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REMOVING THE UNFIT LAWYER

Charles F. Adams*

In my annual address to the Nebraska State Bar Association in October, 1969¹ I suggested that much had been accomplished by the organized bar to secure the continued service of competent judges and the removal of incompetent judges and that little or no progress had been made in the area of removing the unfit lawyer. This problem impinges upon disciplinary procedures and the effect of the new *Code of Professional Responsibility*² which outlines the modern concept of the obligation of a lawyer to discharge his professional duties. Canon 6 admonishes us that "A Lawyer Should Represent a Client Competently." Ethical Consideration 6-1³ requires that a lawyer should strive to become *and remain* proficient. Whether this admonition can be resolved within the framework of disciplinary procedures or whether it will require an entirely different approach has not yet been resolved. Disciplinary procedures normally involve some conscious and deliberate act on the part of an offending lawyer with an element of intent usually considered to be an essential part of the transgression. Of course, there is another area consisting of those cases which involve professional negligence, but even here the doing of that which should not have been done or the failure to do that which ought to have been done does involve a considerable element of voluntary activity or inactivity. Of course, not every case of professional negligence constitutes a violation of the disciplinary rules of the Code and possible proceedings for the discipline of the offending lawyer.

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¹ Address of the President, Charles F. Adams, October, 1969, reprinted in NEBRASKA STATE BAR ASSOCIATION PROCEEDINGS 1969, at 305; at Appendix A of this article is an excerpt of one of the chapters.

² ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969), adopted by the House of Delegates of the American Bar Association on August 12, 1969, effective January 1, 1970, adopted by the Supreme Court of Nebraska on March 10, 1970, effective May 1, 1970 (with the exception of DR-2-103 (D) (5)).

³ EC 6-1 states: "Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle."

It is recognized that a lawyer's unfitness to serve his clients may be caused by senility, mental instability or sheer incompetence. It has also been suggested that addiction to drugs or alcohol might well be included among these causes. Probably the most definitive analysis of this problem has been developed by the Special Committee of the American Bar Association on Evaluation of Disciplinary Enforcement. This Committee released its final draft on "Problems and Recommendations in Disciplinary Enforcement" in June, 1970, and this report was accepted by the House of Delegates of the American Bar Association.⁴ This is the Committee headed by the Honorable Tom C. Clark, retired Justice of the Supreme Court of the United States, and it is commonly referred to as the "Clark Committee." Immediately after its action on the report and recommendations of the Clark Committee, the House of Delegates created a Special Committee on National Coordination of Disciplinary Enforcement whose commission is to bring about prompt implementation of the recommendations of the Clark Committee. The Clark Committee's report contains 36 problems suggesting concern in this area.⁵

Problem 20⁶ is entitled "Inadequate provisions for dealing with attorneys incapacitated by reason of mental illness, senility or addiction to drugs or intoxicants." It will be noted that the element of incompetency, disassociated from the other stated causes, is not included in the definition of the problem. Nevertheless, it constitutes what appears to be the best analysis of the problem thus far produced and does propose certain solutions within the framework of disciplinary procedures.

It appears that only five states have made any substantial progress in dealing with the problem of the unfit lawyer, although the subject has been raised in a number of states (including Nebraska and Colorado) as worthy of study and consideration. The statutes of the State of Georgia specify as among grounds compelling removal of a lawyer "want of a sound mind,"⁷ but no evidence of disciplinary cases based on this ground has been found. On April 29, 1963 the Supreme Court of Arizona adopted a revision to its rules relating to the discipline of lawyers which had been pro-

⁴ SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASSOCIATION, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Final Draft 1970).

⁵ The Chairman of the Committee is Henry L. Pitts, Esq., of Chicago, and the project is under the direction of F. Raymond Marks, Jr., Senior Research Attorney in the American Bar Association.

⁶ Appendix B.

⁷ GA. CODE ANN. § 9-501 (1935).

posed by the State Bar Board of Governors. Rule 42⁸ deals with incompetency and sets forth grounds for suspension of a lawyer who has been judicially declared incompetent, who has been committed to a mental institution, who has failed to maintain such special mental fitness as would have entitled him to admission to practice, or who has committed any act or omission indicating mental unfitness to continue the practice of law. Here again the procedure for suspension is included within the general machinery for disciplinary proceedings for violations of the *Code of Professional Responsibility*.

