissions also define judicial misconduct. Misconduct that is sanctionable typically includes violation of the ABA Model Code of Judicial Conduct, persistent failure to perform duties, habitual intemperance, and conduct prejudicial to the administration of justice. *See infra* notes 22-24 and accompanying text.

4. *See, e.g.*, *Quinn v. State Comm'n on Judicial Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981) (reviewing a commission determination that an alcoholic judge be removed from office and holding that he instead should be censured and permitted to retire).

5. An American Medical Association publication states:

The American Medical Association and the World Health Organization . . . regard alcoholism as a disease. . . . The American Medical Association defines alcoholism as an illness characterized by significant impairment that is directly associated with persistent and excessive use of alcohol. . . . The key factor is loss of control and craving for the drug alcohol. Alcoholics can be treated, but because their illness is ongoing or chronic, control short of cure is an acceptable criterion for success. . . . The alcoholic who suffers a temporary relapse during treatment is no more a failure than the diabetic who occasionally strays over his diet. The primary goal of treatment is to help the alcoholic discover more effective ways to deal with the stresses of living.

DEP'T OF HEALTH EDUC., AM. MEDICAL ASS'N, *THE ILLNESS CALLED ALCOHOLISM* 2, 3 (1977).

Alcoholics, like diabetics, metabolize alcohol differently from non-diseased people. When they drink, alcoholics produce an abnormal chemical by-product which works on the brain's opiate receptors to cause addiction. The alcohol also destroys organs such as the liver and brain over a period of time and causes severe vitamin deficiencies. *See Mandiberg, Civil Commitment of Alcoholics: Readjusting the Focus*, 45 ORE. ST. BAR. BULL. 44 (1985) (citing J. MILAM & K. KETCHAM, *UNDER THE INFLUENCE* 29-36 (1981)).

6. Commissions generally have jurisdiction to investigate complaints alleging disability and to order involuntary retirement in appropriate cases. *See* I. TESITOR & D. SINKS, *supra* note 2, at 40-43.

7. *See infra* notes 8, 11.

have proceeded on such complaints tend to adopt one of three approaches in sanctioning judges for alcohol-related behavior. The punitive approach addresses only the misconduct and frequently results in the removal of the judge from office.<sup>8</sup> In contrast, the rehabilitative approach sanctions the misconduct but also provides for treatment and monitoring of the judge's rehabilitation.<sup>9</sup> The mitigating factor approach, applied once the court or commission determines that a judge's continued service is unacceptable to the public,<sup>10</sup> considers alcoholism to be a mitigating factor in determining the proper method of terminating a judge's services.<sup>11</sup>

This article discusses the three approaches toward the alcoholic judge taken by judicial conduct commissions and state courts.<sup>12</sup> Commission determinations and court decisions in the area are examined, illustrating the range of responses to alcoholism and alcohol-related behavior. These decisions are then analyzed in an attempt to clarify the advantages and disadvantages of each approach. This article notes that the punitive and mitigating factor approaches are simple in application because they do not require continued monitoring of a judge's performance. Nevertheless, the

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8. See, e.g., *Matter of Wangler*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Sept. 28, 1984) (judge who appeared to perform his judicial duties while intoxicated was removed for this and other conduct); *Matter of Somers*, 384 Mich. 320, 182 N.W.2d 341 (1971) (judge who presided over court while intoxicated on several occasions over a two-year period was censured). The commissions and courts in disciplining these judges viewed their behavior as judicial misconduct rather than manifestations of the illness of alcoholism. See also *infra* text accompanying notes 46-63.

9. See, e.g., *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982) (judge who neglected duties, conducted court while intoxicated, and was drunk in public, was placed on probation, with in-patient treatment for alcoholism as one of several conditions); *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985) (judge who presided over several cases under the influence of alcohol, appeared intoxicated at Law Day ceremonies, and failed to render decisions in several cases for as long as two years, was ordered to continue treatment for alcohol addiction, suspended for two months, and censured; commission was ordered to monitor her work performance for six months); see also *infra* text accompanying notes 64-79.

10. The standard for determining whether a judge's conduct warrants termination of his judicial services is whether public confidence in the judge had been "irretrievably lost." See *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 283, 447 N.E.2d 1276, 1278, 460 N.Y.S.2d 915, 917 (1983).

11. See *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 394, 430 N.E.2d 879, 884, 446 N.Y.S.2d 3, 8 (1981); see also *infra* text accompanying notes 80-92.

12. This article is limited in scope to cases involving persistent alcohol-induced misbehavior, such as repeated complaints of a judge presiding over court while intoxicated. See, e.g., *Matter of Clements*, No. 48, slip op. (Pa. Mar. 14, 1975) or cases in which the judge admitted or medical testimony demonstrated that the judge was an alcoholic, e.g., *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983); *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980).

article concludes that rehabilitative dispositions of judicial alcoholism cases should be adopted. This approach would preserve the experience and ability of alcoholic jurists while insuring fair administration of justice and maintaining public confidence in the judiciary.<sup>13</sup> This article suggests that commissions adopt guidelines developed by the American Judicature Society that provide suggested procedures for commissions wishing to take a rehabilitative approach toward judicial disability.<sup>14</sup>

## II. BACKGROUND

Since 1960, the states have taken a more formal approach to dealing with judicial misconduct and discipline.<sup>15</sup> All fifty states and the District of Columbia now have constitutionally<sup>16</sup> or statutorily<sup>17</sup> created commissions for receiving and prosecuting complaints of judicial misconduct. However, these courts and commissions have not been uniform in their disciplinary approaches toward judges whose alcohol-related conduct becomes

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13. One commentator has noted that if the public lost confidence in the judiciary, military regiments would be necessary to enforce judgments. Public confidence is essential for the judicial system to function. S. LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* 5, 6 (1984).

14. See *infra* notes 151-69 and accompanying text; see also Appendix.

15. See *supra* note 2.

16. See ALA. CONST. amend. 328, § 6.17; ALASKA CONST. art. IV, § 10; ARIZ. CONST. art. VII, § 1; CAL. CONST. art. VI, § 8; COLO. CONST. art. VI, § 23; CONN. CONST. art. 5, § 7, DEL. CONST. art. IV, § 37; FLA. CONST. art. V, § 12; GA. CONST. art. VI, § XIII, ¶ III; HAWAII CONST. art. VI, § 5 (implemented by HAWAII SUP. CT. R. 26); ILL. CONST. art. 6, § 15(b); IND. CONST. art. 7, § 9; IOWA CONST. art. V, § 19; KAN. CONST. art. 3, § 15 (implemented by KAN. SUP. CT. R. 602); KY. CONST. § 121; LA. CONST. art. V, § 25; MD. CONST. art. IV, § 4A; MICH. CONST. art. VI, § 30; MISS. CONST. art. 6, § 177A; MO. CONST. art. 5, § 24; MONT. CONST. art. VII, § 11; NEB. CONST. art. V, § 28; NEV. CONST. art. 6, § 21; N.M. CONST. art. VI, § 32; N.Y. CONST. art. VI, § 22; PA. CONST. art. 5, § 18; S.C. CONST. art. V, § 13 (implemented by S.C. SUP. CT. R. 34); S.D. CONST. art. V, § 9; TEX. CONST. art. 5, § 1-a; VA. CONST. art. VI, § 10; WASH. CONST. art. IV, § 31; W. VA. CONST. art. VIII, § 8 (implemented by W. Va. Supreme Court Order of Dec. 15, 1982); WYO. CONST. art. 5, § 6.

17. Jurisdictions that have statutes pertaining to the creation of judicial conduct commissions include: ARK. STAT. ANN. § 22-1002 (Supp. 1983); D.C. CODE ANN. § 11-1521 (1981); IDAHO CODE, § 1-2101 (1979); IOWA CODE ANN. § 602.2102 (West Supp. 1985); ME. REV. ANN. STAT. tit. 4, § 9-B (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 211C, § 1 (West Supp. 1985); MINN. STAT. ANN. § 490.15 (West Supp. 1985); N.H. REV. STAT. ANN. § 490.4 (1983); N.J. STAT. ANN. § 2A:1B-1 (West 1984); N.C. GEN. STAT. § 7A-375 (1981); OHIO REV. CODE ANN. § 2701.11 (Page Supp. 1984); OKLA. STAT. ANN. tit. 20, § 1652 (West Supp. 1984); OR. REV. STAT. § 1.410 (1984); R.I. GEN. LAWS § 8-16-1 (Supp. 1984); TENN. CODE ANN. § 17-5-201 (Supp. 1984); UTAH CODE ANN. § 78-7-27 (1983); WIS. STAT. ANN. § 757.83 (West 1981 & Supp. 1984).

the subject of complaint.<sup>18</sup> This variation results from differing philosophies regarding the propriety of a disciplinary authority's becoming involved in the rehabilitation of an alcoholic judge. The attitude of the court or commission on this issue permeates its analysis.

In proceeding against a judge for alcoholic drinking or behavior precipitated by alcohol, judicial conduct commissions rely upon both constitutional and statutory provisions which establish the commission and define judicial misconduct<sup>19</sup> and disability<sup>20</sup> for that jurisdiction. Sanctionable misconduct related to alcoholic drinking<sup>21</sup> typically includes violations of the ABA Model Code of Judicial Conduct<sup>22</sup> ("the Code"), persistent failure to perform duties, habitual intemperance,<sup>23</sup> and conduct on or off the bench that

18. See *infra* notes 22-24 and accompanying text.

19. See *infra* notes 22-24 and accompanying text.

20. Commissions may recommend involuntary retirement for judges found to be suffering from a physical or mental disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent. See, e.g., CAL. CONST. art. VI, § 18(c); GA. CONST. art. VI, § XIII, ¶ III; see *infra* note 39.

21. See, e.g., *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981) (judge, arrested for driving under the influence of alcohol on two occasions, reacted abusively towards arresting officers); *Matter of Somers*, 384 Mich. 320, 182 N.W.2d 341 (1971) (judge presided over court while intoxicated on several occasions over a two-year period).

22. In addition to the statutory or constitutional judicial standards described in note 3, *supra*, 45 states have adopted a uniform code of conduct for judges — the ABA MODEL CODE OF JUDICIAL CONDUCT (1972). The Code consists of statements of norms for judicial behavior in the form of canons. The accompanying text sets forth specific rules, followed by commentary. The non-Code states are Illinois, Maryland, Montana, Rhode Island, and Wisconsin.

23. Thirty-three states have a judicial discipline supreme court rule, constitutional provision, or statute categorizing intemperance, habitual intemperance, habitual drunkenness, or similarly described alcohol abuse as misconduct.

KY. SUP. CT. R. 4.020(b); N.J. RULES GOVERNING APPELLATE PRACTICE 2:15-8; S.C. SUP. CT. R. 34(1); VT. SUP. CT. R. 2(8); ARIZ. CONST. art. VII, § 4; CAL. CONST. art. VI, § 18(c)(2); COLO. CONST. art. VI, § 23(3)(b); GA. CONST. art. VI, § XIII(b), ¶ III(a); IND. CONST. art. 7, § 11; MICH. CONST. art. VI, § 30; MISS. CONST. art. 6, § 177A; MO. CONST. art. 5, § 24(3); MONT. CONST. art. VII, § 11(3); NEB. CONST. art. V, § 30; NEV. CONST. art. 6, § 21(6); N.M. CONST. art. VI, § 32; N.Y. CONST. art. VI, § 22(a); OKLA. CONST. art. VII-A, § 1(b); OR. CONST. art. VII, § 8(1)(f); S.D. CONST. art. V, § 9; WYO. CONST. art. 5, § 6(e); ALASKA STAT. § 22.30.070(c)(2) (1982); CONN. GEN. STAT. ANN. § 51-51i(5) (West 1985); IDAHO CODE § 1-2103 (1979); IOWA CODE ANN. § 602.2106(3)(b) (West Supp. 1985); MASS. GEN. LAWS ANN. ch. 211C, § 2 (West Supp. 1985); MINN. STAT. ANN. § 490.16(1) (West Supp. 1985); N.C. GEN. STAT. § 7A-376 (1981); N.D. CENT. CODE § 27-23-03(3) (Supp. 1983); R.I. GEN. LAWS § 8-16-4(b) (1984); TENN. CODE ANN. 17-5-302(5) (Supp. 1984); UTAH CODE ANN. § 78-7-28(1)(d) (1983); WIS. STAT. ANN. § 757.81(4)(c) (West 1984).

