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**Attorney—Disciplinary Action—Mental Incapacity and
Drunkenness in Mitigation Thereof**

The respondent committed four acts of professional misconduct, involving deliberate deception and misrepresentations upon clients and the court, misappropriation of clients' funds, and commingling of the funds with his own. In the disciplinary proceedings, the hearing panel found respondent to be an alcoholic, causing neglect and irresponsible handling of his law practice. The State Bar's Board of Governors, on review of the hearing panel's findings, recommended disbarment. Respondent maintains that he was emotionally ill, that excessive drinking is no longer a problem, that he is showing progressive improvement toward complete recovery, and that an indefinite suspension until fit to practice law again would be a better discipline than disbarment. *Held*, disbarment rather than indefinite suspension. The state of Washington has adopted the code of ethics of the American Bar Association, and respondent's acts are in direct violation of the code's provisions. Recognizing that the primary purpose of disciplinary proceedings is not to punish, but to maintain the respect and honor of the profession, to protect the public, and to assure attorney reliability and integrity, the court considered the seriousness and the circumstances of the offenses and concluded that disbarment was warranted. The effect of the punishment on the attorney, the claim of alcoholism as the cause of professional misconduct, and the promise of progressive cure of alcoholism were *not* considered by the court in mitigation of disbarment. In re *Moody*, 420 P.2d 374 (Wash. 1966).

The dissent of one justice reasoned that an indefinite suspension would have protected the public and maintained discipline at the bar, and, in addition, would have given the attorney a chance for rehabilitation and, upon complete recovery, to demonstrate to the court his capability of adhering to the ethical standards of the profession.

Attorneys have long been disbarred for conduct such as this. While this case announces no new development in the area of attorney discipline, it sets the stage for a reconsideration of the nature of punishment imposed upon attorneys and the policies followed by the disciplining bodies with respect to their consideration of mental illness and drunkenness as mitigating circumstances.

Conduct of attorneys requiring discipline¹ can be divided basically into two divisions—professional misconduct and non-professional misconduct. Professional misconduct generally involves a violation of one of the Canons of Professional Ethics, either in a direct or indirect manner. Professional misconduct is divisible into three subdivisions—offenses against the court, offenses against clients, and offenses against the ethical standard of the profession. Examples of attorney misconduct upon the court are fraud on the court by witness tampering or subornation of perjury,² and abusive or defamatory criticism of the court.³ Attorneys' acts as to clientele requiring discipline are, for example, representing conflicting interests,⁴ misappropriation or commingling of funds entrusted to an attorney,⁵ and the failure to act in the utmost honesty and good faith as to the client's interests.⁶ Representative of an attorney's unethical conduct offensive to the standards of the profession are advertising and solicitation of business,⁷ ambulance chasing,⁸ and acts of defamation upon other attorneys.⁹

Nonprofessional misconduct refers to activities and practices of the attorney beyond the scope of his legal duties. When conduct becomes so immoral or illegal that the reputation of the legal profession becomes endangered or subject to damaging ridicule, disciplinary measures must be taken.¹⁰ Criminal conduct showing moral turpitude¹¹ is conduct warranting discipline. The ultimate question seems to be whether or not the irresponsibility of the

¹ The discussion here of attorney misconduct warranting discipline and the examples following are by no means intended to be complete, but are presented to furnish a background for the more limited scope of this comment, that of the policies of disciplinary bodies toward insanity and alcoholism as a defense or mitigating circumstance.

² CANON 23, ABA, CANONS OF PROFESSIONAL ETHICS.

³ CANON 1, ABA, CANONS OF PROFESSIONAL ETHICS.

⁴ CANONS 6 and 37, ABA, CANONS OF PROFESSIONAL ETHICS.

⁵ CANON 11, ABA, CANONS OF PROFESSIONAL ETHICS.

⁶ CANON 8, ABA, CANONS OF PROFESSIONAL ETHICS.

⁷ CANON 27, ABA, CANONS OF PROFESSIONAL ETHICS.

⁸ CANON 28, ABA, CANONS OF PROFESSIONAL ETHICS.

⁹ CANON 18, ABA, CANONS OF PROFESSIONAL ETHICS.

¹⁰ See 7 AM. JUR. 2d *Attorneys at Law* § § 44-49 (1963).

