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Abstracts fo Recent Cases

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added). No cases have been found construing this statute. However, the words "wherever earned" make a strong case for the proposition that the legislature intended to aggregate the earnings from all employments, similar or dissimilar, in computing the employee's average weekly wage.

Menis Elbert Ketchum, II

ABSTRACTS

Attorney and Client—Disciplinary Action for Negligence and Inattention by an Attorney

Respondent practiced law while engaged in full-time employment in an unrelated field. He was charged with misrepresenting to his client the reason for an extensive delay in the disposition of a divorce case. The delay was caused by his failure to obtain an entry of default. *Held*, suspended. The attorney should be suspended until he can devote himself fully to the practice of law. *In the Matter of Klaiber*, 46 N.J. 133, 215 A.2d 29 (1965).

Several courts have held that negligence, inattention or professional incompetence in handling a client's affairs constitutes a violation of the canons of professional ethics, attorney's oath or court rule. *In re Greer*, 52 Ariz. 385, 81 P.2d 96 (1938); *State ex rel. The Florida Bar v. Fishkind*, 107 So. 2d 131 (Fla. 1958).

In some instances negligence and inattention with respect to a client's affairs have resulted in disbarment. *In re Hall*, 58 Ariz. 67, 118 P.2d 67 (1941); *In re Hermann*, 165 Ore. 59, 105 P.2d 512 (1940). On the other hand, some courts regard negligence and inattention as grounds for suspension or censure. *People ex rel. Chicago Bar v. Anderson*, 273 Ill. 37, 112 N.E. 273 (1916); *Attorney Gen. v. Lane*, 259 Mich. 283, 243 N.W. 6 (1932).

An investigation of the cases reveals that the courts have called particular attention to factors other than mere inattention. Some courts have considered the fact the fees were received in advance for services never rendered or rendered only after formal charges were brought. *In re Hall*, *supra*; *In re Hermann*, *supra*. In other instances courts have considered the prior history of misconduct

by the attorney. *Waterman v. State Bar of California*, 8 Cal. 2d 17, 63 P.2d 1133 (1936); *In re Moller*, 248 App. Div. 877, 290 N.Y.S. 257 (1936).

The West Virginia Code provides that in any case of malpractice, any court of record shall order an attorney to be summoned to show cause why his license should not be suspended or annulled. W. VA. CODE ch. 30, art. 2, § 7 (Michie 1961). The West Virginia court has held that misconduct justifying disbarment must show that the attorney is unworthy of public trust and confidence and that he is unfit to exercise the privileges and duties of his profession. *In re Damron*, 131 W.Va. 66, 45 S.E.2d 741 (1947). No cases have been reported concerning negligence or inattention regarding a client's affairs. Malpractice, however, is a broad term which includes wilfull, negligent and ignorant misconduct. *Gould v. State*, 127 So. 309 (Fla. 1930). It would be possible for the Supreme Court of Appeals of West Virginia to reach a decision that is in accord with the principal case.

Estate Tax—Methods for Evaluating the Reversionary Interest of a Decedent

The decedent during her life created an irrevocable trust under which the settlor was to receive the income from the trust for life, with remainders to her son and daughter or to the survivor of them. The trust instrument provided that the trust would terminate and be paid to the settlor in the event that the remaindermen predeceased the settlor. The decedent's daughter predeceased her but her son survived her. For nine years prior to her death the decedent was in declining health. At the time of her death, the decedent had a life expectancy according to standard mortality tables of only three years, and her reversionary interest was further limited by the improbability that she would survive her son, who had a life expectancy of fifteen years. The Commissioner assessed *Ps*, executors of the decedent's estate, with a deficiency by including in the decedent's estate the value of the decedent's reversionary interest as determined by the mortality tables. *Ps* filed a claim for a refund which was granted by the district court on the theory that the basis of the valuation of the interest is the actual life expectancy as indicated by the facts of the case. *Held*, affirmed. Factors which relate to the decedent's physical and mental condition may be con-

sidered for the purpose of computing the value of the gross estate. *Hall v. United States*, 353 F.2d 500 (7th Cir. 1965).

The value of the gross estate of a decedent includes the value of all property in which the decedent had retained more than a five per cent reversionary interest. The value of the reversionary interest is determined by the usual methods, including the use of mortality tables and actuarial principles. INT. REV. CODE OF 1954, § 2037. Value is a question of fact that must be determined from a consideration of all relevant facts and circumstances in the case. *United States v. Provident Trust Co.*, 291 U.S. 272 (1933). Mortality tables are not necessarily controlling factors. *Nourse v. Riddell*, 143 F. Supp. 759 (S.D. Cal. 1956).