Seven of the 33 states explain this ground in more specific language, as follows: California, "habitual intemperance in the use of intoxicants or drugs," CAL. CONST. art. VI, § 18(c)(2); Connecticut, "habitual drunkenness or illegal use of intoxicating liquors or

controlled substances to such an extent as to render him unfit for judicial duties," CONN. GEN. STAT. ANN. § 51-51i(5) (West 1985); Oregon, "habitual drunkenness or illegal use of narcotic or dangerous drugs," OR. CONST. art. VII, § 8(1)(f); Rhode Island, "disabling addiction to alcoholic beverages, drugs or narcotics," R.I. GEN. LAWS § 8-16-4(b) (Supp. 1984); Tennessee, "a persistent pattern of intemperate . . . conduct," TENN. CODE ANN. § 17-5-302(5) (Supp. 1984); Utah, "habitual use of alcohol or drugs which interferes with the performance of his judicial duties," UTAH CODE ANN. § 78-7-28(1)(d) (1983); Wisconsin, "habitual intemperance due to consumption of intoxicating beverages or use of dangerous drugs, which interferes with the proper performance of judicial duties," WIS. STAT. ANN. § 757.81(4)(c) (West 1984).

Although they use different descriptions, these provisions all refer to persistent consumption of intoxicating beverages. In contrast, only one American jurisdiction statutorily defines habitual intemperance of judges as a disabling condition. In the District of Columbia, a judge who suffers from habitual intemperance or other physical or mental disability that is permanent or is likely to become permanent and that seriously interferes with judicial duties, is to be involuntarily retired from office. D.C. CODE ANN. § 11-1526(b) (1984).

In 1978, the Joint Committee on Professional Discipline of the Appellate Judges' Conference and the Standing Committee on Professional Discipline of the American Bar Association issued model Standards Relating to Judicial Discipline and Disability Retirement. These Standards exclude the habitual intemperance ground for discipline from the list of grounds for discipline. STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT (1978).

Section 3.3. of the Standards states:

Grounds. Grounds for discipline should include:

- (a) Conviction of a felony;
- (b) Willful misconduct in office;
- (c) Willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute;
- (d) Conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the judicial office into disrepute;
- (e) Any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.

These Standards were first published 18 years after the first judicial conduct commission was created in California in 1960. The majority of commissions had already promulgated the habitual intemperance ground for discipline modeled after that of California. See I. TESITOR & D. SINKS, *supra* note 2; CAL. CONST. art. VI, § 18(c)(2). Neither the Standards nor the commentary to the Standards explain why the drafters chose to omit the habitual intemperance ground. No reference to alcoholism or intoxication is made in the Standards. The omission of any reference to habitual intemperance or intoxication as misconduct in the Standards may indicate a trend toward viewing alcoholism as a disease rather than misconduct. The ABA Standards for Lawyer Disciplinary Proceedings, in contrast, not only omit the habitual intemperance ground for discipline but contain a further provision which states that a lawyer whose mental or physical condition prevents him from completely representing the interest of his client should be transferred to disability inactive status. LAWYER STANDARDS § 12 (1979). The commentary to that section provides that incapacity should not be treated as misconduct. *Id.* commentary.

One writer has suggested that incapacity need not be established to implement this standard as it applies to alcoholic lawyers. Getty, *The Alcoholic Attorney: New Perspectives on an Old Problem*, 71 ILL. B.J. 470, 471 (1983). He suggests that disciplinary probation be imposed in cases where alcoholism is both direct and causal to the unethical conduct being considered. In addition, the author suggests that rules be enacted to provide for disciplinary proceedings in appropriate cases. To prevent misuse of the sub-

is prejudicial to the administration of justice.<sup>24</sup>

Although the Code does not specifically refer to alcohol-related conduct, two canons can be interpreted as relating to the topic of alcoholism in the judiciary.<sup>25</sup> Courts and commissions mention these canons in opinions disciplining judges for appearing in public under the influence of alcohol.<sup>26</sup> Canon 1 of the Code emphasizes that judges should preserve the integrity and independence of the

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stance-abuse/alcoholism defense, there should be required a finding by clear and convincing evidence that alcoholism was a direct cause of the misconduct involved. In addition, a violation of probation or of the terms of the deferral of proceedings should result in an immediate transfer to inactive status. *Id.* at 472.

24. Conduct prejudicial to the administration of justice is "conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office." *In re Kneiff*, 351 N.W.2d 693, 695 (Neb. 1984). It includes conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office. *Id.* at 695-96. It depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. *Id.* at 696.

For "conduct prejudicial" provisions, see HAWAII SUP. CT. R. 26.5(a)(4); MONT. RULES OF THE JUDICIAL STANDARDS COMM'N R. 9a; VT. SUP. CT. R. 2(6); CAL. CONST. art. VI, § 18(c); GA. CONST. art. VI, § XIII, ¶ III(b); IND. CONST. art. 7, § 11; LA. CONST. art. V, § 25(c); MICH. CONST. art. VI, § 30(2); MINN. CONST. art. 6, § 9; MISS. CONST. art. 6, § 177A; NEB. CONST. art. V, § 30(1); N.Y. CONST. art. VI, § 22(a); N.C. CONST. art. IV, § 17(2); PA. CONST. art. 5, § 18(d); VA. CONST. art. VI, § 10; WYO. CONST. art. 5, § 6(e)(2); ALASKA STAT. § 22.30.070(c)(2) (1982); CONN. GEN. STAT. ANN. § 51-51i (West 1985); D.C. CODE ANN. § 11-1526(a)(2) (1981); IDAHO CODE § 1-2103 (1979); MASS. GEN. LAWS ANN. ch. 211C, § 2 (West Supp. 1985); N.D. CENT. CODE § 27-23-03(3) (Supp. 1983); TENN. CODE ANN. § 17-5-392(8) (1984); UTAH CODE ANN. § 78-7-28(1)(f) (1983).

25. Canon 1 of the Model Code of Judicial Conduct states:

**A Judge Should Uphold the Integrity and Independence of the Judiciary**

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 states:

**A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities**

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

MODEL CODE OF JUDICIAL CONDUCT Canons 1, 2A (1972).

A judge's addiction to an illegal drug recently was found to violate Canons 1 and 2. *See Starnes v. Jud. Retirement and Removal Comm'n*, No. 84-CC-692-RRC, slip op. (Ky. Dec. 6, 1984) (judge removed from office for this and other conduct).

26. *See, e.g., Matter of Wangler, Unreported Determination* (N.Y. Comm'n on Jud. Conduct Sept. 28, 1984). The Commission determined that a judge who violated Canons 1 and 2 of the Code of Judicial Conduct by appearing in public to perform his judicial duties while intoxicated and engaged in additional misbehavior should be removed from office.

judiciary by personally observing high standards of conduct and by participating in the formulation and enforcement of standards of conduct.<sup>27</sup> Canon 2, although broad in its terms, mandates that judges avoid even the "appearance of impropriety" in their conduct.<sup>28</sup> In the context of proceedings brought against judges who abuse alcohol, these canons may operate to make persistent consumption of alcohol a violation of the Code and therefore sanctionable misconduct.<sup>29</sup>

When a judicial conduct commission proceeds against a judge on misconduct charges,<sup>30</sup> the judge faces the possible sanctions<sup>31</sup> of admonition, censure, suspension, or removal from office.<sup>32</sup> Removal from office is the most severe of these because it affects a judge's reputation and may have other serious consequences, such as loss of retirement benefits,<sup>33</sup> ineligibility to hold future judicial office,<sup>34</sup> and loss of license to practice law.<sup>35</sup> Despite these sanc-

27. See *supra* note 25.

28. See *supra* note 25.

29. See *supra* text accompanying note 22. Judges who violate the Code of Judicial Conduct are subject to discipline.

30. See *supra* notes 22-24 and accompanying text.

31. Censure and removal are the sanctions most often authorized by constitution or statute. Courts have inherent authority to discipline judges independent of any express constitutional grant. STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT § 1.1 commentary (1978). The courts have this power because they are responsible for the operation of the judicial branch. *Id.* The power to remove a judge from office, however, is omitted from the list of inherent powers of the courts. *Id.* A constitutional provision is needed to give the courts the authority to remove judges. See, e.g., CAL. CONST. art. VI, § 18(c) ("[o]n recommendation of the Commission for Judicial Performance the Supreme Court may . . . censure or remove a judge for misconduct").

Some states have additional sanctions, such as suspension or reprimand. See, e.g., LA. CONST. art. V, § 25 ("[o]n recommendation of the judiciary commission, the supreme court may censure, suspend with or without salary, remove from office, or retire involuntarily a judge for willful misconduct"); MICH. CONST. art. VI, § 30(2) ("[o]n recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for . . . misconduct in office"); N.Y. CONST. art. VI, § 22(a) ("[t]he commission on judicial conduct . . . may determine that a judge . . . be admonished, censured or removed from office for cause").

32. Probation is not one of the sanctions provided for by constitution or statute. I. TESITOR & D. SINKS, *supra* note 2, at 44-46.

33. See, e.g., *Maurice v. Board of Directors*, 450 F. Supp. 755, 757 (E.D. Va. 1977) (removed judge lost pension pursuant to constitutional provision, even though loss of pension not mentioned in court's removal decision).

34. See, e.g., *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978) (judge removed from office for willful misconduct disqualified from holding future judicial office); *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981) (removal rather than retirement may be necessary to insure permanent retirement from office). *Id.* at 394, 430 N.E.2d at 884, 446 N.Y.S.2d at 8.

35. In California, a judge who has been removed from office is suspended from the practice of law pending further order of the state supreme court. CAL. CONST. art. VI, § 18(d). See, e.g., *Gonzalez v. Comm'n on Judicial Performance*, 33 Cal. 3d 359, 657

tions, the object of the proceeding is to protect the public and litigants before the court from a judge unfit for his or her office.<sup>36</sup>

In addition to prosecuting cases of judicial misconduct, conduct commissions also have the function of taking action in cases of judicial disability.<sup>37</sup> Where judges have been unable to perform their duties because they are victims of cancer, chronic mental illness, heart disease, stroke, or other permanent disabling conditions, commissions generally request that the court order involuntary retirement,<sup>38</sup> as distinguished from removal from office. For example, courts have followed commission recommendations to retire rather than remove mentally impaired judges even in cases where the judges engaged in serious injudicious behavior as a result of their disease.<sup>39</sup> Involuntary retirement would not adversely affect a

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P.2d 372, 188 Cal. Rptr. 880 (1983). In *Gonzalez*, a judge was removed from office for such conduct as engaging in improper bail procedures, improperly failing to hear a motion, impugning the character of judicial colleagues, and attempting to persuade a state's attorney to dismiss criminal cases on behalf of friends. Nevertheless, according to the court, his offenses did not reach the level of moral turpitude or dishonesty. He was permitted to practice law provided he pass the Professional Responsibility Examination required of all lawyers seeking readmission after suspension from the bar. *Id.* at 378, 657 P.2d at 383, 188 Cal. Rptr. at 891.

36. See, e.g., *In re Bennett*, 301 Md. 517, 528, 483 A.2d 1242, 1247 (1984); *McComb v. Superior Court*, 68 Cal. App. 3d 89, 92-93, 137 Cal. Rptr. 233, 237 (1977); see also STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT § 1.1 commentary (1978), which states that judicial discipline is imposed for four reasons: to protect the public; to protect the integrity of the judicial process; to maintain public confidence in the judiciary; and to make judges aware of what constitutes proper judicial conduct.

Disciplinary proceedings instituted against attorneys are likewise intended to protect the public rather than to punish the individual. *McComb v. Superior Court*, 68 Cal. App. 3d 89, 92, 93, 137 Cal. Rptr. 233, 237 (1977).

37. See *supra* note 20.

38. See, e.g., *In re Retirement of Falk*, 323 So.2d 571 (Fla. 1974) (court ordered involuntary retirement for judge with prostate carcinoma); *McComb v. Commission on Judicial Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 564 P.2d 1, 138 Cal. Rptr. 459 (1977) (court ordered involuntary retirement for judge with senile dementia). Voluntary disability retirement and resignations are outside the jurisdiction of the judicial conduct commissions. See generally T. PYNE, JUDICIAL RETIREMENT PLANS (1984) (complete survey of the retirement and disability plans for each state and the District of Columbia).

