

A Guide for North Carolina Judges: Dealing with an Impaired Lawyer

THE JUDGE'S DILEMMA

Public perception of our legal system is not the best. While many of these perceptions are, perhaps, ill-founded, there may be nothing that undermines our system more than an intoxicated attorney seeking to represent a client. The client is ill-served, the public snickers, and the court is embarrassed. Just as embarrassing but not as obvious is the depressed lawyer who continues month after month to avoid returning a client's call. Judges are trained in the law, not in chemical addiction, depression, or other mental illness. Yet it is the judge who will, through his or her action or inaction, decide whether an encounter with an impaired lawyer will turn out for the benefit or the detriment of the client, the lawyer, and the court system.

QUESTIONS AND ANSWERS

These questions and answers are designed to help a judge know how to turn a potentially harmful situation for the good.

Judge's Question: Why do I hesitate to take action when a lawyer who may be impaired appears in court?

Answer: First, a judge may not like to admit it, but he or she may not know what to do or where to turn to get help. Second, a judge's willingness to help is often hindered by his or her own personal views about alcohol, depression, or mental illness. The judge may view the lawyer's problem as a moral deficiency and not a medical problem that needs treatment. Or, the judge may be ambivalent about his or her own relationship to alcohol or mental illness. Either way, the judge's ambivalence may affect how he/she deals with alcohol problems, depression, or mental illness in other members of the legal profession. The result may be inaction.

Judge's Question: If I am not sure what to do, why should I do anything?

Answer: A judge is really under an obligation to take action when an impaired lawyer practices before him or her. The North Carolina Code of Judicial Conduct, Canon 3, provides that "[a] judge should maintain order and decorum in proceedings before him." Similarly, a judge is required to be patient, dignified, and courteous to those with whom a judge comes in contact with in his or her official capacity, and "should require similar conduct of lawyers . . ." Canon 3 Section A (3). Additionally, Canon 3 Section B (3) authorizes a judge to "take or initi-

ate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." A lawyer seeking to represent a client while intoxicated is unprofessional, undignified, and contemptuous of the court.

Judge's Question: If I see an impaired lawyer in my court and he or she is doing an adequate job for the client, isn't it better just to leave the matter alone?

Answer: No, for three reasons. First, you are not helping the client. While the lawyer may appear to be doing an adequate job, it is impossible for the judge to know what the lawyer might be able to do if he or she were not impaired. A person with a significant chemical addiction will have a greatly increased tolerance for alcohol. Because of this, he or she may appear to function normally. However, unrelated to tolerance is the adequacy of brain functioning. Brain functioning is impaired when a person is intoxicated, especially that which requires analytical reasoning. It is through analytical reasoning that a lawyer uses his or her thinking ability and knowledge of the law to assist the client. This type of brain functioning is, in fact, what the lawyer is primarily hired for.

Second, you are not helping the lawyer. One of the characteristics of chemical addiction is that it affects the person's ability to see clearly the impact of addiction on his or her life. This self-deception, or denial, is caused by the fact that on one hand, the person's brain is telling the lawyer that he or she has a physiological need for alcohol in order to survive; and on the other, his or her intoxicated behavior is creating problems that conflict with the alcohol use. The mind's way out is to deny that a problem is being created or to minimize, rationalize, or blame someone else for the results of the alcoholic behavior. Thus, the more someone is allowed to escape the full consequences of their behavior, the more the judge becomes a partner in the lawyer's denial. Normally the lawyer will only "wake up" to his or her need for help when he or she cannot escape the consequences of alcoholically driven behavior.

Third, every time a judge tolerates an intoxicated or otherwise impaired lawyer practicing in his or her court, a standard is set that the legal system itself does not show respect for the public decorum of the courtroom. And since the rule of law is itself a set of guidelines for the public decorum of society, the public readily draws the conclusion that

the system is hypocritical. In other words, in such circumstances, the manner in which the courtroom is run undermines public respect for the rule of law.

Judge's Question: I understand that I need to take some form of action—what should I do?