¹¹ See 7 AM. JUR. 2d *Attorneys at Law* § § 50-57 (1963). In *Committee on Legal Ethics v. Scherr*, 149 W. Va. 721, 726, 143 S.E.2d 141, 145 (1965), the court states in its dictum that moral turpitude "imports an act of baseness, vileness or depravity in the duties which one owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow."

lawyer has attained such a level as to render him unfit to manage the legal affairs of his clients.¹²

West Virginia has adopted the Canons of Professional Ethics.¹³ The West Virginia State Bar By-Laws¹⁴ contain a statement of policy proposing the standard of conduct to be adhered to by attorneys, provide that attorneys should act in the highest standard of professional conduct and rigidly observe the canons of ethics, and establish procedures for discipline investigation and action in cases of violation of the canons, commission of criminal offense reflecting moral unfitness, wrongful detention of property or money, and fraudulent conduct. Moreover, the West Virginia Code specifically provides for statutory annulment¹⁵ in the case of conviction of a felony or other crime involving moral turpitude,¹⁶ for disbarment in the case of any conviction for failure to pay over money collected for another,¹⁷ and for suspension or annulment for any malpractice.¹⁸

Once it is determined that an attorney must be disciplined, the court is faced with the question of what punishment to impose. West Virginia is representative of the jurisdictions providing for the disciplining body to privately reprimand or to order a public reprimand, or suspension for an indefinite time on whatever terms the court considers necessary, or annulment of the attorney's license to practice law (commonly called disbarment).¹⁹ The purpose of disciplinary proceedings is not primarily for punishment, but for the protection of the public from attorneys found unfit to perform the functions of a lawyer.²⁰ It must be kept in mind that by imposing the punishment of disbarment, or even suspension, one is de-

¹² DRINKER, LEGAL ETHICS 43 (1953).

¹³ THE CODE OF PROFESSIONAL ETHICS was adopted and promulgated by the Supreme Court of Appeals of West Virginia on March 28, 1947.

¹⁴ W. VA. STATE BAR BY-LAWS, art. VI, § 2 (approved by the Supreme Court 1951).

¹⁵ Annulment is the West Virginia terminology for the discipline commonly known as disbarment—a permanent dissociation from the bar.

¹⁶ W. VA. CODE, ch. 30, art. 2, § 6 (Michie 1966).

¹⁷ W. VA. CODE, ch. 30, art. 2, § 14 (Michie 1966).

¹⁸ W. VA. CODE, ch. 30, art. 2, § 7 (Michie 1966).

¹⁹ W. VA. STATE BAR BY-LAWS, art. VI, § 20 (approved by the Supreme Court 1951).

²⁰ Hyland v. State Bar of Cal., 59 Cal. 2d 765, 382 P.2d 369 (1963); *In re Carter*, 59 Idaho 547, 86 P.2d 162 (1938); *In re Patlak*, 368 Ill. 547, 15 N.E.2d 309 (1938); *In re Breeding*, 188 Minn. 367, 247 N.W. 694 (1933).

prived of his method of earning a living acquired through the sacrifice of years of his life for schooling together with expenditure of a sizeable sum of money. Disbarment is extreme punishment to be ordered only where the court is convinced of its necessity for protection of the public, the courts and the profession. Where lesser punishment of censure or suspension would accomplish the desired result, disbarment should not be ordered.²¹ *Drinker on Legal Ethics*,²² while recognizing the necessity for disbarment after a continuous course of misconduct, cautions that, unless the attorney clearly should be barred permanently from practice, suspension is preferable to disbarment, and that for incidental acts, not so significant as to render it impossible to maintain the position as a respectable lawyer, censure is more appropriate. Each case, however, must be decided after close examination of the particular facts involved. In arriving at the punishment, precedents are of little aid. The court uses sound discretion in each case to mete out the discipline that will punish the offender, serve as an effective deterrent to others in the future, and give assurance to the public that the ethical standards of the legal profession will be observed.²³

Many of the disciplinary cases involve attorneys who are suffering from insanity or other severe mental conditions. In these proceedings, the attorney often presents this mental illness as a defense or as a mitigating circumstance. The history of cases where mental illness has been so offered shows that, generally, in the earlier cases, insanity was no bar to disbarment or annulment.²⁴ These cases emphasized the primary purpose of the proceeding as being protection of the public and prospective clients of the attorney, and that the client's injury is the same, whether it results from dishonesty sparked by criminal intent or from disability, rendering the lawyer unable to discern right from wrong.²⁵ Some of the earlier cases, without discussing the principle, rejected insanity as a de-

²¹ *In re Williams*, 233 Mo. App. 1174, 128 S.W.2d 1098 (1939).

²² DRINKER, *LEGAL ETHICS* 46 (1953).

²³ *Maddy v. First Dist. Comm. of Va. State Bar*, 205 Va. 652, 139 S.E.2d 50 (1965).