39. See *Ohio State Bar Ass'n v. Mayer*, 54 Ohio St.2d 431, 377 N.E.2d 770 (1978). In *Mayer*, a judge "could not or would not" control his manic depressive mental condition with lithium, and the disease caused delusions and paranoid symptoms. In letters, a brief, and conversations, and at public meetings, the judge referred to a fellow judge as a liar, a cruel sadist, and as "the godfather," and claimed that the prosecuting attorney belonged to the Mafia and was incompetent. *Id.* at 435, 377 N.E.2d at 771. The supreme court said that the judge's conduct violated Canons 1 and 2A of the Code of Judicial Conduct and, given the possibility of recurrence of the conditions which precipitated the erratic and nonjudicious conduct, concluded that the judge should be retired from office. See text of canons, *supra* note 25. Judge Mayer's retirement for disability was pursuant to an Ohio statute which provides that "[g]rounds for retirement of a judge from office for

judge's pension benefits, but removal would.<sup>40</sup> Some states specify that suspension for disability is appropriate when the disability prevents the judge's discharge of his or her duties for an indefinite time.<sup>41</sup>

Despite recognition by the medical community that alcoholism is a disease,<sup>42</sup> courts and commissions do not treat complaints alleging alcoholism or alcohol-induced behavior as allegations of a disability, which would lead to a judge's involuntary retirement. Disciplinary sanctions are imposed in every case where the alcohol-induced misbehavior is proven to have occurred. These sanctions vary in severity depending on the approach taken by the particular jurisdiction.

### III. APPROACHES

In sanctioning judges brought forth on various charges stemming from conduct related to alcohol consumption, courts and commissions have adopted various approaches. These generally

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disability exist when he has a permanent physical or mental disability which prevents the proper discharge of the duties of his office." OHIO REV. CODE § 2701.12(b) (Page Supp. 1984). Thus, while the court found that Judge Mayer had engaged in misconduct, it did not impose a disciplinary sanction.

In *Matter of Williamson*, 242 S.E.2d 221 (S.C. 1978), a judge who suffered from a manic depressive illness with collateral alcohol abuse was retired from office pursuant to the South Carolina Constitution. Article V, § 13 of the constitution states that "[w]ithin the unified court system, the Supreme Court shall have power after hearing, to remove or retire any judge from office upon a finding of disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character." The *Williamson* court indicated that the judge's illness caused him to miss scheduled court appearances and to appear in public to the embarrassment of his office. 242 S.E.2d at 223. The court reviewed the important duties of a judge and concluded that although the judge may have been fully capable of employment in other professions, he was disabled within the meaning of the constitution to perform the judicial work for which he was selected. *Id.* at 223-24.

In *McComb v. Comm'n on Jud. Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 564 P.2d 1, 138 Cal. Rptr. 459 (1977), the court noted that instances of bizarre behavior must be considered as symptomatic of the judge's illness, which was chronic brain syndrome or senile dementia. Balancing the gravity of the conduct against the reason for it and the public interest in an effective judiciary, the court concluded that disciplinary sanctions were not appropriate, and that the public interest would be sufficiently served by the judge's involuntary retirement.

40. See, e.g., CAL. CONST. art. VI, § 18(d); N.Y. CONST. art. VI, § 22(h) (judge retired by state high court considered to have retired voluntarily). Removal from office may result in the loss of a judge's retirement pension. See *supra* note 33.

41. See, e.g., OHIO REV. CODE ANN. § 2701.12(c) (Page Supp. 1984). The rules of one commission permit it to hold open the allegation for an indefinite time if the judge agrees to seek treatment. If the disability is removed, the allegation is dismissed. See WIS. ADMIN. CODE, § JC 4.07(1)(e) (1982).

42. See *supra* note 5.

fall into three different categories: (1) the punitive approach;<sup>43</sup> (2) the rehabilitative approach;<sup>44</sup> and (3) the mitigating factor approach.<sup>45</sup> Each approach has specific characteristics that distinguish the tribunals' analyses of the cases.

### A. *Punitive Approach*

Under the punitive approach, courts and commissions view a judge's abuse of alcohol and acts stemming from that abuse as sanctionable misconduct rather than as a treatable illness.<sup>46</sup> A judge is rarely allowed to remain on the bench because it would require monitoring of his behavior. Thus, in affixing a sanction to a judge's conduct, courts and commissions following this approach disregard evidence that the judge was addicted to alcohol<sup>47</sup> and evidence that the alleged misconduct was directly associated with the disease.<sup>48</sup> In disposing of a case, they consider the severity of

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43. See *infra* notes 46-63 and accompanying text.

44. See *infra* notes 64-79 and accompanying text.

45. See *infra* notes 80-92 and accompanying text.

46. The punitive approach is applied to a wide range of alcohol-induced behavior. See *Matter of Barr, Unreported Determination* (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980), where a judge arrested for driving under the influence of alcohol while serving a sentence of conditional discharge for driving while ability impaired, was abusive to the arresting officers, and asked for special consideration. *Id.* at 1-4. The commission determined that Judge Barr had engaged in misconduct, including conduct prejudicial to the administration of justice and failure to conduct himself in a manner that would promote public confidence in the integrity and impartiality of the judiciary, in violation of the state constitution and Canons 1 and 2A of the Code of Judicial Conduct. See *supra* note 25.

In *Matter of Clements, No. 48, slip op.* (Pa. Mar. 14, 1975), Justice Clements was removed from office for neglecting administrative duties, abusive conduct toward her staff, witnesses, and litigants, and presiding over court while intoxicated. Pennsylvania does not have a habitual intemperance category in its statutory provisions defining judicial misconduct, but the board charged that her behavior constituted misconduct under general statutory provisions. *Clements, Report of Proceedings Before the Judicial Inquiry and Review Board* at 2. The board's recommendation simply called for Justice Clements' removal "under the power provided for in Article V, § 18, subsection (d) of the Pennsylvania Constitution." *Id.* at 7. The provision states that judges may be disciplined for misconduct in office, neglect of duty, failure to perform their duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute. Judges may be retired for disability seriously interfering with the performance of their duties.

47. See *Matter of Clements, No. 48, slip op.* (Pa. Mar. 14, 1975), where the supreme court's order removing the justice failed to address the question of whether the justice's alcoholism should be treated as a disability. Testimony by the justice's physician indicated that the justice had been admitted to the hospital for alcohol withdrawal and that medical tests revealed inflammation of her liver due to alcohol.

48. In *Matter of Dearman, 287 S.E.2d 921* (S.C. 1982), an alcoholic magistrate twice drove his car while intoxicated, and, also while intoxicated, suggested he would commit suicide. Magistrate Dearman was removed from office for violating the habitual intemperance provision, Rule on Judicial Discipline and Standards, S.C. SUP. CT. R. 34. Sec-

the conduct and any aggravating or mitigating circumstances, such as the relatively short period of time during which the misconduct occurred<sup>49</sup> and the judge's length of service.<sup>50</sup> Alcoholism is not considered a mitigating circumstance although abstinence from alcohol by a recovering alcoholic judge may be.<sup>51</sup> Courts have generally ordered that judges found to have engaged in severe misconduct be removed from office<sup>52</sup> and thereby lose their benefits

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tion 1(b) of Rule 34 contains the applicable Standard of Judicial Conduct and Health, which provides: "A judge shall be deemed guilty of misconduct in office if . . . he is habitually intemperate."

49. See *In re Somers*, 384 Mich. 320, 182 N.W.2d 341 (1971), where the judge went on the bench at least once under the influence of alcohol over a two-month period. The court noted in mitigation that no additional complaints had been received since that time, and censured rather than removed the judge. 384 Mich. at 321, 182 N.W.2d at 342.

50. See *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980), where an alcoholic judge was convicted of driving under the influence of alcohol while serving a sentence for driving while impaired. The commission noted that, although the judge suffered from the "illness" of alcoholism, that did not excuse his conduct. However, since the judge had an unblemished 13-year record on the bench, was making a sincere effort to rehabilitate himself since his second arrest, and never appeared under the influence while on the bench, severe censure rather than removal from office was imposed. *Id.* at 46-47.

51. See *Matter of Dearman*, 287 S.E.2d 921 (S.C. 1982). At a magistrate's hearing on a complaint that he had been habitually intemperate, he admitted that he was an alcoholic but stated that his problem was under control. The hearing masters concluded that Magistrate Dearman was serious about dealing with his problem but that the evidence compelled a finding that he was habitually intemperate. The disciplinary commission in *Dearman* previously had stated that retirement for disability was appropriate. The magistrate's problem was considered sufficiently serious so as to prevent further service as a magistrate but, in light of his service, disciplinary measures were not warranted nor would they solve the problem. *Matter of Dearman*, Report of the Board of Comm'rs on Jud. Standards (S.C. Comm'n on Jud. Standards Dec. 22, 1981). However, the supreme court reviewed the commission determination and refused, without explanation, to adopt the suggested alternative of retirement and instead ordered the magistrate's removal. *Dearman*, 287 S.E.2d at 921 (S.C. 1982). See also *Matter of Kremenick*, Unreported Determination (N.Y. Comm'n on Jud. Conduct June 28, 1985), where an alcoholic town court justice was convicted of driving while ability impaired. The commission determined that the judge's conviction and abusive treatment of the arresting officer and his attempts to invoke the prestige of his office during his arrest, in violation of Canons 1 and 2 of the Code, made public sanction appropriate. *Id.* at 3-4. However, the judge's self-imposed rehabilitation, including a hospital detoxification program, Alcoholics Anonymous, and abstention from alcohol made admonition, rather than censure, appropriate. *Id.* at 4.

52. See *Matter of Wangler*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Sept. 28, 1984). In the commission's view, Justice Wangler undermined the public's confidence in the integrity of the judiciary by appearing in an intoxicated condition to perform his judicial duties. He was removed for this and other conduct, including failure to promptly deposit court funds into his official account and delay in remitting funds to and filing reports with the State Department of Audit. *Matter of Dearman*, 287 S.E.2d 921 (S.C. 1982); see also *Matter of Clements*, No. 48, slip op. (Pa. Mar. 14, 1975) (removal imposed for neglect of duties, abusive conduct, and presiding over court while intoxicated).

rather than be allowed to retire and retain benefits<sup>53</sup> or be permitted to remain on the bench. The sanction of removal from office is simple in application since it does not involve any continuing monitoring by the commission or court of the alcoholic judge's rehabilitation. Nevertheless, because of the harsh consequences attached to removal from office, the punitive approach can be devastating to the judge's career.<sup>54</sup> If the misconduct is considered less serious, censure rather than removal may be imposed.<sup>55</sup> However, because jurisdictions following this approach choose not to address the treatment of the underlying disease, probation with rehabilitative conditions and monitoring of judicial performance is not ordered. Authority to impose dispositions other than those expressly provided for by statute will not be inferred by courts and commissions under this approach.<sup>56</sup>

The punitive approach has been used in Michigan,<sup>57</sup> South Carolina,<sup>58</sup> Pennsylvania,<sup>59</sup> and New York.<sup>60</sup> In one case, for example, the court ordered a judge removed from office for habitual intemperance<sup>61</sup> after he had suggested, while intoxicated, that he would commit suicide, and three years later, had twice operated an automobile while intoxicated.<sup>62</sup> In another case, a justice of the peace

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53. See *supra* note 51.

54. See *supra* notes 33-35.

55. See *In re Somers*, 384 Mich. 320, 182 N.W.2d 341 (1971). Although the charge of habitual intemperance was not proven, Judge Somers was censured by the court since, during the period of the complaints, "the proceedings in Judge Somers' courtroom gave the appearance of impropriety in the administration of justice." *Id.* at 321, 182 N.W.2d at 342. Noting an increasing number of complaints filed with respect to trial judges appearing in court after having consumed "liquid refreshments," the court stated that "neither the Judicial Tenure Commission nor the Court can condone such practices. The public has a right to expect their judges to act in a more circumspect manner. One who assumes such a position must not only be, but like Caesar's wife must appear to be, above reproach." *Id.*

56. See *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980). In censuring an alcoholic judge for repeated instances of drinking and driving, the commission stated that, if suspension from office were an available disposition, it would have been imposed in Judge Barr's case in order to better "measure the success of respondent's rehabilitative efforts." *Id.* at 8. Suspension is not one of the sanctions authorized by New York's constitution. See *supra* note 31.

57. *In re Somers*, 384 Mich. 320, 182 N.W.2d 341 (1971). Michigan recently adopted a rehabilitative approach in *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985). See *infra* note 64.

58. *Matter of Dearman*, 287 S.E.2d 921 (S.C. 1982); see *supra* notes 48, 51.

59. *Matter of Clements*, No. 48, slip op. (Pa. Mar. 14, 1975); see *supra* notes 46, 47.

60. See *Matter of Wangler*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Sept. 28, 1984); *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980); *supra* notes 52, 56.

