THE JUDGE NEEDS A LAWYER

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> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom and would destroy that independence without which no judiciary can be either respectable or useful.[1]

Despite our longstanding commitment to the above principle, a present-day judge, particularly a trial judge, encounters a new personal and financial risk. I do not mean the diminished purchasing power of judicial salaries which often fail to keep pace with inflation. I refer to a job hazard brought about by the litigation explosion and its handmaiden — the redress neurosis. Whatever a judge does in the courthouse, he runs a substantial risk of becoming embroiled in litigation where he is no longer the dispute-resolver, but rather, the object of the complaint. When this occurs, serious problems arise respecting the nature and source of legal representation for the judge.

It has not been uncommon for judges to be the adversary when parties to a lawsuit have brought extraordinary writs from appellate courts concerning a ruling in their case pending before the judge.[2] But increasingly, the judge is apt to be sued in separate private actions for damages or equitable relief.[3] Moreover, with the advent of judicial disability and tenure

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1. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

2. *See generally* Note, *Mandamus as a Means of Federal Interlocutory Review*, 38 OHIO ST. L.J. 301 (1977); Comment, *The Use of Extraordinary Writs for Interlocutory Appeals*, 44 TENN. L. REV. 137 (1976).

3. *See* notes 8-38 and accompanying text *infra*. *See generally* Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980); Note, *Immunity of Federal and State Judges from Civil Suit — Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727 (1977).

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commissions, the judge may be called upon to respond to complaints before these disciplinary bodies.[4] The purpose of this article is to expose and explore the scope of the ethical and practical dilemmas created for the judge by the necessity of obtaining legal representation due to this rapidly growing phenomenon of suits and complaints against judicial officers.

I. SUITS AGAINST JUDGES AND THE IMMUNITY DOCTRINE

It is often believed that judges are absolutely immune from damage actions under the principles established by the Supreme Court in *Bradley v. Fisher*.[5] In *Bradley* the Court held that, when a judge performs "judicial acts," he cannot be held personally liable for such acts in a civil action.[6] The Court recognized that exposure to personal liability would destroy judicial independence, the hallmark of the administration of justice.[7] Yet, despite this long-established precedent, there is no guarantee that claimants are not going to file suit for relief from alleged judicial wrongs. When a suit is filed, the judge must still defend the action and obtain counsel in order to apply the judicial immunity defense.

One traditional mechanism through which the acts of trial judges have been subject to appellate scrutiny has been the writ of mandamus.[8] This

4. *See* notes 39-53 and accompanying text *infra*. *See generally Symposium — Judicial Discipline and Disability*, 54 CHI.-KENT L. REV. 1 (1977).

5. 80 U.S. (13 Wall.) 335 (1871). In an earlier case, Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), the Court appeared to carve out an exception to the immunity doctrine "where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." *Id.* at 537. Any such exception was expressly rejected in *Bradley*. 80 U.S. (13 Wall.) at 350-51.

6. Judicial immunity attaches only when the judge acts in a discretionary, rather than a ministerial, capacity. *See Ex parte* Virginia, 100 U.S. 339, 348 (1879). Moreover, the judge must have subject matter jurisdiction over the action. The Court in *Bradley* distinguished acts in the absence of jurisdiction from acts in excess of jurisdiction as follows:

> Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

80 U.S. (13 Wall.) at 351-52. *See* Stump v. Sparkman, 435 U.S. 349, 356-59 (1978).

7. 80 U.S. (13 Wall.) at 348-49. *See also* Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104 (1976).

8. The All Writs Act, 28 U.S.C. § 1651(a) (1976), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *See* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE:

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remedy is used to confine the judge to the proper exercise of discretion or to order its exercise where it has been withheld.[9] In *Kerr v. United States District Court for the Northern District of California*,[10] the government had sought a writ of mandamus from the United States Court of Appeals for the Ninth Circuit to vacate a district court order granting the plaintiff's discovery motion for the production of prison documents. In upholding the Ninth Circuit's denial of the writ, the Supreme Court reaffirmed the long-established policy that a "writ will issue only in extraordinary circumstances."[11] The Court recognized that an important reason for limiting the use of mandamus is that such actions "have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him in the underlying case."[12] One could reason that, in most instances, the petition for writ of mandamus is only nominally against the judge. Consequently, it is appropriate to leave the matter of representation in the appellate court to counsel for the parties in the trial proceedings. However, the Supreme Court in *Kerr* acknowledged the anomalies in this situation and recognized that the judge may in fact have a personal stake in the outcome and thus may require personal representation. Moreover, the judge may believe that counsel for the parties in the case will not capably advocate his interests.[13]

