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There is currently an expanding effort to curb and discipline what is sometimes perceived as errant judicial behavior.³⁹ This is no doubt the product of society's consuming quest to police all of its officers.⁴⁰ Thus, judicial disciplinary commissions have become a popular vehicle for reviewing judicial behavior.⁴¹

Nothing could more personally involve a judge than a challenge to judicial behavior before a judicial disciplinary body.⁴² Such a challenge is akin in gravity to a charge of malpractice or sixth amendment ineffectiveness of counsel.⁴³ Few persons would consider entering such a risky arena without counsel, but many judges do so, mainly for financial reasons. Moreover, it is questionable whether an attorney general or the equivalent is the appropriate defender of a judge whose actions are being challenged by another arm of the state - a disciplinary commission.⁴⁴ The judge's remaining tolerable choices are to retain private counsel or to impose on a professional acquaintance for an indulgence. Faced with such a choice, the judge may well be tempted to appear *pro se* rather than face the cost of private counsel or the embarrassment of imposing on a friend.

Aside from inquiries into personal and private misconduct, there is the temptation in some quarters to subject decisions of trial judges to review by disciplinary bodies.⁴⁵ While the line between bench misbehavior and trial error may be troublesome in a few cases, it is unthinkable that a judge should be called before a disciplinary body for asserted errors reviewable on appeal. Judicial disciplinary proceedings are not a substitute for or a corollary to an appeal, and bodies entrusted to conduct those proceedings must avoid being used in such a manner.⁴⁶ Indeed, one could argue that judges have an obligation to preserve judicial independence by resisting, with the force of prohibitory process if necessary, any attempt by a disciplinary body to bring pressure to bear when it invades the appellate process or threatens judicial independence. By inference, the American Bar Association's approved draft of *Standards Relating to Judicial Discipline and Disability Retirement (ABA Standards)*⁴⁷ recognizes this proposition by stating that "[c]laims of error should be left to the appellate process."⁴⁸

It is disappointing to observe, however, that the ABA Standards have not recognized the judge's problem in securing legal representation in the disciplinary context. Yet, the ABA Standards state that a "judge's conduct on or off the bench" may be the



subject of judicial discipline.⁴⁹ Even more distressing is that, despite an acknowledgment that the judge has the right to counsel in a disciplinary proceeding,⁵⁰ the ABA Standards state that a judge's "attorney's fees should not be at public expense."⁵¹ Moreover, not only must the judge face the cost of retaining his own counsel, but he may be assessed the costs of the proceeding as a sanction.⁵²

In contrast, under the ABA Standards, a judge appearing in a disability retirement proceeding not only has the right to counsel, but, if he appears before the commission without one, the commission is obligated to appoint an attorney at public expense to represent the judge.⁵³ It is commendable that the ABA Standards recognize the public's responsibility to provide such representation if the judge does not. But why should this policy not be extended to disciplinary proceedings? Perhaps the reason is that an asserted disability does not involve presumed personal fault, which seems to be the case at the beginning of disciplinary proceedings.

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Footnotes

³⁹. See, e.g., W. BRAITHWAITE, WHO JUDGES THE JUDGES? (1971); Comment, *Judicial Discipline, Removal and Retirement*, 1976 WIS. L. REV. 563. See also Traynor, Who Can Best Judge the Judges, 53 VA. L. REV. 1266 (1967).

⁴⁰. As former Judge Marvin Frankel has noted: "Judicial bad manners is a critical problem which renders a disciplinary technique vital. Although circumstances will not normally permit or justify removal, the public needs a tool to assert the standards of decency." Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117, 1123 (1966) (footnotes omitted). For an examination of cases decided under the Code of Judicial Conduct, see Thode, *The Code of Judicial Conduct - The First Five Years in the Courts*, 1977 UTAH L. REV. 395.

⁴¹. See, e.g., Gasperini, Anderson & McGinley, *Judicial Removal in New York. - A New Look*, 40 FORDHAM L. REV. 1 (1971); Gillis & Fieldman, *Michigan's Unitary System of Judicial Discipline. A Comparison with Illinois' Two-Tier Approach*, 54 CHI.-KENT L. REV. 117 (1977); Comment, *Judicial Tenure in the District of Columbia*, 27 CATH. U.L. REV. 543 (1978); Note, *Discipline of Judges in Maryland*, 34 MD. L. REV. 612 (1974); Note, *Judicial Discipline - The North Carolina Commission System*, 54 N.C.L. REV. 1074 (1976); Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967).



⁴². See generally Overton, *Grounds or Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI-KENT L. REV. 59, 61-65 (1977). See also Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190 (1976).

⁴³. Cf. *In re Ruffalo*, 390 U.S. 544, 551 (1968) (disbarment proceedings against lawyer are quasi-criminal in nature). See also *Spevack v. Klein*, 385 U.S. 511, 514-16 (1967) (disbarment of lawyer is a penalty such that right against self-incrimination attaches and person cannot be penalized for invoking it).

⁴⁴. See notes 54-59 and accompanying text *infra*.

⁴⁵. The resignation of Judge Charles W. Halleck from the Superior Court of the District of Columbia was inextricably intertwined with the disciplinary proceedings pending against him. See Comment, *supra* note 41, at 543, 561-77.

⁴⁶. Chief Justice Ben F. Overton of the Supreme Court of Florida has noted:

To allow disciplinary proceedings to evaluate judicial decisions could force the judge to walk an ill-defined and standardless line between propriety and impropriety. Clearly, such a sword over a judge's head would have a tendency to chill his independence. A judge would have to be as concerned with what is proper in the eyes of the disciplinary commission as with what is the just decision.

Overton, *supra* note 42, at 66.

⁴⁷. ABA STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT (1978) [hereinafter cited as ABA STANDARDS].

⁴⁸. ABA STANDARDS § 3.4.

⁴⁹. *Id* § 1.2 commentary.

⁵⁰. *Id* § 4.17. See *In re Complaint Against "Judge Anonymous,"* 590 P.2d 1181, 1188 (Okla. 1978), where the court held that "fundamental fairness and fair play dictate that Judge Anonymous be permitted to appear as a witness with counsel" in a hearing before a disciplinary council on a complaint against him.

⁵¹. ABA STANDARDS § 5.29 commentary. For a defense of this provision, see Peskoe, *Procedures for Judicial Discipline. Type of Commission, Due Process and Right to Counsel*, 54 CHI.-KENT L. REV. 147, 164 (1977).

⁵². ABA STANDARDS § 6.7(g). In a disciplinary proceeding, the expense of witnesses are to be paid by the party calling the witnesses. If the judge is exonerated and can prove financial hardship, he may be relieved of the burden. *Id* § 5.26(b).

⁵³. *Id* § 8.3.