61. *Matter of Dearman*, 287 S.E.2d 921 (S.C. 1982); see *supra* notes 48, 51.

62. *Id.*

was removed for neglecting her administrative duties and presiding over court while intoxicated.<sup>63</sup> The courts and commissions taking the punitive approach address the judge's behavior rather than assist the judge's recovery from alcoholism.

### B. *Rehabilitative Approach*

Three elements characterize the rehabilitative approach and distinguish it from the punitive approach: recognizing alcoholism as a treatable illness, permitting a judge to remain on the bench, and monitoring the rehabilitation period as a condition of probation. Under this approach, alcoholic judges are given an opportunity to change their behavior<sup>64</sup> under supervised probation.<sup>65</sup>

Disciplinary commissions frequently use the rehabilitative approach in informal commission action.<sup>66</sup> Such action typically consists of a state disciplinary commission's warning to a judge that complaints have been received, that investigation has revealed a problem with alcohol, that treatment must be sought to prevent formal charges, and that progress in treatment will be monitored.<sup>67</sup> If the commission believes that the judge cannot or will not be

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63. *Matter of Clements*, No. 48, slip op. (Pa. Mar. 14, 1975); *see supra* notes 46, 47.

64. *See* *Complaint and Stipulation, In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982). The judge had conducted court on several occasions while under the influence of alcohol and had been drunk and offensive in public places. Judge Sears frequently neglected his duties, resulting in numerous delays for which he was reprimanded to no avail. He was charged with conduct prejudicial to the administration of justice and violations of Canons 1 and 2A of the Code because he had been habitually intemperate. Complaint at 1-4. *See also* Comm'n Decision at 3, *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985), where a judge was charged with habitual intemperance, conduct prejudicial to the administration of justice, and neglect of administrative duties because she appeared intoxicated at a Law Day ceremony, presided over cases while intoxicated, and failed to decide several cases for long as two years.

65. *See infra* note 76.

66. Some commissions have express authority to meet informally with a judge before instituting formal proceedings. *See, e.g.,* ARIZ. JUD. QUALIFICATIONS COMM'N R. 6D. Prior to a formal hearing, a commission can delegate the authority and responsibility to personally and confidentially confer with the judge subject to the inquiry. The authority of the delegates is to recommend: (a) that the judge make specific changes in particular matters of conduct; (b) that the judge retire; or (c) that the judge resign. *See also* FLA. JUD. QUALIFICATIONS COMM'N R. 6(c). The Florida Commission has the right to require a judge to informally meet with it in reference to matters that relate to the discharge of his or her judicial duties.

67. A former member of the Michigan Judicial Tenure Commission described this investigation process in a recent newspaper article. Hayden, *Judges threatening to dilute watchdog panel's oversight, ex-member says*, *Detroit Free Press*, Dec. 16, 1984, at 1D. He noted that a judge's realization of the probable political damage connected with a formal public complaint enables the commission to secure the judge's cooperation. An alcoholic judge, for example, is told that failure to go dry will result in a complaint incorporating all the allegations filed since the commission became aware of the problem.

successfully treated, an ultimatum results, demanding that the judge retire or resign to avoid formal charges.<sup>68</sup> Because they usually are not reported, the number of informal resolutions is difficult to measure. The results of one survey, however, indicate that informal action is the most frequently used method of dealing with alcoholism among judges.<sup>69</sup>

Courts and commissions adopting the rehabilitative approach toward alcoholic judges formally charged with misconduct have done so where judges recognized their problem and stopped drinking prior to the commission reaching its determination of an appropriate disposition.<sup>70</sup> The courts have been considerably more lenient in the disposition imposed under this approach than under

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68. *See supra* note 67.

69. CENTER FOR JUDICIAL CONDUCT ORGANIZATIONS, AMERICAN JUDICATURE SOC'Y, JUDICIAL DISABILITY, RESOURCES AND REFERENCES 19 (1982). The survey, conducted in 1979, asked each judicial conduct commission to report the number and types of disability cases processed since its inception. Twenty-five states responded, reporting a total of 151 informal disability resolutions. Twenty-seven of those resolutions were designated as involving alcoholic judges. Twenty-seven is a minimum figure, since some states were unable to identify particular disabilities in their survey responses. From 1960, when the first judicial discipline commission was established, through 1979, only five cases involving judges' alcoholism were formally adjudicated and published in case reports or entered in public records. *See In re McDonough*, 286 N.W.2d 648 (Minn. 1980); *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980); *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977); *Matter of Clements*, No. 48, slip op. (Mar. 14, 1975); *Stark County Bar Ass'n v. Weber*, 175 Ohio St. 13, 198 N.W.2d 918 (1963). Informal resolution apparently accounts for the bulk of dispositions in cases of judicial alcoholism.

70. *See, e.g., Stark County Bar Ass'n v. Weber*, 175 Ohio St. 13, 198 N.E.2d 918 (1963). Judge Weber presided over cases while intoxicated, made improper comments concerning a pending case while drinking in a bar, and was seen drunk and slumped over the wheel of his car in a public parking lot. The court deferred its ruling for one year, noting that the judge stopped drinking and was attentive to his duties for some time prior to the disciplinary hearing. On final determination, the court found that the judge's conduct during the intervening year was beyond reproach. The judge was reprimanded and ordered to pay costs but was not suspended from practice.

The conditional sanction imposed in *Weber* was "specifically disapproved" without further comment in an attorney discipline case. *Disciplinary Counsel v. Hiller*, 5 Ohio St. 3d 237, 450 N.E.2d 1157 (1983).

In *In re McDonough*, 296 N.W.2d 648 (Minn. 1980), the Minnesota discipline commission had recommended that the judge be censured and involuntarily retired for numerous violations of the Code, involving abusive and threatening treatment of lawyers, judges, and public figures. Noting the judge's long years of service and that he stopped drinking in 1973, the court imposed censure and a fine but did not force Judge McDonough to leave office. *Id.* at 649. *See also* Comm'n Decision at 1-2, *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985), in which the judge denied any problem with alcohol until the second day of hearings on a complaint alleging habitual intemperance, at which time she admitted that she was an alcoholic and entered an in-patient treatment facility. The commission recommended a rehabilitative probationary disposition to the supreme court, which the court then imposed upon the judge.

others, frequently permitting the judge to remain on the bench with a public reprimand or censure.<sup>71</sup> However, conditions such as completion of alcohol treatment,<sup>72</sup> monitoring of work performance,<sup>73</sup> and participation in Alcoholics Anonymous<sup>74</sup> often are placed on the judge, either by cautionary language<sup>75</sup> or by actual probation orders agreed to by the judge.<sup>76</sup> Violation of the probation conditions can lead to the judge's immediate removal from

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71. However, the judge may be ordered to first undergo and complete a period of inpatient treatment. See *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982). In addition, a judge may also be subject to sanctions short of removal, such as censure or admonition. See, e.g., *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982) (public reprimand imposed); *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985) (censure imposed). These sanctions are imposed even though the judge's alcoholism may be recognized as the underlying cause of the judge's misconduct. See, e.g., *Stipulation between the Board on Judicial Standards and the Hon. Darrell M. Sears at 2*, *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982), stating that conduct in the complaint was caused by the judge's alcohol dependency; cf. *Consent to Recommendation at 3*, *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985), in which the commission stated that the misconduct described in the complaint "may" have been alcohol-induced. Rehabilitative dispositions were imposed in both *Sears* and *Sobotka*.

72. See *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982).

73. See, e.g., *Consent to Recommendation at 2*, *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985). The judge agreed to employ a certified court reporter and electronic tape recording equipment to record all proceedings before the judge for six months. These records were to be made available to the commission on demand.

74. See *Consent to Order of Discipline at 1*, *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985); *Stipulation at 3*, *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977).

75. The court in *McDonough*, 296 N.W.2d 648 (Minn. 1980) emphasized that the judge stood "on the brink of forced retirement, . . . [was] in effect on probation for the remainder of his service as a judge, and [that] we intend to monitor his performance with interest." *Id.* at 697; see also *Stark County Bar Ass'n v. Weber*, 175 Ohio St. 13, 198 N.E.2d 918 (1963) (judge's conduct monitored for one year by court); *supra* note 70.

76. See *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982). These probation orders commonly impose conditions of alcohol treatment, participation in Alcoholics Anonymous, abstinence, and waiver of confidentiality as to treatment records. *Stipulation at 3-6*, *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982); *Stipulation at 1-3*; *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977). The probation orders required each judge to regularly attend Alcoholics Anonymous meetings, permit discipline commission monitoring of compliance and progress by a means of a representative from the state bar alcoholism assistance group who would communicate regularly with the judge and the commission, and made violation of the conditions grounds for automatic removal from office. Judge Sears was also required to seek immediate and effective in-patient treatment. The probation would continue for the duration of the judges' judicial careers. In another case, a probation order required that a judge be censured, suspended for two months and forfeit two months' salary, and that for six months, she permit her work performance to be monitored by the commission under terms to be established by the commission. *Consent to Recommendation at 1*, *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985). The terms of the order required abstinence from alcohol, attendance at Alcoholics Anonymous meetings, confirmed in writing, and to provide a record of proceedings before her for six months. Violation of

office.<sup>77</sup> Courts have imposed these probationary dispositions despite absence of express statutory authority.<sup>78</sup> The trend toward use of the rehabilitative approach is consistent with that used by courts considering formal disciplinary charges against lawyers.<sup>79</sup>

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the conditions of probation would constitute misconduct in office and conduct clearly prejudicial to the administration of justice. *Id.* at 2.

77. See Stipulation at 3, 5-6, *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982); Stipulation at 2-3, *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977); *supra* note 76.

78. See *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982); *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977). Although the only statutory sanctions for judicial misconduct in Minnesota are censure and removal, MINN. STAT. ANN. § 490.16(3) (West Supp. 1985), the supreme court decided that the legislative grant of power to remove judges carried an implied power to impose lesser sanctions. Power to remove judges must be granted to the court by constitutional provision. See § 1.1 commentary, *supra* note 36. The *Sears* and *Sandeen* decisions placed the judges on probation for the remainder of their judicial careers. The court relied on its power to fashion appropriate sanctions short of removal, citing MINN. STAT. ANN. § 490.16(3) (West Supp. 1985); MINN. BOARD JUD. STANDARDS R. 12, and *Matter of Anderson*, 312 Minn. 442, 252 N.W.2d 592 (1977).

In *Anderson*, a judge who accepted loans from members of the bar, failed to file requested informational reports, and failed to timely decide matters submitted, was suspended without pay for six months. In response to Judge Anderson's contention that the court was empowered to impose a sanction of suspension, the court noted both the broad constitutional authorization for § 490.16 and the legislative objective of providing a judicial discipline system capable of dealing appropriately with a wide variety of cases. The court concluded that, in the absence of a specific legislative indication to the contrary, the grant of power to remove a judge implicitly gave the court the power to suspend. 312 Minn. at 448, 252 N.W.2d at 595.

79. See, e.g., *Mahoning County Bar Ass'n v. Kelly*, 4 Ohio St. 3d 188, 447 N.E.2d 1304 (1983) (attorney neglectful of clients' matters entrusted to him suspended indefinitely until drinking problem resolved); *Tenner v. State Bar*, 28 Cal. 3d 202, 617 P.2d 486, 168 Cal. Rptr. 333 (1978) (temporary suspension given attorney who converted client funds). See also *Petition for Johnson*, 332 N.W.2d 616 (Minn. 1982), where the court conditioned an alcoholic attorney's continued practice on fulfillment of the following conditions: participation in Alcoholics Anonymous or Lawyers Concerned for Lawyers, complete abstinence from alcohol, and complete maintenance of records concerning client funds. The attorney had misappropriated client funds and failed to maintain trust account records. In *In re Driscoll*, 85 Ill.2d 312, 423 N.E.2d 873 (1981), where an alcoholic attorney forged his co-counsel's name in order to convert the proceeds of a client's settlement for his own use, the Illinois Supreme Court acknowledged that its rules did not provide for probation as a sanction. Nevertheless, the court imposed a six-month suspension followed by an indefinite probationary period, during which time the attorney was to report his progress to the Attorney Registration and Discipline Commission until further order. *Id.* at 317, 423 N.E.2d at 875. This disposition was adopted under the court's inherent authority as an "experiment in dealing with impaired attorneys." *Id.* The court noted that it would not have hesitated to disbar the attorney had his conduct accurately reflected his character and had alcoholism not been a strong contributing cause. *Id.* at 315, 423 N.E.2d at 874.