The New York Supreme Court, Appellate Division, First Department, adopted its Rule 603.15⁹ on June 9, 1969, which likewise provides for suspension of a lawyer who has been judicially declared incompetent or involuntarily committed to a hospital. The rule further provides for special proceedings to determine the alleged incapacity of a lawyer who has not yet been the subject of proceedings based upon the general state law with reference to mental illness.

It is suggested that the same reasons which have caused the several states to distinguish between criminal prosecutions and inquisitions into the mental condition of a person should prompt the legal profession to endeavor to solve the problem of the unfit lawyer, other than in cases involving incompetency, in procedures completely disassociated from enforcement of disciplinary rules of professional responsibility. A supreme court could, by the adoption of an appropriate rule, provide for the suspension of a lawyer who had been adjudged mentally ill by action of the County Board of Mental Health. Such a rule could also provide for the filing of a complaint with a board of lawyers with state-wide jurisdiction to consider charges filed against any lawyer for mental illness, senility or addiction to drugs or alcohol. It would probably be advisable to limit the power of such board to suspension from practice rather than absolute disbarment. One of the hoped-for beneficial effects of such a rule would be to induce such a lawyer to voluntarily submit to suspension rather than have the proceedings continued with the publicity incident thereto. This has been the effect of the provisions in many states regarding the removal of unfit judges, for only in rare instances have such judges insisted upon a full hearing of the complaint. In nearly every instance judges have voluntarily retired from the bench rather than subject themselves to the ordeal of a hearing.

⁸ Rule 42 is reprinted as Appendix C of this article.

⁹ Rule 603.15 is reprinted as Appendix D of this article.

It is suggested that this problem should be dealt with in the near future because of the fact that the medical profession has successfully lengthened our life expectancy without a corresponding preservation of our mental acuity. Until the time arrives when drugs or therapy can preserve or restore the mental capacity of a lawyer to successfully represent his clients, the clients certainly are entitled to the concern and protection of our profession.

APPENDIX A

REMOVING THE UNFIT LAWYER

Under the leadership of the organized Bar in the several states, as well as our national organizations, much has been accomplished to secure the continued service of competent judges and the removal of judges who should not be permitted to remain on the bench. Twenty-one states and Puerto Rico have enacted constitutional provisions or statutes, or both, making it possible to remove the unfit judge without resorting to the cumbersome and ineffective process of impeachment. It has seldom been necessary to actually conduct an adversary proceeding against such a judge for the reason that he usually comes to the realization that a contest would be futile and would serve only to tarnish his judicial reputation.

The experience of California during the years 1966, 1967, and 1968 is illuminating. Slightly more than 1,000 judges are within the jurisdiction of their Commission on Judicial Qualifications. During these three years 16 judges decided to resign or retire after proceedings were started but before any publicity had been given to the charges against them. During this time no judge was actually removed or retired by Court order.

On the other hand, there has been little or no progress in the area of removing the unfit lawyer. The unfit lawyer I am talking about is not the one who is guilty of a direct violation of our present Canons or Ethics or our new Code of Professional Responsibility, but the one who has become unfit to practice by reason of senility, mental instability, or sheer incompetence. This is becoming a more serious situation as the years go by, as our medical practitioners have learned how to keep our physical bodies alive but have not learned how to insure comparable mental acuity. Our doctor friends are also concerned about this, because under present laws there is nothing to prevent a man who graduated from medical school twenty-five or fifty years ago and has spent his intervening years in some other pursuit, from hanging up his shingle and announcing

to the world that he is now engaged in the practice of medicine and surgery. We pity the poor man or woman who would place his or her life in the hands of such a man.

The same thing can happen to us under our present rules. There is nothing to prevent one who has been an inactive member of the Association for years, presumably in some other field of endeavor, from simply paying the dues as an active member and immediately becoming licensed to practice his profession. The problem is how to cancel the license of the unfit lawyer and how to prevent the unfit inactive member from attaining active status. As this situation will become more acute in the foreseeable future, a solution must be found.