²⁴ *In re Bourgeois*, 25 Ill. 2d 47, 182 N.E.2d 651 (1962); Annot., 96 A.L.R.2d 739 (1964).

²⁵ *In re Patlak*, 368 Ill. 547, 15 N.E.2d 309 (1938); *Louisiana State Bar Ass'n v. Theard*, 222 La. 328, 62 So. 2d 501 (1952), *rev'd*, 354 U.S. 278 (1957); *In re Breeding*, 188 Minn. 367, 247 N.W.694 (1933).

fense or mitigating factor.²⁶ Others recognized the respondent's illness, but indicated that the reason the plea of insanity was disregarded was that there was no showing of complete cure or assurance that there would be no recurrence.²⁷ A most severe view taken refused to consider insanity in mitigation, even where it was shown that the attorney was completely cured,²⁸ possibly relying on the same reasoning as the cases that have held that a lawyer suffering from severe mental illness is not capable of practicing law, and that this alone will be grounds for disbarment, in order to protect the public from undesirable consequences.²⁹ The Minnesota court in *In re Breeding*³⁰ sums up this feeling with the statement that to the public "irresponsibility brings the same misfortune as wilful misconduct."

The trend of the more recent cases, however, is to consider the attorney's mental illness in mitigation and to either suspend him for a fixed period and until such time thereafter that he demonstrates to the court his fitness to resume the practice of law³¹ or to impose an indefinite suspension without first attaching a fixed period.³² In this way a dual purpose is served, the public being given its proper protection and the attorney being given a chance to rehabilitate and to return to active practice of the profession. While giving due recognition to the mitigating circumstances, this type of punishment places the burden of proof on the suspended attorney to show that he is rehabilitated to the extent that his irrational behavior is very unlikely to recur and to the extent that the confidence of the public and respect of his colleagues have been

²⁶ *Bruns v. State Bar of Cal.*, 18 Cal. 2d 667, 117 P.2d 327 (1941); *In re Streater*, 262 Minn. 538, 115 N.W.2d 729 (1962); *In re Bivona*, 261 App. Div. 221, 25 N.Y.S.2d 130 (1941), though recognizing other mitigating factors in imposing a one year suspension; *In re Dubinsky*, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938).

²⁷ *In re Manahan*, 186 Minn. 98, 242 N.W. 548 (1932); *In re Durham*, 41 Wash. 2d 609, 251 P.2d 169 (1952).

²⁸ *In re Gould*, 4 App. Div. 2d 174, 164 N.Y.S.2d 48, appeal denied, 4 App. Div. 2d 833, 166 N.Y.S.2d 301 (1957).

²⁹ *In re Patlak*, 368 Ill. 547, 15 N.E.2d 309 (1938); *In re Breeding*, 188 Minn. 367, 247 N.W. 694 (1933).

³⁰ *In re Breeding*, *supra* note 29, at 369, 247 N.W. at 695.

³¹ *State ex rel. Fla. Bar v. Ruskin*, 126 So. 2d 142, (Fla. 1961); *In re Bourgeois*, 25 Ill. 2d 47, 182 N.E.2d 651 (1962); *In re Freedman*, 7 App. Div. 2d 447, 184 N.Y.S.2d 199 (1959).

³² *Hyland v. State Bar of Cal.*, 59 Cal. 2d 765, 382 P.2d 369 (1963) (dictum); *In re Fleckenstein*, 34 N.J. 20, 166 A.2d 753 (1961); *In re Creamer*, 201 Ore. 343, 270 P.2d 159 (1954).

regained, so that he is now again fit to practice law.³³ In *State ex rel. Fla. Bar v. Ruskin*,³⁴ the attorney made full restitution of misappropriated funds, took treatment and recovered his mental composure, and appeared before the court in solemn repentance, assuring the court of his future good conduct. In granting a six month suspension and thereafter until he showed the court he was entitled to reinstatement, the court stated that disbarment should be reserved for the most serious misconduct, and, where a lawyer shows the possibility of rehabilitation, disbarment should not be inflicted. A fixed suspension period imposes no affirmative burden upon the attorney to justify re-entrance by his own conduct, while rarely does the bar look with favor on a disbarred attorney's application for readmittance. But, the bar has more leniency toward a suspended lawyer, and the indefinite suspension, with its valid and attainable opportunity for readmittance, poses rehabilitation as a goal for the attorney.