The court was impressed by the attorney's strenuous efforts to overcome his alcoholism but found him culpable "to some degree" for which a six-month suspension was appropriate. The court noted that the suspension could operate as a deterrent against misbehavior by other alcoholic lawyers and reassure the public that even alcoholic attorneys

### C. *Mitigating Factor Approach*

Under the mitigating factor approach, courts may consider a judge's alcoholism as a mitigating factor in determining the disposition.<sup>80</sup> Even if alcoholism is seen as a disease, that fact receives less weight than under the rehabilitative approach. The judge is rarely allowed to remain on the bench under the mitigating factor approach. However, he may be allowed to retain benefits. The consideration of alcoholism as a mitigating factor occurs in the second step in a two-step process. In the first step, the court determines whether the judge's conduct warrants termination of his or her judicial services.<sup>81</sup> Thus, unlike the punitive and rehabilitative approaches, which can be applied in all instances where particular conduct occurs as a result of alcoholism, courts apply the mitigating factor approach only when the conduct is determined to be so extreme or so persistent that the public's confidence in the judge has been "irretrievably lost."<sup>82</sup>

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must observe standards of ethics. *Id.* at 317, 423 N.E.2d at 875. The *Driscoll* court remarked that "the financial hardship, social embarrassment, and perhaps despair that a long suspension would create would not be conducive to sobriety; respondent may actually be fitter after a short suspension than a long one." *Id.* at 317, 423 N.E.2d at 875.

The rehabilitative approach is applied in Wisconsin attorney discipline cases only if a showing is made that the misconduct would not have occurred in the absence of the dependency. *See* *Disciplinary Proceedings Against Glasschroeder*, 113 Wis. 2d 672, 335 N.W.2d 621 (1983). In *Glasschroeder*, an attorney, convicted of theft and forgery-uttering, produced no testimony to establish that the misconduct would not have occurred but for his alcoholism. The court held that license revocation was appropriate and rejected the attorney's assertion that such a sanction was punishment in view of the fact that he had successfully sought treatment. *Id.* at 678, 335 N.W.2d at 623-24. Punishment is not the goal of attorney discipline proceedings. *McComb v. Superior Court*, 68 Cal. App. 3d 89, 92-93, 137 Cal. Rptr. 233, 237 (1977).

80. *See, e.g., Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981), where the New York Court of Appeals stated that "as far as the [judge's] fitness for judicial office is concerned, his alcoholism . . . can provide no basis for dispensation. However, there is no reason why his alcoholism may not be given consideration in determining the method for terminating his services." *Id.* at 394, 430 N.E.2d at 884, 446 N.Y.S.2d at 8. The court reviewed the commission determination that an alcoholic judge be removed from office and determined, rather, that he should be censured. The court acknowledged the judge's application for disability retirement and permitted the judge's application for retirement benefits to proceed in normal course. *Id.* at 395, 430 N.E.2d at 885, 446 N.Y.S.2d at 9.

81. *See supra* note 10.

82. *See supra* note 10. The conclusion that the public's confidence in a judge was "irretrievably lost" was reached in two cases decided under the mitigating factor approach. *See Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 392, 430 N.E.2d 879, 883, 446 N.Y.S.2d 3, 7 (1981). The commission admonished Judge Quinn after a drunk driving conviction and two occasions where he was found intoxicated and asleep behind the wheel of his car. After the admonishment, he continued drinking and was arrested two years later when he passed out at the wheel of his car while the motor was running and the car in gear. At that time he was belligerent and uncooperative with the

Once the court determines that an alcoholic judge is unfit to continue in office,<sup>83</sup> the mitigating factor approach is then used to determine whether the judge should be removed from office for misconduct or merely retired for disability.<sup>84</sup> In this phase, a judge's alcoholism is considered to be a mitigating factor that may increase the chance of a retirement disposition.<sup>85</sup> However, the cases indicate that such a disposition is available only if the judge offers to step down voluntarily.<sup>86</sup> When a judge does not offer to

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police and asserted the prestige of his office during the course of his arrest. The public nature of the drinking and involvements with the law over a span of several years led to the New York Court of Appeal's conclusion that the judge was unfit to continue on the bench. *Id.* at 392, 430 N.E.2d at 883, 446 N.Y.S.2d at 7; *see also* *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983). On two occasions, Aldrich presided over court proceedings while intoxicated and, under the influence of alcohol, used profane, menacing language, and made insulting racial references in court. He also made racial remarks toward a security guard and threatened him with a knife, again while intoxicated, when the guard stopped the judge's car at the entrance gate of a psychiatric facility where the judge was scheduled to preside over hearings. *Id.* at 281-82, 447 N.E.2d at 1273, 460 N.Y.S.2d at 916.

83. The failure of a judge to recognize the inappropriateness of his conduct or attitudes contributed to one court's determination that he be removed from office. *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 283, 447 N.E.2d 1276, 1278, 460 N.Y.S.2d 915, 917 (1983). The fact that the misconduct occurs while a judge is performing his or her duties is considered to be an aggravating factor. *Id.* at 283, 447 N.E.2d at 1278, 460 N.Y.S.2d at 917.

84. In *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 394, 430 N.E.2d 879, 884, 446 N.Y.S.2d 3, 8 (1981), the New York Court of Appeals concluded that Judge Quinn's alcoholism provided no basis for dispensation concerning his fitness for office, but it could be considered in determining the method for terminating his services. *See supra* note 80. The court reviewed the commission determination that an alcoholic judge who had engaged in misconduct should be removed from office and it reduced the sanction to censure. The judge's application for disability retirement based on cancer, filed prior to the court review, was permitted to proceed. The court noted that the complaint against the judge involving drunk-driving had been framed in terms of misconduct rather than disability, but decided not to broaden the complaint in the technical sense "because we can under all the circumstances achieve the same functional effect by censuring Justice Quinn and acknowledging his retirement." *Id.* at 395, 430 N.E.2d at 885, 446 N.Y.S.2d at 9.

The *Quinn* court noted that both Congress and the state legislature formally recognized alcoholism as an illness and a public health problem, and that federal assistance was available to alcoholics disabled by the disease. *Id.* at 394, 430 N.E.2d at 884, 446 N.Y.S.2d at 8. Those observations were followed, however, by the conclusion that alcoholism provided no legal excuse for violating the law since alcohol use remains an element of certain crimes (e.g., drunk driving) and that civil service laws do not preclude the discharge of employees who are unable to perform their duties because of alcoholism. *Id.* at 394, 430 N.E.2d at 884, 446 N.Y.S.2d at 8 (citing 42 U.S.C. § 4561(d)(1976)).

85. *See Quinn v. Stat Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981), where the court noted that removal rather than retirement may be necessary in some cases to insure a permanent bar to judicial office. *Id.* at 394, 430 N.E.2d at 884, 446 N.Y.S.2d at 8.

86. *See Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983). The *Aldrich* court said that the "dispositive issue" in *Quinn*

step down but rather wishes to keep his position, courts generally will not consider the mitigating effect of alcoholism.<sup>87</sup> This situation usually has resulted in the sanction of removal rather than a less severe sanction.<sup>88</sup> One state's high court rejected as unavailable a probationary penalty which had been suggested by the judge,<sup>89</sup> a sanction which would probably have been considered an acceptable disposition in jurisdictions following the rehabilitative approach, in view of the fact that the judge acknowledged that he was an alcoholic, regularly attended Alcoholics Anonymous meetings,<sup>90</sup> and had engaged in conduct of no greater severity than that of judges who had received probation.<sup>91</sup>

Like the punitive approach, the mitigating factor approach results in simple dispositions which do not require continued monitoring of a judge's rehabilitation. However, in responding to perceived public opinion that an alcoholic judge cannot continue in office because of serious misconduct, this approach achieves a harsh result.<sup>92</sup>

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had not been the mitigating effect of alcoholism but "the fact that the Judge had recognized his physical incapacity . . . and applied for retirement prior to the commission's recommended determination of removal." *Id.* at 283, 447 N.E.2d at 1278, 460 N.Y.S.2d at 917. Judge Aldrich, who admitted that he was an alcoholic and was regularly attending Alcoholics Anonymous meetings since the time that proceedings were instituted against him, did not tender either an application for voluntary disability retirement or a resignation. Rather than impose a disposition permitting the judge to remain on the bench, the court affirmed the commission's determined sanction of removal.

87. See *supra* note 86.

88. See *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983) (alcoholic judge who did not tender an application for retirement was removed from office).

89. In *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983), the judge suggested a probationary penalty conditioned on treatment in view of his status as a recovering alcoholic. In the court's view, the available sanctions were limited to those expressly listed in the constitution: admonishment, censure, removal, and mandatory retirement; none would be inferred from the constitutional grant of authority to order removal. *Id.* at 282, 447 N.E.2d at 1277, 460 N.Y.S.2d at 916.

90. See *id.* at 284, 447 N.E.2d at 1278, 460 N.Y.S.2d at 917.

91. See, e.g., Complaint, *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982); Complaint, *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977). In these cases, where probation was imposed, the facts are not readily distinguishable from *Quinn* and *Aldrich*: the judge's conduct was public, affected judicial duties, and occurred over a period of time. Furthermore, the Minnesota court did not have express authority to impose probation; rather, that disposition was implied from the court's express power to remove judges from office. *Sandeen*, at 1-2; *Sears*, at 1-2; see also *supra* note 78.

92. One court has noted that forced retirement for disability was "embarrassing" and a "drastic" measure to be employed, but that retirement at least permitted a judge to leave the bench without the adverse legal consequences accompanying the alternative of removal, such as a permanent bar to seeking future judicial office. *Quinn v. State*

## IV. ANALYSIS

As the previous discussion illustrates, it is difficult to accurately predict the dispositions that the various judicial conduct organizations and courts will reach in cases regarding the alcohol-induced behavior of judges. Perhaps the primary reason for this difficulty is the variety of conduct and the fact patterns that occur in these cases. A judge suffering from alcoholism may be found to have engaged in such conduct as driving under the influence of alcohol,<sup>93</sup> neglecting official duties,<sup>94</sup> appearing in court while intoxicated,<sup>95</sup> and verbally abusing others in or out of the courtroom.<sup>96</sup> Another reason for this unpredictability is the existence of three different approaches—punitive, rehabilitative, and mitigating factor—that are followed in determining a disposition for judges found to have abused alcohol in a persistent manner. Depending on the approach used, alcoholic judges arrested for multiple drinking and driving violations have been censured,<sup>97</sup> placed on probation and admonished,<sup>98</sup> or permitted to retire.<sup>99</sup> Alcoholic judges presiding over court under the influence have been admonished or censured and placed on probation,<sup>100</sup> censured only,<sup>101</sup> or removed from office.<sup>102</sup> Whether a judge's conduct is characterized as habitual intemperance,<sup>103</sup> as conduct prejudicial to the administration of

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Comm'n on Jud. Conduct, 54 N.Y.2d 386, 394, 430 N.E.2d 879, 884, 446 N.Y.S.2d 3, 8 (1981).

93. See, e.g., *Matter of Dearman*, 287 S.E.2d 921 (S.C. 1982); *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981).

94. See, e.g., *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982); *Matter of Clements*, No. 48, slip op. (Pa. Mar. 14, 1975).

95. See, e.g., *Matter of Wangler*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Sept. 28, 1984); *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977).

96. See, e.g., *In re McDonough*, 296 N.W.2d 648 (Minn. 1980).

97. *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980) (punitive approach).

98. *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977) (rehabilitative approach).

99. *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981) (mitigating factor approach).

100. *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985) (rehabilitative approach); *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982) (rehabilitative approach); *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977) (rehabilitative approach).

101. *In re Somers*, 384 Mich. 320, 182 N.W.2d 341 (1971) (punitive approach).

102. *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983) (mitigating factor approach).

103. See *Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985) (rehabilitative approach — censure, suspension, and probation imposed); *Matter of Dearman*, 287 S.E.2d 921 (S.C. 1982) (punitive approach — removal from office imposed); *Complaint at*

justice,<sup>104</sup> or as a violation of the Code of Judicial Conduct<sup>105</sup> seems to have little impact on the approach taken and the ultimate outcome. Of greater importance is the court's or commission's willingness to address a judge's alcoholism as a disease and to take a continuing role in monitoring a rehabilitation period.