The Tax Court in some instances has refused to accept the Commissioner's contention that the value must be determined solely by mortality tables. In *Estate of Denbigh*, 7 T.C. 387 (1946), the court held that the value of the decedent's reversionary interest is determined by a consideration of the physical condition of the reversioner rather than by the exclusive use of mortality tables. This decision was reaffirmed in *Estate of Jennings*, 10 T.C. 323 (1948).

Although *Nourse v. Riddell*, *supra*, is not concerned expressly with the valuation of a reversionary interest, it does involve the problem of determining the weight to be given the use of mortality tables. The *Nourse* case defines mortality tables as opinion evidence which might be a sufficient basis upon which to impose a tax if no other evidence is available. The trend of the decisions seems to make the method of determining value contingent upon the physical and mental conditions of the decedent as well as mortality tables. The principal case is indicative of this trend.

Evidence—The Status of the Mere Evidence Rule

Ds, a physician and his assistant, were convicted of submitting false and fraudulent claims to the bureau of public assistance. The state introduced into evidence medical care statements and medical care records taken from *Ds*' office. *Ds* appealed from an order denying a motion for a new trial on the ground that the records were mere evidence of the crime and as a consequence the seizure was unconstitutional. *Held*, affirmed. The mere evidence rule is

not a constitutional standard and is not applicable in California. *People v. Thayer*, 47 Cal. Rptr. 780 (1965).

The mere evidence rule prevents the admission into evidence of objects having evidentiary value only, even though the seizure was properly conducted under a valid search warrant. Such evidentiary materials are regarded as papers having no value other than the fact that they are evidence of criminal fraud against the owner. *Gouled v. United States*, 255 U.S. 298 (1921). Mere evidence includes private papers, books and documents. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

The rule originated in the Supreme Court and has had frequent application in federal courts. Most states, however, have remained silent on the issue. Comment, *Limitations on Seizure of Evidentiary Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 320 (1953).

The controlling statute in the principal case defined property properly seized under a search warrant as any item which constitutes any evidence that tends to show that a felony has been committed or that a person has committed a felony. CAL. PEN. CODE § 1524. Although the West Virginia statute is not identical, it includes some language which may incorporate the principles of the California statute. In the West Virginia search and seizure statute, property is defined as including books, papers and documents. W. VA. CODE ch. 62, art. 1A, § 2 (Michie, Supp. 1965). While this provision is not entirely repugnant to the principle of the mere evidence rule, such an interpretation is entirely possible.

Prior to the Supreme Court decision in *Gouled v. United States*, *supra*, the West Virginia court sustained the admission of a letter written by an accused and intercepted by a law officer on the ground that this was not a violation of his constitutional privilege of self-incrimination. *State v. Booker*, 68 W.Va. 8, 69 S.E. 295 (1910). As this statute remains uninterpreted and the mere evidence rule remains unlitigated in West Virginia, the status of the rule is questionable.

Income Tax—Limitation of Educational Expenses as Business Expenses

Ps filed a joint income tax return claiming a deduction for educational expenses incurred as a result of carrying on a trade or business. Prior to the year in which the expense occurred, *P* had

resigned her position and was a full-time student. The deduction was disallowed by the Internal Revenue Service. *Held*, affirmed. Before a taxpayer may claim a deduction for educational expenditures incurred for the purpose of maintaining or improving skills, the taxpayer must be actively engaged in a related activity or have a definite connection with a position. *Canter v. United States*, 354 F.2d 352 (Ct. Cl. 1965).

The trade or business deduction of the Internal Revenue Code allows a taxpayer to deduct all ordinary and necessary expenses of carrying on a trade or business. INT. REV. CODE OF 1954, § 162. Expenditures made by a taxpayer for his education are deductible when such expenses are a result of maintaining or improving skills used in the trade or business or of meeting express requirements of the taxpayer's employer. Treas. Reg. § 1.162 (5). These provisions are further limited by the requirement that the taxpayer be currently and actively engaged in the trade or business to which the education relates. Rev. Rul. 60-97, 1960-1. CUM. BULL. 69. Off-duty seasons and temporary leaves of absence are not considered a cessation of activity for the purpose of this section.

The principal case deals with the judicial interpretation of a temporary leave of absence. Although this is a case of first impression, prior case law has been indicative of the requirement that educational expenses must be relative to an existing position. *Namrow v. Commissioner*, 368 U.S. 914 (1961); *United States v. Michaelson*, 313 F.2d 668 (9th Cir. 1963).

The revenue ruling has been interpreted to mean that when a taxpayer ceases his employment and undertakes educational training in preparation for returning to similar employment or other business, the deduction is lost. This analysis indicates, however, that a showing of an intent to resume the original position should satisfy the rule. Annot., 3 A.L.R. 829, 835 (1965).

The majority opinion in the principal case seems to be contrary to this interpretation. It would seem that some contractual relationship or enforceable commitment to the original position is mandatory. Mere intent to return to the position, even when accompanied by subsequent return, will not satisfy the requirement.

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