APPENDIX B

PROBLEM 20

Inadequate provisions for dealing with attorneys incapacitated by reason of mental illness, senility or addiction to drugs or intoxicants.

DIMENSION

The testimony before this Committee indicates that disciplinary agencies throughout the United States are becoming increasingly concerned with the problem of the attorney who is incapacitated by reason of mental illness, senility or addiction to drugs or intoxicants. A statement by the chairman of a local disciplinary agency in a large urban center is illustrative:

A second problem we have is this question of insanity, mental incompetence, chronic alcoholism. The lawyer has not violated any of the canons of ethics, he has gotten awfully close, close enough for the committee, at least, and we note he should not be practicing law because it's only going to be a matter of time before he is going to be disbarred or suspended.

As yet there is no real remedy that we have to cope with that situation. There should be, I submit to the members of this committee, some remedy which we as members of the bar have in dealing with that kind of problem.

A number of states have formulated specific procedures for suspending the attorney's right to practice during the period of disability. Most, however, are still in the process of determining how best to meet the problem.

RECOMMENDATION

A court rule authorizing indefinite suspension or transfer to inactive status of any attorney incapacitated by mental illness, senility or addiction to drugs or intoxicants until such time as the incapacity no longer exists.

DISCUSSION

Two factors probably are principally responsible for the profession's failure to deal adequately with the problem of incapacitated attorneys. First, the traditional concern of disciplinary agencies has been attorney misconduct, and an attorney who had not yet engaged in any active misconduct, although he was incapacitated, was considered outside the agency's jurisdiction. The chairman of a state bar association disciplinary agency explained:

We have for consideration another problem, and that involves a lawyer who is notoriously unfit to practice law, because of psychiatric problems, senility, alcoholism, and we run into them once in a while. No offense may have been committed thus far, other than general incompetency, and we have no jurisdiction over that. I do not know what the answer is, but I think it is a problem that should be considered.

The counsel to a local disciplinary agency testified concerning this problem:

This state has no procedure for dealing with mentally disabled attorneys except in the context of a standard disciplinary proceeding. If charges of misconduct are preferred against an attorney, and in the course of a proceeding it is established that his conduct was due to an existing mental condition, the courts have entered orders of indefinite suspension authorizing an application for reinstatement upon proper proof of rehabilitation.

This procedure, however, is not wholly satisfactory. It does not touch the attorney who may be mentally disabled but has not yet engaged in misconduct and permits him to remain a danger to the public until that danger has materialized. Moreover, the institution of a standard disciplinary proceeding against an attorney alleged to be mentally disabled raises serious due process problems.

In many jurisdictions an attorney has been proceeded against for his misconduct without regard to the underlying disability. He has been disbarred, although the misconduct was the result of a condition beyond his control and there is the possibility of rehabilitation (see Annotation, 96 A.L.R. 2d 739).

The second factor responsible for the profession's delay in meeting the problem of the incapacitated attorney has been its reluctance to deprive brother attorneys, who often have no independent income or pension, of their means of earning a livelihood. This attitude was expressed by the past president of a state bar:

In the area of incompetency, I know of lawyers who are alcoholics; I know of lawyers who are too ill to practice; I know of lawyers who are senile; I know occasionally of a negligent lawyer. What do you do with a lawyer who has lost his marbles but needs the practice of law and the few clients that come in? What do you do with this lawyer? Do you take his license away when he is 65 years old?

Quite understandably, the profession has been particularly reluctant to take appropriate action when there was no evidence that the attorney had been guilty of misconduct. By contrast, the profession has been a vigorous advocate of effective measures to remove the disabled judge, with respect to whom there is usually no problem as to income. The president of a local bar association in one of the larger urban areas testified:

I would like to point out in the case of a member of the judiciary, he probably has retirement income assured, whereas, in the case of members of the bar, it is very likely just the reverse. You are going to force a man to retire. Are you also going to furnish him something on which to live during his retirement? It is this that lies behind the whole problem—depriving the man of his livelihood.