Under the punitive approach to judicial alcoholism, no provisions are made for treatment or rehabilitation. Even where a judge is not removed from office, sanctions without provisions for medical or other assistance are not conducive to sobriety.<sup>106</sup> Because the judge continues to preside without treatment or monitoring, such sanctions do little to protect the public and litigants, which is the goal of judicial discipline proceedings.<sup>107</sup> The sanctions serve only to punish the judge.<sup>108</sup> Removal from office eventually may become necessary if the judge's illness continues unchecked.<sup>109</sup>

Similar to those persons who engage in inappropriate behavior because of mental illness, alcoholics are innocent sufferers of a physical disease.<sup>110</sup> Alcoholism cases decided under the punitive approach conflict with cases involving mental illness, where involuntary retirement for disability is a frequently imposed disposition.<sup>111</sup> For example, a justice of the peace who appeared for her duties while under the influence of alcohol<sup>112</sup> was no more respon-

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2, *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977) (rehabilitative approach — admonition and probation imposed).

104. See *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982) (rehabilitative approach — admonition and probation imposed); *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980) (punitive approach — censure imposed); Complaint at 2, *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977) (rehabilitative approach — admonition and probation imposed).

105. See *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982) (rehabilitative approach — admonition and probation imposed); *Matter of Kremenick*, Unreported Determination (N.Y. Comm'n on Jud. Conduct June 28, 1985) (punitive approach—admonition imposed); *Matter of Barr*, Unreported Determination (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980) (punitive approach — censure imposed).

106. See, e.g., *In re Driscoll*, 85 Ill.2d 312, 317, 423 N.E.2d 873, 875 (1981), where the Illinois Supreme Court, in an attorney discipline case, remarked that a long suspension would not be conducive to sobriety. See *supra* note 79.

107. See *supra* note 36.

108. *Id.*

109. See *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981) (judge, who was formally admonished by the conduct commission after a drunk driving conviction and for being intoxicated and asleep in his car, was rearrested two years later when he passed out behind the wheel of his car; his application for voluntary disability retirement was allowed to proceed in lieu of removal from office and he was censured).

110. See *supra* note 5.

111. See *supra* note 39.

112. *Matter of Clements*, No. 48, slip op. (Pa. Mar. 14, 1975); see *supra* note 46.

sible for her behavior than a judge who appeared in a manic state.<sup>113</sup> The alcoholic judge was removed from office,<sup>114</sup> subject to loss of benefits for conduct resulting from her alcoholism, while the other was forced to retire but retained benefits for similar conduct that was a manifestation of mental illness.<sup>115</sup> These results are inconsistent. There is no reason, in law or medicine, to believe the legislators intended to distinguish between alcoholism and other disabling illnesses in providing for involuntary disability retirement.<sup>116</sup> Involuntary disability retirement should be available where the judge's conduct was very serious<sup>117</sup> and the judge has made no or unsuccessful efforts at rehabilitation.

Courts deciding cases under the mitigating factor approach have concluded that the alcoholic judge who has engaged in serious misconduct should not be permitted to remain on the bench, even if the judge acknowledges his or her dependence on alcohol and has sought treatment.<sup>118</sup> In contrast to the punitive approach, the mitigating factor approach does view retirement for alcoholism as an acceptable alternative to removal from office.<sup>119</sup> Of course, under this approach the alcoholic judge must voluntarily retire. Failure to do so has led to at least one judge's removal.<sup>120</sup>

Unfortunately, the alcohol-induced conduct for which the judges are forced off the bench under the mitigating factor approach is no more outrageous than that of judges permitted to undergo a rehabilitative probation in other jurisdictions.<sup>121</sup> By concluding that public confidence in a judge is irretrievably lost after he or she presides over court while intoxicated<sup>122</sup> or is ar-

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113. *Matter of Williamson*, 242 S.E.2d 221 (S.C. 1978); *see supra* note 39. Alcoholism, like mental illness, is a disease. *See supra* note 5.

114. *Matter of Clements*, No. 48, slip op. at 1 (Pa. Mar. 14, 1975).

115. *Matter of Williamson*, 242 S.E.2d 221 (S.C. 1978)

116. *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 284, 447 N.E.2d 1276, 1279, 460 N.Y.S.2d 916, 918 (1983) (dissenting opinion).

117. Both forced retirement and removal cause embarrassment and stigma for the judge. Removal from office, however, carries more serious consequences. *See supra* notes 32-34 and accompanying text; *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 394, 430 N.E.2d 879, 884, 446 N.Y.S.2d 3, 8 (1981).

118. *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983); *see supra* note 89 and accompanying text.

119. *See Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981) (permitting judge's application for retirement to take effect rather than ordering his removal where court found judge's conduct to be manifestations of illness of alcoholism).

120. *See supra* note 86 and accompanying text.

121. *See supra* note 91 and accompanying text.

122. *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983); *see also supra* note 82.

rested on more than one occasion for driving under the influence of alcohol and behaving improperly during the arrests,<sup>123</sup> courts make available only two alternatives: voluntary disability retirement or removal from office. This harsh result has developed from the courts' perceived inability to fashion a probationary sanction<sup>124</sup> which would permit a court or commission to monitor a judge's rehabilitation and performance while the judge continues to sit on the bench.

The lack of flexibility in applying dispositions short of removal wastes judicial resources. Even a judge who admits his or her problem with alcohol and who takes significant steps toward rehabilitation may be forced from the bench by either removal or retirement.<sup>125</sup> With the ever-increasing caseloads in our nation's courts it is especially important not to lose the services of a judge whose disability can be treated. In contrast to the legal system, private industry recognizes that alcoholic persons can be successfully rehabilitated. Data from Employee Assistance Programs active in approximately one-third of the larger corporations in this country has universally indicated that it is more cost-effective to treat and retain alcoholic employees rather than to fire them and recruit replacements.<sup>126</sup>

Of the three approaches to judicial alcoholism cases, only the rehabilitative approach focuses on the source of the alleged misconduct—the judge's alcoholism. It addresses the illness and provides for rehabilitation by ordering that treatment be obtained,<sup>127</sup> that abstinence be encouraged,<sup>128</sup> and that the judge's work performance be monitored.<sup>129</sup>

Recently, courts have also taken a rehabilitative-type approach in determining sanctions for alcoholic attorneys.<sup>130</sup> Courts have

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123. *Quinn v. State Comm'n on Jud. Conduct*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981); *see supra* note 82.

124. *See supra* note 89 and accompanying text.

125. *See supra* note 86.

126. Getty, *The Alcoholic Attorney: New Perspectives on an Old Problem*, 71 ILL. B.J. 470, 471 (1983) (citing J. Conway, *The Professional and Chemical Dependency* (paper presented at the Third Annual Conference of the Palm Beach Institute Foundation, Feb. 19, 1982)).

127. *See, e.g., In re Sears*, No. 81-1264, slip op. (Minn. July 26, 1982); *see also supra* note 76 and text accompanying notes 72-76.

128. *See, e.g., In re Sandeen*, No. 48183, slip op. (Minn. Oct. 27, 1977); *see also supra* note 76 and accompanying notes 72-76.

129. *See, e.g., Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985); *see also supra* note 76 and text accompanying notes 72-76.

130. *See, e.g., Mahoning County Bar Ass'n v. Kelly*, 4 Ohio 3d 188, 447 N.E.2d 1304 (1983); *In re Driscoll*, 85 Ill. 2d 312, 317, 423 N.E.2d 873, 875 (1981); *see supra* note 79.

substituted probation with temporary suspension for disbarment with reinstatement available upon effective treatment in several cases.<sup>131</sup> Whether alcoholic judges should be accorded the same opportunity for rehabilitation and continued service as lawyers are beginning to receive is a difficult question. It is well-settled that a judge's conduct, both on and off the bench, not only must be free from impropriety, but additionally must appear to be so.<sup>132</sup> Judges are responsible for the fair and efficient administration of the American justice system.<sup>133</sup> An alcoholic judge who continues to drink is certainly in a position to do serious harm to the administration of justice. Public confidence in the legal system and in the judiciary may suffer if a judge known to be an alcoholic is permitted to remain on the bench while under treatment or to return following a period of detoxification and abstinence. Yet it has been stated that the goals of judicial and attorney discipline are the same: to protect the public and litigants from an unfit judge or attorney rather than to punish the individual.<sup>134</sup> A rehabilitative disposition, such as a combination of probation with treatment, monitoring of the judge's rehabilitation, and a public reprimand,<sup>135</sup> can accomplish the objective in most cases.<sup>136</sup>

The probation permits the commission to maintain jurisdiction over the judge and reassures the public that prompt disciplinary action will be taken when a judge fails to comply with treatment directives.<sup>137</sup> Supervision of the judge's rehabilitation by a member

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131. See *supra* note 79.

132. See text of Canon 2, *supra* note 25; *In re Somers*, 384 Mich. 320, 321, 182 N.W.2d 341, 342 (1971); see also *supra* note 55.

133. See *Matter of Williamson*, 242 S.E.2d 221, 223-24 (S.C. 1978), where the court reviewed the important duties of a judge and concluded that a mentally ill judge, although capable of other employment, would be forced to retire. See also *supra* note 39.

134. See *supra* note 36.

135. Imposition of disciplinary sanctions short of removal, such as censure or admonition, in addition to probation with rehabilitative conditions, may deter alcoholic judges from similar conduct and reassure the public. Although one commentator has suggested that alcoholic attorneys who have engaged in misconduct as a result of their illness be transferred to disability inactive status without any disciplinary sanctions, see Getty, *supra* note 23, some formal reproof may be called for when a judge engaged in alcohol-related misbehavior. Judges are held to a higher standard of conduct than persons in other professions, including other public officials. See *supra* text accompanying note 132; *Matter of Callanan*, 419 Mich. 376, 386, 355 N.W.2d 69, 73 (1984).

136. The public is protected by monitoring of the judge's rehabilitation. See *supra* note 76 for examples of the monitoring process. The possibility of an abstinent alcoholic returning to drink becomes less like over time. See National Institute on Alcohol Abuse and Alcoholism Information and Feature Service, Feb. 1, 1983, at 2.

137. These directives typically include attendance at Alcoholics Anonymous meetings and abstinence. See *supra* note 76. Violation of probation conditions may result in a judge's removal from office without a hearing. See Stipulation at 3-6, *In re Sears*, No. 81-

of the judges' and lawyers' recovery network<sup>138</sup> or Alcoholics Anonymous aids the commission in this task. One commission has further required a judge to provide stenographic and audio tape recordings of any proceedings over which she presided during the first six months following her return to the bench.<sup>139</sup> Finally, a public reprimand may reassure the public and, by example, caution other judges that alcohol-induced misbehavior will not be tolerated. If the judge fails to comply with the probation conditions, removal from office<sup>140</sup> or involuntary retirement for disability is an appropriate disposition.

With the medical profession's acceptance of the concept of alcoholism as a controllable disease,<sup>141</sup> judicial conduct organizations and courts should not be limited by statute or court decisions in the types of dispositions available in misconduct cases involving alcoholism.<sup>142</sup> An entire range of alternatives, including probation with or without suspension, should be available. The court or commission may then choose a disposition that best fits the facts of each case, taking into account the seriousness of the conduct, the extent to which it was precipitated by the disease, the judge's attitude toward treatment, and the impact of the misconduct on the public's perception of the judiciary. Based on these four considerations, a rehabilitative disposition could be imposed in a majority of cases involving alcohol-induced behavior.

Serious misconduct should not bar the rehabilitative dispositions. Rehabilitative dispositions have been imposed in cases involving serious misconduct, including intoxication while performing judicial duties.<sup>143</sup> Misconduct on the bench generally

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1264, Unreported Order (Minn. July 26, 1982); Stipulation at 1-3, *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977).

138. See Stipulation at 3-6, *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982). Thirty-eight states and the District of Columbia have state bar association-sponsored programs aimed at members with drinking problems. Tarr, *Drinking Lawyers Get Aid, But Many Firms Shy Away*, National Law Journal, May 6, 1985, at 21, col. 4.

139. Consent to Recommendation at 1, Matter of Sobotka, No. 73651, slip op. (Mich. Feb. 13, 1985); see also *supra* note 76.

140. Stipulation at 3, 6, *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982); Stipulation at 1-3, *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977); see also *supra* note 76.

141. See *supra* note 5.

142. Compare *In re Sandeen*, No. 48183, Unreported Order (Minn. Oct. 27, 1977) (power to impose rehabilitative probationary disposition inferred from legislative authority to order removal) with *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983) (probationary sanction denied in absence of express legislative authority to impose probation). See *supra* notes 78, 89; see also *supra* note 56 and accompanying text.

143. See *supra* note 64.

is considered to be more serious than misconduct occurring when a judge is not performing judicial duties.<sup>144</sup>

The extent to which the misconduct is precipitated by the disease can be difficult to measure. Nevertheless, this too should not prevent the imposition of a rehabilitative disposition.<sup>145</sup> A disciplinary sanction such as censure or suspension<sup>146</sup> should instead be imposed in combination with probation when the misconduct may have been the result of alcoholism.