Absolute judicial immunity is disappearing in favor of more limited immunity, depending on the nature of the judicial act involved.[14] Classes of

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JURISDICTION §§ 3932-3936 (1977); Note, *Supervisory and Advisory Writs Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

9. *See, e.g.*, Will v. United States, 389 U.S. 90 (1967); Schlagenhauf v. Holder, 379 U.S. 104 (1964); La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

10. 426 U.S. 394 (1976).

11. *Id.* at 403. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

12. 426 U.S. at 402.

13. Under rule 21 of the Federal Rules of Appellate Procedure, all parties in the trial court, except for the petitioner, are deemed respondents for all purposes. As a further means of relieving the trial judge from responding, and in recognition that most petitions are denied, rule 21 also allows denial of the petition without an answer and provides for ordering an answer from the respondents if the appellate court is "otherwise" inclined. FED. R. APP. P. 21.

This is a partial answer to the trial judge's need for counsel but it does not solve the problem of the perceived less capable lawyer. Moreover, for the balance of the proceedings in the trial court, one party is in the unique position, for practical purposes, of having been the trial judge's lawyer. To the lay litigant, this surely appears suspect. The rule 21 provision of naming some parties as additional respondents does not remedy this seeming impropriety.

14. *See* Stafford, *An Overview of Judicial Immunity*, STATE CT. J. 3, 5 (Summer 1977). *See also* Comment, *An Intolerable Accommodation: A Fresh Look at the Immunity Doctrine*, 27 AM. U.L. REV. 863 (1978).

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allegations where immunity from suit may not exist include: acts evidencing a lack of good faith; acts of a criminal nature;[15] acts in the absence of authority or beyond jurisdiction;[16] and acts of an administrative or ministerial nature.[17] Moreover, an increasing number of personal actions against judges are being brought under 42 U.S.C. § 1983 (1976),[18] alleging denial of constitutionally protected rights under color of law.

The extent of judicial immunity under section 1983 was recently explored in *Stump v. Sparkman*.[19] This suit was brought against a state judge who had approved a parent's petition for sterilization of her "somewhat retarded" fifteen-year-old daughter. In reversing the Seventh Circuit's determination that the judge had not acted within his jurisdiction, the Supreme Court recognized that judicial immunity from damage suits is crucial to the survival of an independent judiciary. Thus, the Court established an immunity rule for judicial acts performed within the court's com-

15. *See, e.g.*, Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974). The court in *Gregory* held that "[t]he [judge's] decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature." *Id.* at 64. Thus, the judge was not absolutely immune from a suit for assault and battery. *See generally* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972). *See also* Strawbridge v. Bednarik, 460 F. Supp. 1171 (E.D. Pa. 1978); Luttrell v. Douglas, 220 F. Supp. 279 (N.D. Ill. 1963).

16. *See, e.g.*, Zarcone v. Perry, 572 F.2d 521 (2d Cir. 1978). In *Zarcone*, the Second Circuit affirmed a district court's award of $80,000 in actual damages against a judge and a sheriff and $60,000 in punitive damages against the judge under 42 U.S.C. §§ 1983, 1988 (1976), because the judge had abused his official powers. *See also* Raitport v. Provident Nat'l Bank, 451 F. Supp. 522 (E.D. Pa. 1978); O'Bryan v. Chandler, 356 F. Supp. 719 (W.D. Okla. 1973), *aff'd*, 496 F.2d 403 (10th Cir.), *cert. denied*, 419 U.S. 986 (1974); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971); Rhodes v. Houston, 202 F. Supp. 624 (D. Neb.), *aff'd*, 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 383 U.S. 971 (1965).

17. *See, e.g.*, Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). The *Lynch* court found the defense of judicial immunity inapplicable when the judge was presiding over a county fiscal court which was actually a county legislative and administrative body. *See also* Atcherson v. Siebenmann, 458 F. Supp. 526 (S.D. Iowa 1978); Doe v. Lake County, Indiana, 399 F. Supp. 553 (N.D. Ind. 1975).

18. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See Castro, *Innovations in the Defense of Official Immunity Under Section 1983*, 47 TENN. L. REV. 47 (1979); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977); Comment, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95; Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969).

19. 435 U.S. 349 (1978). *See* Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833 (1978).

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petence to act.[20] In barring the recovery of damages, the Court reasoned that judges must be able to act without fear of personal consequences, including the expenses incident to a suit, in controversial cases.[21]

The Court, in *Stump*, identified two factors to be considered in determining whether a judge's act is in fact "judicial." First, the nature of the act itself must be examined to see if it is a function normally performed by the judge. Second, the expectations of the parties should be scrutinized to determine whether they dealt with the judge in his official capacity.[22] While this may be the legal rule, there will always be questions as to what constitutes "judicial acts" and what is within the court's competence to act. Thus, although the judge may ultimately prevail, doing so will be a long and expensive process requiring counsel every step of the way.

While the doctrine of judicial immunity bars damage actions under section 1983, it does not necessarily preclude suits under section 1983 for declaratory or injunctive relief.[23] In one recent case, *Consumers Union of the United States, Inc. v. ABA*,[24] suit was brought under section 1983 against the Virginia State Bar, the Supreme Court of Virginia, the court's chief

20. 435 U.S. at 357-60. In an earlier case, Pierson v. Ray, 386 U.S. 547 (1967), the Supreme Court held that the common law principle of judicial immunity was not abrogated by the enactment of § 1983, noting that errors made by a judge respecting the judicial process could be corrected on appeal. In reaffirming the immunity principle espoused in *Bradley*, the Court stated that imposing liability on judges under § 1983 would result in intimidation and prevent "principled and fearless decision-making." *Id.* at 554. *See generally* Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. Rev. 615 (1970).

21. 435 U.S. at 363-64. Although this was the articulated justification for the Court's decision, other considerations such as preservation of judicial dignity, judicial authority, and finality of judicial decisions have been suggested as underpinnings for judicial immunity. *See* Nagel, *Judicial Immunity and Sovereignty*, 6 Hastings Const. L.Q. 237 (1978). *See generally* Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Ariz. L. Rev. 549, 579-88 (1978).

22. 435 U.S. at 362.

23. *See* Jacobson v. Schaefer, 441 F.2d 127, 130 (7th Cir. 1971). The question of whether the immunity principle extends to actions against judges for declaratory or injunctive relief has been the subject of considerable dispute. One line of cases holds that the doctrine of judicial immunity is not a bar to such relief. *See, e.g.*, Mills v. Larson, 56 F.R.D. 634 (E.D. Pa. 1972); Stambler v. Dillon, 288 F. Supp. 646 (S.D.N.Y. 1968). Other courts, however, maintain that the immunity doctrine bars suits for injunctive or declaratory relief. *See, e.g.*, Woolbridge v. Virginia, 453 F. Supp. 1333 (E.D. Va. 1978); Smallwood v. United States, 358 F. Supp. 398 (E.D. Mo.), *aff'd*, 486 F.2d 1407 (8th Cir. 1973); MacKay v. Nesbett, 385 F. Supp. 498 (D. Alaska 1968), *aff'd*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969). Except for official action in respect to bar discipline, the Supreme Court left this issue open in its recent decision in Supreme Court of Va. v. Consumers Union of the United States, 48 U.S.L.W. 4620, 4624 (June 2, 1980).

24. 470 F. Supp. 1055 (E.D. Va. 1979) (three-judge court), *vacated and remanded*, Supreme Court of Va. v. Consumers Union of the United States, Inc., 48 U.S.L.W. 4620 (June 2, 1980).

