Comments

Mental or Physical Incapacity as a Bar to the Practice of Law

There are various types of sicknesses or disorders from which an attorney can suffer that cause either specific acts or problems requiring disciplinary proceedings against such an attorney. The question often arises whether these illnesses or disorders are defenses or mitigating factors in a disciplinary proceeding. One such disorder is physical illness.¹ Specific types of physical illness that have been asserted by attorneys as a defense or mitigating factor in disciplinary proceedings are diabetes,² high blood pressure,³ nervous disorders,⁴ and poor health in general.⁵ This list is certainly not an exhaustive one of the types of physical sicknesses that can cause acts or problems requiring disciplinary action, but it is sufficient for demonstrating the attitude of the courts when physical illness is raised as a defense in disciplinary proceedings.⁶

Mental illness is the second type of disorder that is often raised as a defense or mitigating factor in disciplinary proceedings.⁷ Examples of such mental illness are medically recognized and categorized mental disorders,⁸ emotional disturbances,⁹ and alcoholism.¹⁰ A

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¹ See, e.g., Stark County Bar Ass'n v. Lukens, 48 Ohio St. 2d 187, 357 N.E.2d 1083 (1976).
³ In re Albright, 274 Or. 815, 549 P.2d 527 (1976).
⁶ There is an obvious absence of cases involving the permanently disabled such as blind, deaf, or paraplegic individuals. There could be serious implications for such persons in this area of the law, but until an attorney is disciplined for conduct arising out of his disability, there will be no need for a judicial discussion of the matter.
⁷ See, e.g., State ex rel. Fla. Bar v. Ruskin, 126 So. 2d 142 (Fla. 1961); In re Manahan, 186 Minn. 98, 242 N.W. 548 (1932).
⁸ In re Patlack, 368 Ill. 547, 15 N.E.2d 309 (1938); Louisiana State Bar Ass'n v. Theard, 222 La. 328, 62 So. 2d 501 (1952).
⁹ Charleston County Bar Ass'n v. Lempesis, 248 S.C. 47, 148 S.E.2d 869
third sickness or disorder that causes acts or problems resulting in disciplinary action against an attorney is encompassed in the term "personality disorders." This term contemplates something less than mental illness in that it is not an illness at all but a personality trait. Like physical and mental illness, a personality disorder is often raised as a defense or mitigating factor in a disciplinary proceeding against an attorney.

Although these three types of disorders seem to be closely related, historically, they have not received the same treatment by the courts. The physical illness cases have received substantially uniform treatment irrespective of the facts of the case or the specific type of illness. In *Sullivan v. State Bar of California* an attorney accepted fees for rendition of future services, failed to devote necessary attention to the matters involved, and failed to give adjustments to the wronged clients. He alleged ill health generally as his only defense without citing a specific disease or condition other than his advanced age. The court recognized that such ill health might be explanatory of the cause of the misconduct but held that ill health would not constitute an excuse for the misconduct. In *In re Albright* an attorney guilty of neglect, deceit, and misuse of a client's trust account was suffering from diabetes, high blood pressure, and gout. Medical testimony indicated that his judgment was severely affected by his health. Basing its decision on "the danger to the public from a lawyer's misconduct," the court refused to recognize the attorney's ill health as a defense.

In *Hoffman v. New York State Bar Association*, the court followed the same reasoning in not recognizing physical illness as a defense to a disciplinary proceeding, but held that physical illness could be considered in mitigation of the punishment to be imposed.

(1966); *In re Durham*, 41 Wash. 2d 609, 251 P.2d 169 (1952).
14. *Id.*
15. 274 Or. 815, 549 P.2d 527 (1976).
16. *Id.*, 549 P.2d at 529.
The physical illness cases provide for reinstatement to the practice of law only upon a proper medical showing of the attorney’s fitness to engage in the practice of law.\(^\text{18}\) In no case where an attorney suffered from a physical illness has disbarment been the penalty imposed, nor even the penalty recommended by the bar association’s disciplinary body.\(^\text{19}\)

The cases involving mental illness have provided a much more fertile ground for discussion of the type of penalty to be imposed upon an attorney suffering from some sort of sickness. Generally, in the earlier cases when mental illness was offered as a defense in a disbarment proceeding, insanity was not a bar to disbarring the attorney or a bar to striking his name from the roll of attorneys.\(^\text{20}\) This line of cases recognized that the primary purpose of the proceeding was protection of the public from unscrupulous and dishonest lawyers, and that the injury to the client was the same whether it stemmed from mere irresponsibility brought on by mental illness or from dishonesty emanating from criminal intentions.\(^\text{21}\) The Minnesota Supreme Court espoused the latter principle in *In re Breding* where it said, “As far as the public is concerned irresponsibility brings the same misfortune as willful misconduct.”\(^\text{22}\) Some of the earlier cases flatly rejected insanity as a defense or mitigating factor\(^\text{23}\) while others recognized the attorney’s illness but, disregarded the plea of insanity absent a showing of complete cure or some other assurance that there would be no recurrence of the symptoms.\(^\text{24}\)


\(^{19}\) Indefinite suspension without a provision for reinstatement is arguably the same thing as disbarment. However, an attorney would, at least theoretically, not be visited with the stigma of disbarment in such cases. Moreover, suspension does not carry with it the connotation of permanence as does disbarment.