*Hyland v. State Bar of Cal.*³⁵ concedes mental incompetence as a defense, though imposing disbarment because it was here insufficiently proven. Despite the primary consideration being the protection of the public, if an attorney's mental state renders his mind unable to form the intent that is a requisite element of the offense charged to him, this court felt that he should not be disbarred but simply enrolled as an inactive member of the bar, to prevent his practice while his mental incompetence persisted, with an opportunity to re-enter practice on restoration of his mental competence.

The dissent in the principal case reasoned that the attorney's recognition of his problem and his seeking a cure should be a major consideration and should even be determinative of the decision between disbarment and suspension. An earlier Washington case, *In re Sherman*,³⁶ expressly set out this attitude in the opinion. Mental incompetency was said to be a *complete defense* in a disciplinary action if the attorney could show his conduct was a

³³ *State ex rel. Fla. Bar v. Ruskin*, 126 So. 2d 142 (Fla. 1961); *In re Bourgeois*, 25 Ill. 2d 47, 182 N.E.2d 651 (1962); Annot., 96 A.L.R.2d 739 (1964).

³⁴ 126 So. 2d 142 (Fla. 1961).

³⁵ 59 Cal. 2d 765, 382 P.2d 369 (1963).

³⁶ 58 Wash. 2d 7, 363 P.2d 390 (1961).

direct result of his illness and that his mental condition has since been cured to the point that there is little likelihood of recurrence. If the attorney can show his mental irresponsibility at the time of his offenses, but is unable to carry the burden of proof of complete recovery, yet has recognized his problem and has shown improvement so that the court has reason to believe that he will fully recover in the future, then he should be "suspended until such time as he can prove such recovery—otherwise, he shall be disbarred."³⁷

A similar case is presented where the attorney raises habitual use of intoxicating liquor as a defense or in mitigation. As compared to cases on mental incompetency, disciplinary actions where the issue of alcoholism is raised are relatively few. The principal case speaks of both drunkenness and emotional illness, the majority feeling disbarment should be imposed, without commenting separately on the mental illness and drunkenness issues. In two cases cited earlier³⁸ (for attorney's mental irresponsibility as a mitigating factor) the fact of alcoholism was also present. Though the attorney showed improvement in each case, even to the extent of complete cure, disbarment was ordered since in both cases the court discerned no assurance against recurrence or relapse.

In an early case, *In re Webb*,³⁹ the lawyer admitted all his unprofessional and dishonest acts, but pleaded excessive use of alcohol and subsequent reformation plus partial restitution of funds wrongfully retained. The court imposed disbarment, holding the attorney's plea to be immaterial. And in *People v. Tracey*,⁴⁰ the court states that "habitual drunkenness . . . cannot be recognized by this court as a sufficient excuse or cause for an attorney to escape the condemnation of punishment required by the statute."⁴¹ In fact, the court further notes that drunkenness, should it become so habitual as to endanger the funds and legal security of clients, will itself be

³⁷ *Id.* at 9, 363 P.2d at 392. *Contra, In re Freedman*, 7 App. Div. 2d 447, 184 N.Y.S.2d 199 (1959), where a two year suspension and thereafter until a clear showing of rehabilitation was imposed on an attorney, who, as a result of mental disturbance, committed several acts of professional misconduct, but has since showed no improvement or any appreciation of his abnormal condition.

³⁸ *In re Manahan*, 186 Minn. 98, 242 N.W. 548 (1932); *In re Durham*, 41 Wash. 2d 609, 251 P.2d 169 (1952).

³⁹ 32 S.D. 509, 159 N.W. 107 (1916).

⁴⁰ 314 Ill. 434, 145 N.E. 665 (1924).

⁴¹ *Id.* at 436, 145 N.E. at 666.

sufficient grounds for disbarment. Other cases have held that where a lawyer appears in court intoxicated so as to be unable to proceed and so as to bring ridicule upon the profession and the courts, he should not be permitted to continue his practice of law.⁴²

The opposite view of disciplining the attorney because of his alcoholic condition has been taken. In an early South Carolina case,⁴³ the court was faced with conduct which would ordinarily call for disbarment, but considered the source of the attorney's misconduct. After a discourse on the evils of alcohol, the court proceeded to distinguish the cases where an attorney's character has been affected by alcohol and the case where an attorney acts out of inherent wickedness, deliberately planning his misconduct. Though at the time of the offense, both attorneys are equally incompetent and unworthy, there is a much greater probability of rehabilitation in the former case. This court then gave the attorney an opportunity to reform and to be reinstated upon proof of his being rid of the alcoholic habit, by imposing an indefinite suspension, with the privilege to apply for reinstatement any time after two years, upon proof of reformation of his character and abstention from the use of alcohol for two years immediately preceding. This view is consistent with the trend of later cases dealing with the mental incompetency of an attorney, giving the attorney a chance for reformation, yet assuring that the public is adequately protected by prohibiting him from practice for so long as no redemption in habits or character is shown to the court.