Many judges may not admit that they have an alcohol problem until after disciplinary proceedings are instituted.<sup>147</sup> Late recognition of alcoholism by the judge should likewise not be a bar to a rehabilitative disposition; denial is part of the disease.<sup>148</sup> However, the judge must agree to a treatment and rehabilitation program to insure that he or she will completely abstain from alcohol as long as the judge remains on the bench.

Finally, the impact of the misconduct on the public's confidence in the judiciary must be assessed. This issue is closely tied to the severity of the conduct. If public confidence in a judge has been irretrievably lost, then retirement or removal should be an available disposition. However, when the conduct is comparable to that in cases in which the rehabilitative approach can be applied this conclusion should not be reached.<sup>149</sup>

Courts and commissions must be willing to take an active role in an alcoholic judge's rehabilitation in order to fulfill their dual responsibilities: to insure to the public a judiciary beyond reproach and to deal humanely and fairly with the individual judge.<sup>150</sup> Whenever an alcoholic judge can be rehabilitated and return to the bench as an effective member of the judiciary, the commission not

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144. See *Aldrich v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 279, 283, 447 N.E.2d 1276, 1278, 460 N.Y.S.2d 915, 917 (1983).

145. See *supra* note 71. A specific finding that the conduct was caused by alcoholism is not required to impose a rehabilitative disposition.

146. See *supra* notes 71, 135, and accompanying text.

147. See *Comm'n Decision at 1-2, Matter of Sobotka*, No. 73651, slip op. (Mich. Feb. 13, 1985); see also *supra* note 70.

148. One author has noted that the effects of alcoholism upon performance are often gradual and subtle, and that the alcoholic person's ability to judge performance is also impaired. The sickness, therefore, will often have to be identified by others. Wolf, *Alcoholism and the Legal Profession*, 62 MICH. B.J. 873 (1983).

149. The conclusion that a judge's service must be terminated has been reached in cases involving conduct of comparable gravity to that involved in cases where the judge was allowed to remain on the bench. See *supra* note 91.

150. See *Matter of Barr, Unreported Determination at 5* (N.Y. Comm'n on Jud. Conduct Oct. 3, 1980).

only salvages a career, but educates the public and the profession that an alcoholic person can be a productive member of society.

## V. ALTERNATIVES

One attempt to develop guidelines for judicial conduct commissions wishing to take a rehabilitative approach to judicial disability has been made by the American Judicature Society's Center for Judicial Conduct Organizations.<sup>151</sup> The "Guidelines For Cases Involving Judicial Disability" ("Guidelines") provide a framework of suggested procedures for commissions to follow from the earliest stages of investigation through disposition. These procedures would likely result in a rehabilitative outcome. The Guidelines specifically apply to situations where, due to alcohol abuse, a judge experiences difficulty in performing judicial duties caused by alcohol abuse.<sup>152</sup> They recommend that commissions follow the procedures used in discipline cases.<sup>153</sup> Furthermore, the Guidelines emphasize that informal action may be appropriate, especially where misconduct has not yet occurred.<sup>154</sup> Once formal proceedings become necessary,<sup>155</sup> however, temporary suspension of the judge is recommended.<sup>156</sup> Procedures for obtaining medical records and ordering a medical examination of the judge,<sup>157</sup> and factors affecting dispositions<sup>158</sup> are also provided.

Although permissible procedures vary from state to state, the Guidelines serve as an agenda for reform where they conflict with current statutory procedures. For example, Guideline 8 states that a judicial conduct commission should notify the state court administrative agency or officer when dealing with cases of judicial disa-

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151. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY (American Judicature Soc'y 1985); *see* Appendix.

152. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 1 commentary (American Judicature Soc'y 1985); *see* Appendix.

153. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 4 (American Judicature Soc'y 1985); *see* Appendix.

154. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 9 (American Judicature Soc'y 1985); *see supra* note 66. Since an alcoholic person may not recognize the drinking problem until confronted, informal action avoids the stigma and embarrassment of a public sanction. *See* Wolf, *supra* note 148.

155. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 11 (American Judicature Soc'y 1985); *see* Appendix.

156. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 11 (American Judicature Soc'y 1985); *see* Appendix.

157. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guidelines 12-13 (American Judicature Soc'y 1985); *see* Appendix.

158. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 15 (American Judicature Soc'y 1985); *see* Appendix.

bility.<sup>159</sup> The court administrator may immediately reassign the judge to less critical functions and then monitor the situation.<sup>160</sup> Although Guideline 8 may conflict with some states' confidentiality provisions,<sup>161</sup> its implementation could avoid errors by a judge with impaired judgment and prevent prejudice to the litigants. In addition, it may prevent criticism of commissions for not acting promptly in permitting disabled judges to remain on the bench with no reductions in their caseloads.

While the Guidelines present an effective way to deal with cases involving judicial disability, some concerns in adopting them can be anticipated. For example, Guideline 16<sup>162</sup> suggests that disabled judges be allowed temporary paid leaves of absence to seek treatment. Although legislators might have financial qualms about this approach, they can look to the example of businesses that take similar actions with their employees, finding that it actually saves money in the long run.<sup>163</sup>

Guidelines 14<sup>164</sup> and 16<sup>165</sup> suggest that a wide range of measures be available in cases where it is determined that a disability exists. These measures include reprimand, censure, leave of absence, suspension, retirement, and removal. The commissions of some jurisdictions may conclude that they lack the authority to impose some or all of these dispositions.<sup>166</sup> Jurisdictions such as Minnesota, however, have found implicit authority to impose all sanctions short of removal.<sup>167</sup> It makes sense for a commission to take this approach and to deal directly with an individual judge's problem. Merely treating the symptom—disciplining the conduct without

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159. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 8 (American Judicature Soc'y 1985); see Appendix.

160. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 8 commentary (American Judicature Soc'y 1985); see Appendix.

161. With certain exceptions, commission proceedings are confidential. See, e.g., N.Y. JUD. LAW § 45 (McKinney Supp. 1983); PA. CONST. art. 5, § 18(h).

162. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 16 (American Judicature Soc'y 1985); see Appendix.

163. See Getty, *supra* note 126.

164. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 14 (American Judicature Soc'y 1985); see Appendix.

165. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 16 (American Judicature Soc'y 1985); see Appendix.

166. See *supra* notes 56, 89, 142, and accompanying text.

167. See *In re Sears*, No. 81-1264, Unreported Order (Minn. July 26, 1982); *Matter of Anderson*, 312 Minn. 442, 252 N.W.2d 592 (1977) (court inferred authority to impose probation from legislative grant of authority to order removal); *supra* note 78; see also *In re Driscoll*, 85 Ill.2d 312, 423 N.E.2d 873 (1981) (Illinois Supreme Court imposed probationary sanction for alcoholic attorney in absence of specific legislative authorization as an experiment for dealing with impaired attorneys).

considering the disease—can have unfortunate implications.<sup>168</sup>

Guideline 3<sup>169</sup> takes the rehabilitative approach to its logical limit: it suggests that judicial conduct commissions attempt to prevent misconduct by becoming sensitive to symptoms of disability. A seemingly straightforward complaint alleging such misconduct as arrogance, inability to keep pace with the work of the court, or temper flare-ups may be indicative of a disability related to alcohol. Rather than simply punish the conduct (punitive approach) or wait for the judge to recognize his or her disability<sup>170</sup> and submit an application for disability retirement during a disciplinary proceeding (mitigating factor approach), Guideline 3 exhorts commissions to be sensitive to the symptoms and, if necessary, investigate further with professional assistance.

Commissions electing to follow the Guidelines will find guidance for each stage of the troublesome process. The Guidelines will help them to characterize certain allegations of misconduct as symptoms of disability and then proceed to an appropriate disposition. The Guidelines can assist in promoting a consistent, effective rehabilitative approach throughout the country.

## VI. CONCLUSION

Courts examining judicial discipline cases tend to use one of three approaches in imposing a disposition: the punitive approach, the rehabilitative approach, or the mitigating factor approach. The punitive approach ignores the existence of the underlying disease and simply punishes the behavior. Similarly, the mitigating factor approach also focuses on the behavior: if the behavior is such that public confidence in the judge is irretrievably lost, whether the judge is responsible for it is relevant only to the extent that voluntary retirement rather than removal is appropriate. The rehabilitative approach, in contrast, provides the most favorable disposition for an alcoholic judge. Rehabilitative dispositions address the underlying disease through conditions of probation which require a judge to seek treatment and remain sober. In addition, the public continues to benefit from an experienced jurist. The American Judicature Society has recently developed Guidelines for judicial conduct commissions and courts wishing to take a rehabilitative approach to judicial disability. These Guidelines provide potential

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168. See *supra* note 109 and accompanying text.

169. GUIDELINES FOR CASES INVOLVING JUDICIAL DISABILITY Guideline 3 (American Judicature Soc'y 1985); see Appendix.

170. See Wolf, *supra* note 148.

uniformity for courts and commissions adopting them. They also provide the opportunity to preserve the expertise of judicial officers while adequately protecting the public interest in a fit and competent judiciary.

APPENDIX  
*GUIDELINES FOR CASES INVOLVING  
JUDICIAL DISABILITY\**

1. DEFINITION

JUDICIAL DISABILITY EXISTS WHENEVER A PHYSICAL OR MENTAL IMPAIRMENT SIGNIFICANTLY INTERFERES WITH A JUDGE'S CAPACITY TO PERFORM JUDICIAL FUNCTIONS AND DUTIES.

*Commentary:* Of particular significance are those disabilities that impair a judge's capacity to exercise judgment, discretion, and self-control in the conduct of the judicial office. It has been held in several cases that the presence of willful misconduct is not a prerequisite to finding that a judge is disabled. In fact, in many instances of judicial disability, willful misconduct is not present. Judicial disability can be temporary or permanent, and can be caused by physical illness or injury, mental illness, stress, senility, and alcohol or drug abuse.

2. AUTHORITY

A JUDICIAL CONDUCT ORGANIZATION SHOULD HAVE AUTHORITY TO RECEIVE AND INITIATE COMPLAINTS, INVESTIGATE, CONDUCT HEARINGS, AND MAKE RECOMMENDATIONS TO A COURT OR TAKE ACTION ITSELF IN CASES CONCERNING JUDICIAL DISABILITY.

*Commentary:* A physical or mental disability that impairs a judge's capacity to perform judicial functions affects the administration of justice no less than does judicial misconduct, and the end result of judicial disability may be misconduct. Therefore, a judicial conduct organization is an appropriate agency to deal with judicial disability and should possess the authority over disability cases that it possesses over conduct cases.

Most states have established a judicial retirement and pension board or similar entity charged with administering a judicial retirement program. This guideline is not intended to affect the administrative authority of such entities in cases of voluntary application for disability retirement made in normal course and pursuant to retirement program provisions.

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### 3. ALERTNESS TO SYMPTOMS OF DISABILITY

A JUDICIAL CONDUCT ORGANIZATION SHOULD BE ALERT TO BEHAVIOR THAT IS SYMPTOMATIC OF JUDICIAL DISABILITY, AND SHOULD TAKE STEPS TO DEAL WITH IT TO PREVENT THE POSSIBLE OCCURRENCE OF MISCONDUCT.

*Commentary:* It is always preferable to prevent misconduct rather than to address it after it occurs. Accordingly, a judicial conduct organization should be sensitive to the symptoms of disability, so that treatment, counselling, or other preventive action can be taken prior to the occurrence of misconduct. The following behavior, particularly when it happens recurringly, may be indicative of a disability:

- A. Arrogant conduct
- B. Intolerance and lack of patience
- C. Harrassment of lawyers, litigants, and others
- D. Temper flare-ups
- E. Tyrannical actions
- F. Unsteadiness on the bench
- G. Falling asleep on the bench
- H. Violent mood changes
- I. Severe change in personality
- J. Emotionally unstable conduct (crying, inappropriate laughter, etc.)
- K. Periodic mental lapses
- L. Slurred or halting speech
- M. Missing an excessive amount of work
- N. Drunkenness
- O. Inability to keep up with the work of the court
- P. Generally bizarre conduct

The above list of symptoms is by no means exhaustive. A profitable method for members of a judicial conduct organization to become acquainted with a variety of disabling illnesses and their symptoms is to consult with health professionals, such as physicians, psychologists, and treatment counselors.