These inhibiting factors still exist, but they are being reevaluated. The profession is beginning to realize that although the disciplinary agency was initially established to cope with attorney misconduct, its principal responsibility is to protect a public that is as threatened by the disabled attorney as by the malefactor. The hardship of taking away an attorney's livelihood because of a condition beyond his control simply cannot justify the continued exposure of the public to the danger represented by an attorney's disability.

That is not to say that the profession should concern itself only with removing the disabled attorney and should ignore the economic plight that may follow. To the contrary, a profession whose sense of responsibility prompts it to create security funds to reimburse those victimized by its members might well create a similar fund to protect those of its members who fall victim to illness.

PROPOSED RULE

Since an attorney who cannot properly handle his own affairs obviously is not fit to represent others, the court rule concerning the disabled attorney should provide for the suspension from practice of any attorney who because of mental infirmity or illness, or "because of addiction to intoxicants or drugs, is unable or habitually fails to perform his duties or undertakings competently, and is unable to practice law without danger to the interests of his clients and the public."

The following procedures should be considered in the formulation of such a rule:

1. Suspension for disability should be imposed automatically by the court having disciplinary jurisdiction upon the filing of a certificate indicating that the attorney either has been judicially declared incompetent or has been involuntarily committed to a mental hospital. In such instances, no further proceeding prior to suspension need be had, since there already has been a judicial determination that the attorney cannot safely be entrusted with his own affairs, much less those of his clients.

2. Whenever the disciplinary agency contends, in the absence of a judicial determination of incompetence or involuntary commitment, that an attorney is suffering from a disability that requires his suspension from practice, the matter should be determined in a proceeding substantially similar to that provided for in the jurisdiction whenever an attorney is charged with misconduct. Thus, the attorney should be served with the charge alleging his disability and should be afforded the opportunity to be confronted by the evidence against him, to cross-examine witnesses and to adduce evidence in his own behalf. In order to avoid any due process problem and in fairness to the attorney concerned, counsel should be appointed to represent him if he himself has not retained one.

3. It is, of course, possible that the attorney and not the disciplinary agency will raise the contention that the attorney is disabled. Thus, an attorney facing charges of misconduct may contend that he is suffering from a disability that makes it impossible for him to defend himself adequately. When such an admission of disability is made by the attorney, that fact should be certified immediately to the court having disciplinary jurisdiction and an order entered suspending the attorney for disability. Since a claim of disability may be fabricated to avoid the consequences of the pending misconduct charges, the matter should be remanded to the disciplinary agency for the institution of a proceeding to determine the existence of the alleged disability. If the disciplinary agency thereafter concludes that the disability in fact exists, no further proceeding in the court should be necessary and the attorney should remain suspended until and unless he is able to satisfy the requirements for reinstatement after suspension for disability. If the disciplinary agency concludes that the claim of disability was fabricated, it should report its conclusions, together with the reasons therefore, to the court having disciplinary jurisdiction, which should then make a final determination. If the court finds that the alleged disability does not exist, the previously pending disciplinary pro-

ceeding predicated on charges of misconduct should be resumed. Of course, any conventional disciplinary proceeding pending at the time an accused attorney is adjudged incompetent or is involuntarily committed to a mental institution should be continued.

4. In any proceeding in which the contention is made that the attorney is now disabled or was disabled at the time of the conduct on which the proceeding is predicated, he should be required to submit to an examination by one or more physicians selected by the disciplinary agency or appointed by the court. This will guarantee the availability of all relevant evidence necessary to evaluate the claim of incompetency properly.

5. Whenever an attorney against whom charges of misconduct have been withheld or continued because of disability establishes that he has recovered, he should not be reinstated until the charges of misconduct have been disposed of. The relevance of the disability to the misconduct charged should be determined by the applicable facts and law. Thus, any disability unrelated to the misconduct should not excuse the misconduct automatically. On the other hand, misconduct resulting from disability should not result automatically in denial of reinstatement.

6. Whenever an attorney who has been suspended for disability moves for reinstatement, he should bear the burden of proof to establish that the disability no longer exists and that he can be permitted to resume the practice of law without endangering his clients or the public.