Answer: Since you are not trained in dealing with addiction or mental health, get some help. You may call PALS (1-800-720-PALS) for alcohol or other addiction problems or FRIENDS (1-877- 627-3743) for mental health issues. And, while you are not a trained addictions professional, you do play a key role in assistance being provided to the lawyer. Your critical role is to help bring a reality check to the lawyer—to force him or her to realize that they need help. There are many ways this can be done depending on the particular situation. Here are some examples of how judges have effectively dealt with impaired lawyers:

A. Arrange with PALS or FRIENDS to have committee members come and talk with the lawyer in your chambers.

B. Hold the lawyer in contempt for impaired conduct and allow the contempt to be purged if the lawyer satisfactorily participates in the PALS or FRIENDS Programs.

C. If the lawyer is being sentenced on a DWI conviction, in addition to what other sanction may be appropriate, sentence him/ her in part to a suspended sentence contingent upon his/her satisfactorily participation in the PALS Program for the next two years. Rarely if a lawyer gets a DWI, familiar as we are with the legal system, is this an isolated aberration. Usually it is simply the first time the lawyer is caught driving while impaired. There may have been many other undetected incidents of impaired driving because his or her conduct is no longer governed by rational judgment, but by chemical addiction. Certainly, if the lawyer is getting his second DWI, you can be 99% sure there is an underlying problem.

D. Have the lawyer submit then and there to a breathalyzer and, if it shows intoxication, hold the lawyer in contempt and require that he/she work with PALS, or get help in some other manner, in order to purge the contempt.

E. As a condition of purging the contempt of appearing before you intoxicated, require the lawyer to submit to an evaluation by a chemical addiction's physician or treatment center (this is something much more comprehensive than the DWI evaluations). Have the results reported to you and PALS with the further requirement that he or she follow the treatment recommendations, if any, made by the evaluator.

Judge's Question: Well, if the lawyer has a drug abuse problem, can't I just call PALS and let them handle everything?

Answer: The call to PALS is always appropriate, but, particularly in

situations where the lawyer is intoxicated in court, your active involvement with PALS may be the most effective remedy. PALS has only limited authority to seek to impose consequences, and certainly no ability to impose contempt sentences that can be purged or sentences suspended conditional upon receipt of treatment. PALS is best at giving lawyers hope who are despairing from addiction and offering a way out of the downward spiral caused by chemical addiction. Sometimes PALS only gets a chance to offer help when the court has provided consequences for a lawyer's alcoholic drinking that have forced the lawyer to realize help is needed. For this reason, a judge's role in helping is often critical.

Judge's Question: I would like to involve PALS but I don't want to get the lawyer in trouble with the Bar.

Answer: All efforts by PALS to assist a lawyer are confidential and protected by the attorney-client privilege. This protection is spelled out in the Rules of Professional Conduct. Further, by rule of the State Bar, which has been approved by order of the North Carolina Supreme Court, PALS operates entirely separate from any ethics and disciplinary committees of the State Bar.

Judge's Question: If the lawyer has depression or other mental illness, can I just call FRIENDS?

Answer: Yes. Unlike other helping agencies, FRIENDS responds proactively to offer confidential assistance to any lawyer who may need it. FRIENDS has no power to assure the assistance offered is taken, but usually offering help allows a depressed lawyer to begin making positive changes.

Judge's Question: What if I don't know whether a lawyer's problem is alcohol or depression but he or she is late with discovery again and again. Who do I call, PALS or FRIENDS?

Answer: Call either number. Usually the alcoholic lawyer is depressed and the depressed lawyer may be drinking. You do not need to solve this. The professional staff of the Lawyer Assistance Program (LAP) will determine which program of assistance is appropriate.

Judge's Question: How do I get in touch with PALS and FRIENDS?

Answer: Contact PALS at 1-800-720-PALS, nclap@bellsouth.net. Contact FRIENDS at 1-877-627-3743, eward@ncbar.com.

Or visit our website at www.nclap.org.

This pamphlet was produced as a public service for the judges of North Carolina by the North Carolina State Bar Lawyer Assistance Program (LAP). For additional copies, please call a LAP Assistant at 919-828-4620.