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justice, and several officials of the state bar association, seeking injunctive and declaratory relief respecting the publication of information concerning the practices and fees of attorneys. The three-judge court granted the relief sought and also awarded the plaintiffs attorney's fees under the Civil Rights Attorney's Fees Act of 1976.[25]

In awarding attorney's fees, the trial court held that the Act was intended by Congress to abrogate judicial immunity respecting the awarding of such fees.[26] Thus, the court ruled that, while the judges would not be personally liable, they would be liable in their official capacity,[27] implying that the attorney fee award would actually be paid by the state.[28] On appeal, the Supreme Court held the attorney fee award improper where it was based upon the failure of the Virginia court to exercise its rulemaking authority. However, an award against the Virginia court when acting in its "direct enforcement role" in disciplining, suspending, and disbarring attorneys was approved by the Court, thereby, implying official liability of judges in similar circumstances.[29]

Suits against judges and challenges to the doctrine of judicial immunity arise in other contexts as well. For example, the Supreme Court recently denied certiorari in *Rivera v. Cruz*,[30] a case in which an attorney alleged that the defendants, members of the Puerto Rico Supreme Court, could not participate in a hearing on his appeal. The trial court had summarily dismissed his complaint, which sought to void his suspension from practicing law, as not presenting a justiciable controversy.

Another and relatively new risk of exposure to suit is presented by what might be called a "constitutional tort action," where the immunity defense appears open to question. For example, in *Davis v. Passman*,[31] the plaintiff alleged that a congressman had violated the fifth amendment by dismissing her from his staff solely on the basis of her sex. Damages were sought in the form of backpay, and jurisdiction was predicated only on the existence of a general federal question under 28 U.S.C. § 1331(a) (1976).[32]

25. 42 U.S.C. § 1988 (1976) provides in pertinent part: "In any action or proceeding to enforce a provision of Section . . . 1983 . . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *See* Hutto v. Finney, 437 U.S. 678 (1978).

26. 470 F. Supp. at 1061.

27. *Id.* at 1059.

28. *See id.* at 1061.

29. Supreme Court of Va. v. Consumers Union of the United States, Inc., 48 U.S.L.W. 4020, 4025 (June 2, 1980).

30. P.R. Sup. Ct. (Feb. 1, 1979) (summary at 48 U.S.L.W. 3134), *cert. denied*, 100 S. Ct. 143 (1979).

31. 99 S. Ct. 2264 (1979).

32. *Id.* at 2269.

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Although Congress has historically exempted itself from coverage under the various civil rights acts, the Supreme Court held that a right of action against the congressman existed under the fifth amendment[33] and that damages would be available if the plaintiff prevailed on the merits.[34]

The *Davis* Court recognized that all government officers are bound to obey the Constitution but noted that some "special concerns" arise in a "suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct . . . ."[35] Consequently, it may be argued that *Davis*, when coupled with the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*,[36] establishes a "constitutional tort" equally applicable to the judiciary for violations of fourth and fifth amendment rights.[37] The existence or extent of judicial immunity from such suits is yet to be litigated. However, it is not difficult to imagine that a judge may find himself required to respond to a suit alleging similar discrimination in hiring policies or staff administration.[38]

II. Judicial Disciplinary Commissions

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]

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33. *Id.* at 2276.

34. *Id.* at 2278. *See generally* Note, *"Damages or Nothing," The Efficacy of the Bivens-Type Remedy*, 64 Cornell L. Rev. 667 (1979).

35. 99 S. Ct. at 2277.

36. 403 U.S. 388 (1971). In *Bivens*, the Court held that there was an implied right of action for damages against federal officials when fourth amendment rights are violated under color of law. *Id.* at 397.

37. The concept of a "constitutional tort" was reaffirmed in Butz v. Economou, 438 U.S. 478 (1978). *Butz* is also significant, however, for its holding that the function of the public official's office controls the nature of the immunity. *Id.* at 508.

38. *See generally* Davis v. Passman, 99 S. Ct. at 2279 (Burger, C.J., dissenting).

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*

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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 disci-

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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 for 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.

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plinary 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.

III. Defending the Judge

Most states and the federal government provide judges with legal representation when they are sued in their official capacity.[54] In 1977, the Na-

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.

54. In the federal system the United States Attorney, or a member of his staff, usually represents federal judges sued in their official capacity.