### 4. PROCEDURES

IN DEALING WITH CASES OF JUDICIAL DISABILITY, A JUDICIAL CONDUCT ORGANIZATION SHOULD FOLLOW THE SAME PROCEDURES THAT IT FOLLOWS IN DISCIPLINE CASES INSOFAR AS THOSE PROCEDURES ARE APPROPRIATE TO DISABILITY CASES.

*Commentary:* Usually, the same procedures used in discipline cases will be appropriate in disability cases. Thus, as a general rule, a judicial conduct organization should follow the same procedures in disability cases as are used in discipline cases. For example, procedures that relate to cross-examining witnesses and to the right to counsel ordinarily should be identical in discipline and disability cases. However, a judicial conduct organization should not be reluctant to modify the procedures used in discipline cases to comport with the relevant needs and concerns of disability cases.

## 5. PROMPTNESS

IN DEALING WITH DISABILITY CASES, A JUDICIAL CONDUCT ORGANIZATION SHOULD ENDEAVOR TO ACT AS PROMPTLY AS PRACTICABLE CONSISTENT WITH THE DICTATES OF SOUND DECISION MAKING AND FAIRNESS TO ALL CONCERNED PARTIES.

*Commentary:* Promptness in dealing with disability cases is obviously desirable to prevent judicial misconduct, and, in cases of treatable disability, to encourage the initiation of treatment as soon as possible. The goal of prompt action, however, should not be allowed to override the principles of sound and fair decision making.

## 6. ASSISTANCE PROGRAMS

ASSISTANCE PROGRAMS SHOULD BE AVAILABLE TO HELP JUDGES OVERCOME THEIR DISABILITIES.

*Commentary:* Judges should be fully eligible to participate in any assistance programs available to other state officers or employees. In some states, judges have been excluded from assistance programs for state officers or employees. There seems to be little if any reason for their exclusion, and steps should be taken to remedy this situation where it exists. Additionally, it may be advisable for judicial conduct organizations to encourage the creation or expansion of state assistance programs where assistance programs are lacking.

## 7. AWARENESS OF PROGRAMS

A JUDICIAL CONDUCT ORGANIZATION SHOULD BE AWARE OF TREATMENT, COUNSELLING AND OTHER

## PROGRAMS AVAILABLE TO JUDGES, AND SHOULD URGE JUDGES TO USE THOSE PROGRAMS.

*Commentary:* A judicial conduct organization should gather information on programs available to judges and should try to determine which programs have a reputation for success. In instances of disability, judges should be urged to participate in an appropriate program.

The information on available programs should also be disseminated generally among judges. This will encourage use of the programs even where disability does not come to the conduct organization's attention. Also, making known among judges the organization's interest in disability will encourage reporting of problems.

### 8. NOTIFICATION OF STATE AGENCIES

IN DEALING WITH CASES OF JUDICIAL DISABILITY, A JUDICIAL CONDUCT ORGANIZATION SHOULD NOTIFY AT THE EARLIEST POSSIBLE DATE, AND SHOULD COORDINATE ITS EFFORTS WITH, THE STATE AGENCIES, IF ANY, RESPONSIBLE FOR MAKING JUDICIAL ASSIGNMENTS AND FOR APPOINTING INTERIM JUDGES.

*Commentary:* The state court administrative agency or officer (e.g., court administrator, chief judge) should be notified when indications of disability come to the conduct organization's attention. The administrative officer or agency may conclude, with or without further inquiry, that the judge should be relieved of some or all assignments or reassigned to less strenuous or less critical functions. Such action is particularly appropriate where the potential for hardship to the judge or prejudice to litigants is apparent. In cases where such administrative action is not immediately warranted, early notification provides court administrators with an opportunity to monitor the situation and prepare to take any steps which become necessary as the case proceeds.

In some states, judicial conduct organizations may be restrained by rules of confidentiality from notifying other state agencies or officers about possible cases of disability. However, where other state agencies or officers, such as court administrators and chief judges, have a proper interest in knowing such information, it is advisable for rules of confidentiality to be amended to permit such notification. Where notification is allowed, the existing rules of

confidentiality should attach to the state agencies and officers who receive notification of possible disability cases.

## 9. INFORMAL ACTION

IT MAY BE APPROPRIATE, ESPECIALLY WHERE MISCONDUCT HAS NOT OCCURRED, FOR A JUDICIAL CONDUCT ORGANIZATION TO DEAL WITH A DISABILITY CASE ON AN INFORMAL BASIS.

*Commentary:* When a judicial conduct organization becomes aware of disability which does not yet warrant formal charges, one or more members should be delegated to contact the judge and attempt to find an informal remedy. Such remedy may include treatment, voluntary leave of absence, change in assignment, or other appropriate measures calculated to retain the services of a useful member of the judiciary and to avoid the stigma produced by formal disciplinary proceedings and sanctions. Where permanent disability is evident, the organization may urge the judge to retire voluntarily, avoiding formal action.

A judge who becomes disabled prior to eligibility for full retirement benefits may be reluctant to step down voluntarily. Therefore, judicial conduct organizations should encourage adoption of retirement provisions which allow reasonable benefits for judges who retire early due to disability.

## 10. REASSESSMENT

WHERE A DISABILITY CASE IS DEALT WITH ON AN INFORMAL BASIS, THE JUDICIAL CONDUCT ORGANIZATION SHOULD PERIODICALLY REASSESS THE CASE TO DETERMINE WHETHER FORMAL PROCEEDINGS ARE NECESSARY.

*Commentary:* Where the judicial conduct organization and a judge have informally arrived at an arrangement for dealing with the judge's disability, the organization should be careful to periodically reassess the situation. Disabilities may be recurrent or may proceed through stages of progressive impairment. These considerations are especially pertinent in cases of alcoholism and drug abuse. A judge's enrollment in an alcohol or drug treatment program does not always insure that the problem is solved.

This guideline is only applicable where the informal remedy in-

volves continued judicial service or prospective return from a leave of absence, and not where the judge permanently leaves office.

## 11. FORMAL PROCEEDINGS

WHERE A JUDICIAL CONDUCT ORGANIZATION HAS PROBABLE CAUSE TO BELIEVE THAT A JUDGE IS DISABLED, IT MAY INITIATE FORMAL PROCEEDINGS AGAINST THE JUDGE, IN WHICH CASE THE JUDGE SHOULD BE TEMPORARILY SUSPENDED, WITH PAY, FROM PERFORMING JUDICIAL FUNCTIONS PENDING THE OUTCOME OF THE PROCEEDINGS. THE FORMAL PROCEEDINGS SHOULD BE CONDUCTED AS PROMPTLY AS PRACTICABLE CONSISTENT WITH THE DICTATES OF SOUND DECISION MAKING AND FAIRNESS TO ALL CONCERNED PARTIES.

*Commentary:* The definition of probable cause in disability cases can be formulated by using analogous definitions from other areas of the law: Probable cause exists where, upon reasonable inquiry, there is found to exist an apparent state of facts which would induce a reasonably intelligent and prudent person to believe that the judge in question is disabled.

If, upon a finding of probable cause, it is determined that formal proceedings are warranted, interim suspension with pay is the most appropriate measure to avoid prejudice to litigants and maintain public confidence in the judiciary. Considerations of fairness and due process dictate that a judge under interim suspension should continue to receive pay pending final resolution of the matter, and that resolution of the charges should be prompt.

## 12. MEDICAL EXAMINATIONS AND RECORDS

IN INVESTIGATING JUDICIAL DISABILITY, A JUDICIAL CONDUCT ORGANIZATION SHOULD REQUEST THE JUDGE TO SUBMIT ALL PERTINENT MEDICAL AND OTHER RECORDS TO THE ORGANIZATION. IF A JUDGE DECLINES TO SUBMIT SUCH RECORDS, OR IF FURTHER INFORMATION IS NEEDED, THE JUDICIAL CONDUCT ORGANIZATION SHOULD REQUEST THE JUDGE TO SUBMIT TO INDEPENDENT MEDICAL OR OTHER EXAMINATIONS AT THE EXPENSE OF THE ORGANIZATION. WHERE AN INDEPENDENT EXAMINA-

TION OF A JUDGE IS MADE, A COPY OF ITS RESULTS SHOULD BE GIVEN TO THE JUDGE.

*Commentary:* Records pertinent in disability cases, especially medical and psychiatric records, should be made available to the judicial conduct organization during a disability investigation. A judge who submits to an independent examination is entitled to know the results so that those results may be challenged or taken into account in preparing a defense.

### 13. FAILURE TO SUBMIT TO EXAMINATION

THE FAILURE OR REFUSAL OF A JUDGE TO SUBMIT TO AN INDEPENDENT EXAMINATION REQUESTED BY A JUDICIAL CONDUCT ORGANIZATION, UNLESS DUE TO CIRCUMSTANCES BEYOND THE JUDGE'S CONTROL, SHOULD PRECLUDE THE JUDGE FROM SUBMITTING REPORTS OF MEDICAL EXAMINATIONS DONE ON THE JUDGE'S BEHALF, AND THE ORGANIZATION MAY CONSIDER SUCH FAILURE OR REFUSAL AS EVIDENCE THAT THE JUDGE HAS A DISABILITY.

*Commentary:* A judge who fails or refuses to supply requested records or undergo independent examination denies the conduct organization access to important sources for reaching a sound determination. In such cases, the judge should bear an increased burden of rebutting evidence of disability. In meeting that burden, a judge who refuses or fails to submit to an independent examination should not have at his or her disposal the results of examinations which the judge initiates but which cannot be challenged by independent examiner's results.

### 14. DISPOSITION

IN CASES WHERE IT IS DETERMINED THAT JUDICIAL DISABILITY EXISTS, A RANGE OF MEASURES SHOULD BE AVAILABLE, INCLUDING REPRIMAND, CENSURE, VOLUNTARY LEAVE OF ABSENCE, SUSPENSION, VOLUNTARY AND INVOLUNTARY RETIREMENT, AND REMOVAL.

*Commentary:* Because there is a wide variety of disability cases, and because each case may involve a wide variety of factors affecting its disposition, a judicial conduct organization should have available a comprehensive range of measures.

## 15. FACTORS AFFECTING DISPOSITION

IN DETERMINING WHAT DISPOSITION IS MOST APPROPRIATE IN A DISABILITY CASE, THE JUDICIAL CONDUCT ORGANIZATION SHOULD TAKE INTO ACCOUNT THE TYPE OF DISABILITY INVOLVED, THE JUDGE'S GOOD FAITH PARTICIPATION IN TREATMENT PROGRAMS, THE EXTENT TO WHICH THE DISABILITY HAS BEEN AND CAN BE REMEDIED, THE NATURE OF THE CONDUCT INVOLVED, AND THE EXTENT TO WHICH THE CONDUCT WAS UNINTENTIONAL.

*Commentary:* Sanctions in judicial misconduct cases generally imply at least some degree of official disapprobation of a judge's conduct. Such an implication may be inappropriate in disability cases that involve no misconduct, minor misconduct, or misconduct where the disability was the dominant cause and the judge cannot reasonably be held accountable for misbehavior. In such cases, retirement, for example, is more appropriate than removal, paid leave of absence more appropriate than suspension without pay.

## 16. DISPOSITION—TEMPORARY DISABILITY

WHERE THE DISABILITY IS TEMPORARY, ORDINARILY THE MOST APPROPRIATE DISPOSITION IS A LEAVE OF ABSENCE, SUSPENSION, REPRIMAND AND/OR CENSURE.

*Commentary:* In cases of temporary disability, absent serious misconduct, the most appropriate course of action is treatment during a paid leave of absence. The judge should be encouraged to voluntarily take a leave of absence and seek treatment. If the judge will not voluntarily cooperate, interim suspension should be ordered, and, if the judge refuses to seek treatment, the judicial conduct organization should seek the judge's involuntary retirement or removal from office.

The sanctions of censure and reprimand also should be available for use in appropriate circumstances, either alone or coupled with another measure.

## 17. DISPOSITION—PERMANENT DISABILITY

WHERE DISABILITY IS PERMANENT, ORDINARILY

**THE MOST APPROPRIATE MEASURE IS RETIREMENT,  
REMOVAL, REPRIMAND, AND/OR CENSURE.**

*Commentary:* Ordinarily, in cases of permanent disability involving a judge who is unable to perform judicial functions at an acceptable level, the most appropriate measure is voluntary retirement. If the judge will not voluntarily retire, the judicial conduct organization should seek the judge's involuntary retirement or removal from office.

The sanctions of censure and reprimand also should be available for use in appropriate circumstances, either alone or coupled with another measure.