7. Whenever an attorney who has been suspended for disability applies for reinstatement, he should be required to submit to an examination by one or more physicians selected by the disciplinary agency or appointed by the court.

8. A claim of disability by the respondent in a disciplinary proceeding or the filing of a motion for reinstatement by an attorney suspended for disability should be deemed to constitute a waiver of any doctor-patient privilege existing between the attorney and any doctor or hospital that has treated him during the period of alleged disability, and the attorney should be required to disclose the name of every doctor and hospital by whom he has been treated during such disability or since his suspension.

9. Motions for reinstatement by an attorney suspended for disability should not be entertained more frequently than once a year. This provision is necessary to protect the court having disciplinary jurisdiction from being inundated by motions for reinstatement filed by mentally disabled attorneys.

10. Although the public needs as much protection from the disabled attorney as it does from the attorney guilty of misconduct, suspension from practice for medical reasons must be clearly distinguished from suspension for wrongdoing. The attorney who is ill should not be required to suffer the stigma of conventional discipline. The order removing the disabled attorney from practice should indicate clearly that the suspension is for medical rather than disciplinary reasons. This can be accomplished by the terminology "suspended on grounds of medical disability" or "transferred to inactive status" in referring to the removal.

Rule 603.15 of the New York Supreme Court, Appellate Division, First Department, which was adopted recently, substantially incorporates these recommendations.

APPENDIX C

RULE 42. EFFECT OF INCOMPETENCY OF MEMBER

42(a) Grounds for suspension. The license to practice of any member (1) who has been judicially declared incompetent, or (2) who is committed to an institution, pursuant to the provisions of A.R.S. Title 36, Chapter 5, other than by voluntary admission, or (3) who has failed to maintain such special mental fitness as would have entitled the member to admission to the state bar in the first instance, or (4) who has committed any act or omission either related or unrelated to the practice of law indicating mental unfitness to continue the practice of law, shall be suspended until reinstatement by this court.

42(b) Certification of judicial record to court. The clerks of the superior court shall immediately transmit a certified copy of any such judicial declaration or order of commitment to this court and this court, upon receipt of such record, shall enter an order suspending the member from practice until reinstatement by this court.

42(c) Suspension for mental unfitness; procedures. The license to practice of any member who has failed to maintain such special mental fitness as would have entitled the member to admission to the state bar in the first instance, or who has committed any act or omission either related or unrelated to the practice of law indicating mental unfitness to continue the practice of law, as referred to in Rule 29(b), shall be suspended until reinstatement by this court. Procedure for suspension in these instances shall follow the rules provided for the discipline of members on other grounds except that the member shall be represented by counsel of his own choice or counsel appointed by the committee or the board, as the case may be, at all stages of the proceedings.

42(d) Disciplinary proceedings pending incompetency. No disciplinary proceedings other than proceedings to suspend the license of a member as provided in this rule shall be instituted or maintained against a member who has been judicially declared incompetent or who has been committed to an institution pursuant to the provisions of A.R.S. Title 36, Chapter 5, other than by voluntary admission, until either (1) judicial restoration to competency has occurred, or (2) a determination has been made either by the committee or the board in an appropriate proceeding after notice to the member and appointment of counsel to represent the member, that the member understands the nature of the charges against him and is competent to aid in his own defense. Upon such restoration or determination, the proceedings shall be instituted or recommended at the same stage where the proceedings were abated.

42(e) Certification of defense of incompetency to court. If a member interposes the defense of his incompetency to abate any disciplinary proceedings filed or then pending against him, the committee or the board, as the case may be, shall immediately certify this fact to this court and upon receipt thereof, this court shall enter an order suspending the member from practice until reinstatement by this court.

42(f) Submission to examination by physician. If in any proceeding under this rule the member introduces medical evidence of his mental condition by a physician who has examined or treated the member, the committee or the board, as the case may be, may require the member to submit to examination by a physician chosen by the committee or board and evidence based upon such examination may be received by the committee or the board.