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tional Center for State Courts compiled data regarding state judicial representation. Samuel P. Stafford summarized the results of the study as follows:

> [T]he data showed that the office of the attorney general serves as the official counsel for all but six states and one territory (The Virgin Islands have no provisions for legal representation). In the District of Columbia, corporation counsel handles legal representation of judges; in Kansas, local or private counsel provide legal representation; and in Montana, the Insurance and Legal Division. The legal department of the State Court Administrator's Office provides legal service for Pennsylvania judges; in South Dakota and Texas, judges challenged in their official capacity must choose a private attorney to represent them.
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> With two exceptions, local or state funds cover the costs of official counsel for judges. In South Carolina, either state money or the state's liability insurance finances any judicial representation. In Texas, the individual judge is personally responsible for securing and paying for counsel.
>
> When substitute legal counsel is necessary, all but six of the states use private attorneys. The six exceptions are Illinois (special assistant), Kansas (attorney general when requested and if there is a conflict), Michigan (special or county attorney), Virginia (special counsel), and Wyoming (local or state bar association).
>
> Six states have provisions requiring individual judges to pay for any substitute counsel if the official counsel declines. In Louisiana, Missouri, Oklahoma, and Texas, the challenged judge is personally responsible for funding substitute counsel. In Michigan and New York, judges who prefer private attorneys as substitute counsel must personally assume all costs.[55]

Although legal representation for judges presently exists, there are numerous difficulties and conflicts when a public attorney represents a judge-defendant.[56] The tremendous workload facing every state and federal legal officer is readily apparent. The judge's defense must wait its turn or, if given priority, other work will be neglected. Consider also that due to the nature of government service by lawyers, the judge's defense will generally

55. Stafford, *supra* note 14, at 37.

56. Both federal and state courts have rejected challenges to the legality of representation of judges by public legal officers. *See, e.g.*, Weiss v. Bonsal, 344 F.2d 428 (2d Cir. 1965); Booth v. Fletcher, 101 F.2d 676 (D.C. Cir.), *cert. denied*, 307 U.S. 628 (1938); Moity v. Louisiana State Bar Ass'n, 414 F. Supp. 180 (E.D. La. 1976); Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877 (1921); O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 50 A.2d 10 (1946); Heath v. Cornelius, 511 S.W.2d 683 (Tenn. 1974).

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be in the hands of less experienced, though dedicated, attorneys. Surely an overworked, understaffed, and less experienced public legal office is not the best source for a judge's defense where his reputation and monetary liability are at stake.

The appearances of impropriety and judicial bias that may result from the subsequent appearance before the judge of an attorney who defended him presents a more subtle, but insidious problem.[57] This dilemma is not limited to the government's legal officers; it also applies to privately retained counsel.[58] But the problem is exacerbated because the government appears much more regularly before the court.

Finally, the governmental legal officer cannot serve as a true personal counsel to the judge. His duties are first and foremost to the public and not to the judge as a client. Clearly, the government's attorney has a different relationship with the client-judge than a private lawyer would. Moreover, there are significant practical and ethical considerations extant if the judge is damaged by malpractice. Such a relationship also can be rife with conflict of interest questions.

IV. Conclusion

In view of the problems created for judges by the existing forms of legal representation and their impact on the integrity of the judicial process, it may be that a publicly financed "judicial defender" is needed for judges.[59] The busy workload of the state's attorneys' offices or their federal counterpart, combined with their inability to provide a true attorney-client relationship with the judge, makes them a less than appropriate personal counsel. Retaining private counsel is an option for the judge, but it poses a severe financial burden unless a publicly financed insurance plan is adopted. This is probably the ideal solution.

A judge should not be left to the benevolent dispensation of legal representation by either a lawyer friend or an executive branch lawyer. He is,

57. *See* Peskoe, *supra* note 51, at 162-63.

58. ABA Standards § 4.17 commentary states:

> While the judge has an absolute right to counsel of his own choice at all stages of the proceeding, it is inappropriate for the judge, thereafter, to hear matters in which his counsel appears; at least until considerable time has passed between the commission proceedings and the appearance. When it happens, the judge should disqualify himself.

59. This idea was suggested by Allen Ashman, Assistant Executive Director of the American Judicature Society, at the Sixth National Conference for Judicial Conduct Organization in Phoenix, Arizona, on November 8-11, 1978. *See* Hoelzel, *A Report on the Sixth National Conference for Judicial Conduct Organization*, 62 Judicature 362 (Feb. 1979).

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like anyone else, entitled to have a professional relationship with all the attendant rights and obligations.

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