When an attorney is faced with a pending disbarment proceeding, he may resort to an attempted resignation from the bar. Resignation from the bar and the procedure to be followed may be statutory in character or may be by court rules. The West Virginia State Bar By-Laws⁴⁴ provide for the filing of a verified petition in the Supreme Court. However, a decision by the American Bar As-

⁴² *In re Maley*, 363 Ill. 149, 1 N.E.2d 495 (1936), where a six month suspension was imposed for the attorney's discreditable conduct, the record showing that disbarment was not warranted; *In re Macy*, 109 Kan. 1, 198 Pac. 1095 (1921), where statutory removal is provided for such an act by any officer of the state, not subject to impeachment.

⁴³ *In re Evans*, 94 S.C. 414, 78 S.E. 227 (1913).

⁴⁴ W.VA. STATE BAR BY-LAWS, art. VI, § 29 (amendment approved by the Supreme Court 1962).

sociation Ethics Committee⁴⁵ holds that the practice to be followed is "not to accept the resignation of a member against whom charges are pending." The Minnesota court⁴⁶ has followed this to the extent of not accepting a resignation from the attorney in lieu of disbarment. But, *Drinker on Legal Ethics*⁴⁷ has followed a more objective view saying whether or not a lawyer should be permitted to resign should depend on whether the offense and the circumstances surrounding its commission necessitate publicity to prevent repetition of the act by others.

The principal case lays down guidelines for the court to consider in deciding what punishment to impose. The penalty should be "sufficient (1) to prevent recurrence, (2) to deter other practitioners from engaging in such conduct, (3) to restore and maintain respect for the honor and dignity of the profession, and (4) to assure the public that the rules governing unprofessional conduct will be strictly enforced."⁴⁸ Reemphasizing that punishment of the attorney is secondary in importance to protection of the public and the reputation of the profession, in the case where the attorney suffers from mental incapacity or alcoholism, the imposition of disbarment seems overly severe, as it gives no opportunity for the attorney's rehabilitation. This is especially true where the attorney has recognized his problem and is progressing with a cure. Yet a fixed suspension period with its automatic reinstatement is also an inadequate solution because it is without sufficient protection of the public. There is no burden placed on the attorney to remedy his condition or to improve his character, thus giving no assurance that he will be fit or capable to resume practice at the end of the fixed period.

Thus, the most progressive solution to the problem, where the attorney's misconduct warrants disbarment, but where such misconduct was stimulated by his weakened character, rendered such as a result of mental illness or alcoholism, is to impose a suspension that remains indefinite in length until he shows the court complete

⁴⁵ A.B.A. OPINIONS, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS, Appendix A, 628 (1957).

⁴⁶ *In re Streater*, 262 Minn. 538, 115 N.W.2d 729 (1962).

⁴⁷ DRINKER, LEGAL ETHICS 48 (1953).

⁴⁸ *In re Moody*, 420 P.2d 374, 377 (Wash. 1966).

rehabilitation and fitness to again be an active, productive member of the profession. A preliminary fixed time attached to suspension is unimportant. The important factor is that the suspension remains in force until the attorney has borne the responsibility of regaining his prior rational condition to the satisfaction of the court. The deterrent factor and protection for the public exist, because, as long as the attorney shows no rehabilitation, it is as effective as a disbarment, as the suspension will never be lifted. But, in addition, the future status of the attorney is considered in allowing him the opportunity to *prove* rehabilitation and repentance, with a resulting reward of reinstatement.

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Conflict of Laws—Torts—Lex Loci Delicti
Yielding to Significant Contacts

W, who was a passenger in an automobile driven by *H*, brought an action against *H* seeking damages for personal injuries sustained from *H*'s alleged negligent operation of the automobile. The trip originated and was to have ended in New Hampshire, the domicile of the parties. The accident occurred in Vermont which has a guest statute. The action was instituted in New Hampshire, which has no guest statute, and *W* moved for a pre-trial order that the substantive law of New Hampshire govern the rights of the parties. All questions of law raised by the motion were reserved and transferred without ruling. *Held*, Vermont's guest statute will not govern the rights of these parties simply because the injury occurred in Vermont. The circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence will be determined by the local law of their common domicile, if, at least, this is the state from which they departed on their trip and the state to which they intended to return. *Clark v. Clark*, 222 A.2d 205 (N.H. 1966).