APPENDIX D

603.15 PROCEEDINGS WHERE ATTORNEY IS DECLARED INCOMPETENT OR ALLEGATED TO BE INCAPACITATED. (a) *Suspension upon judicial determination of incompetency or on involuntary commitment.* Where an attorney, who is admitted to practice or has an other [sic] in this department, has been judicially declared incompetent or involuntarily committed to a mental hospital, the court, upon proper proof of the fact, shall enter an order suspending such attorney from practice of law, effective immediately and for an indefinite period and until the further order of the court. A copy of such order shall be served upon such attorney, his committee, and/or director of mental hospital in such manner as the court may direct.

(b) *Proceeding to determine alleged incapacity and suspension upon such determination.*

(1) Whenever an attorney, a bar association or other agency authorized to investigate and prosecute disciplinary proceedings under section 90 of the Judiciary Law, shall petition the court to determine whether an attorney is incapacitated from continuing to practice law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, the court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including examination of the attorney by such qualified medical experts as the court shall designate. If, upon due consideration of the matter, the court is satisfied and concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending him on the ground of such disability for an indefinite period and until the further order of the court and any pending disciplinary proceedings against the attorney shall be held in abeyance.

(2) The court may provide for such notice to the respondent-attorney of proceedings in the matter as is deemed proper and advisable and may appoint an attorney to represent the respondent if he is without adequate representation.

(c) *Procedure when respondent claims disability during course of proceeding.*

(1) If, during the course of a disciplinary proceeding, the respondent contends that he is suffering from a disability by reason of mental infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent adequately to defend himself, the court thereupon shall enter an order suspending the respondent from continuing to practice law until a determination is made of the respondent's capacity to continue the practice of law in a proceeding instituted in accordance with the provisions of subdivision (b) of this section.

(2) If, in the course of a proceeding under this section or in a disciplinary proceeding, the court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) *Appointment of attorney to protect clients' and suspended attorney's interests.*

(1) Whenever an attorney is suspended for incapacity or disability, the court, upon such notice to him as the court may direct, may appoint an attorney or attorneys to inventory the

files of the suspended attorney and to take such action as seems indicated to protect the interests of his clients and for the protection of the interests of the suspended attorney.

(2) Any attorney so appointed by the court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

(e) *Reinstatement upon termination of disability.*

(1) Any attorney suspended under the provisions of this section shall be entitled to apply for reinstatement at such intervals as the court may direct in the order of suspension or any modification thereof. Such application shall be granted by the court upon a showing by clear and convincing evidence that the attorney's disability has been removed and he is fit to resume the practice of law. Upon such application, the court may take or direct such action as it deems necessary or proper including a determination whether the attorney's disability has been removed and including a direction of an examination of the attorney by such qualified medical experts as the court shall designate. In its discretion, the court may direct that the expense of such an examination shall be paid by the attorney.

(2) Where an attorney has been suspended by an order in accordance with the provisions of subdivision (a) of this section and thereafter, in proceedings duly taken, he has been judicially declared to be competent, the court may dispense with further evidence that his disability has been removed and may direct his reinstatement upon such terms as are deemed proper and advisable.

(f) *Burden of proof.* In a proceeding seeking an order of suspension under this section, the burden of proof shall rest with the petitioner. In a proceeding seeking an order terminating a suspension under this section, the burden of proof shall rest with the suspended attorney.

(g) *Waiver of doctor-patient privilege upon application for reinstatement.* The filing of an application for reinstatement by an attorney suspended for disability shall be deemed to constitute a waiver of any doctor-patient privilege existing between the attorney and any psychiatrist, psychologist, physician or hospital who or which has examined or treated the attorney during the period of his disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital by whom

or at which the attorney has been examined or treated since his suspension and he shall furnish to the court written consent to each to divulge such information and records as requested by court appointed medical experts or by the clerk of the court.

(h) *Payment of expenses of proceedings.*

(1) The necessary costs and disbursements of the petitioner in conducting a proceeding under this section shall be paid in accordance with subdivision (6) of section 90 of the Judiciary Law.

(2) The court may fix the compensation to be paid to any attorney or medical expert appointed by the court under this section. This compensation may be directed by the court to be paid as an incident to the costs of the proceeding in which the charges are incurred and shall be charged in accordance with law.