\(^{21}\) *In re Patlack*, 368 Ill. 547, 15 N.E.2d 309 (1938); *Louisiana State Bar Ass’n v. Theard*, 222 La. 328, 62 So. 2d 501 (1952); *In re Breding*, 188 Minn. 367, 247 N.W. 694 (1933).

\(^{22}\) 188 Minn. 367, 369, 247 N.W. 694, 695 (1933).

\(^{23}\) *Bruns v. State Bar of Cal.*, 18 Cal. 2d 667, 117 P.2d 327 (1941); *In re Streator*, 262 Minn. 538, 115 N.W.2d 729 (1962); *In re Dubinsky*, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938).

\(^{24}\) *In re Manahan*, 186 Minn. 98, 242 N.W. 548 (1932); *In re Durham*, 41 Wash. 2d 609, 251 P.2d 169 (1952).
At least one instance, insanity was not considered in mitigation even when it was shown that the attorney was completely cured. Thus, disbarment was often the discipline imposed in earlier cases irrespective of an insanity plea.

In later cases courts have used a different approach to the problem. The tendency has been to suspend an attorney with a mental illness for a definite period of time and until such time thereafter as he demonstrates to the court his rehabilitation and fitness to practice law, or to suspend an attorney indefinitely. On the one hand, these methods of discipline show the courts' recognition of their responsibility to protect the public, and on the other hand, they allow a mentally incompetent attorney to prove his rehabilitation and fitness to become an active member of his profession once again.

While it is true than an attorney may apply for reinstatement, experience shows that the process usually takes many years after disbarment for a reinstatement petition to gain any substantial support. Such reinstatement also casts a bad light on the profession because the public tends to view it as an act of friendship, pity, or political influence. It is for these reasons that some courts believe that suspension for an indefinite period gives recognition to mitigating circumstances, "but at the same time administers appropriate disciplinary action." A mere suspension for a definite period of time, with automatic reinstatement at the end of this period imposes no responsibility upon the lawyer to take affirmative action

25. 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 694 (1957). Although Gould's proof showed that he had been cured, the court said, "[W]e are not assured, in the circumstances, that there is little or no probability of recurrence of the sort of conduct with which he is charged." Id. at 176, 164 N.Y.S.2d at 49 (emphasis added).


30. H. DRINKER, LEGAL ETHICS 49 (1953).

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during the suspension to gain readmittance at the end of the pe-
period.32

The question of what type of discipline to impose, however, is
still one that is largely factually determined. This statement is best
illustrated by two cases from the Washington Supreme Court. In the
first of these two cases, In re Sherman,33 the court permitted Mr.
Sherman to continue practicing law conditional upon his submit-
ting to voluntary treatment of his mental condition. Mr. Sherman’s
offenses were falsification of his application for admission to the
practice of law in the state of Washington and contemptuous re-
marks made to a court of another state.34 Although the opinion was
rendered in 1965, the proceeding had been pending since 1958, and
Mr. Sherman had not yet sought psychiatric help. The more recent
of the two cases, In re Moody,35 dealt with an attorney whose offen-
ses consisted of neglect of duty to clients and misappropriation of
funds. Mr. Moody was disbarred, even though subsequent to the
commencement of the proceedings and prior to the writing of the
opinion, he sought psychiatric help and ceased to practice law.36 The
dissent in Moody aptly points out that “As the law now stands, the
availability of the defense [of insanity] depends upon the nature
of the lawyer’s offense. . . . The question of whether the attorney
has recognized his disability and is seeking a cure is irrelevant.”37

The United States Supreme Court has not spoken directly to
the issue of insanity as a defense to disciplinary proceedings or as a
mitigating factor with respect to sanctions. In Theard v. United
States,38 however, the court refused to follow its normal practice of
disbarring an attorney from federal practice primarily on the
strength of that attorney’s disbarment from state practice. In so
doing the Court stated:

We do not think “the principles of right and justice” require a
federal court to enforce disbarment of a man eighteen years after
he had a uttered a forgery when concededly he was suffering

32. Id.
33. 66 Wash. 2d 718, 404 P.2d 978 (1965).
34. In re Sherman, 58 Wash. 2d 1, 354 P.2d 888 (1960).
35. 69 Wash. 2d 975, 420 P.2d 374 (1966).
36. Id., 420 P.2d at 376.
37. Id., 420 P.2d at 377-78.
38. 354 U.S. 278 (1967).
under an exceedingly abnormal mental condition, some degree of insanity.\(^{39}\)

This statement appears to be a good indication that the Court would consider insanity as a mitigating factor in disciplinary proceedings.\(^{40}\)

Some guidelines have been established for use in determining what sanction to impose. In *In re Sherman*\(^{41}\) the court established that the relevant criteria should be:

1. Is Mr. Sherman presently able capably and competently to represent his clients; to so conduct himself as to reflect no discredit upon his profession, and to maintain its standards; and
2. If so, is the probability of a recurrence of the condition, existing at the time of his misconduct, so great that he should presently be deprived of his right to practice his profession.\(^{42}\)

The same court in *In re Moody*\(^{43}\) said that the penalty should be “sufficient (1) to prevent reoccurrence, (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.”\(^{44}\)

Other cases indicate that mental irresponsibility is a complete defense in an attorney disciplinary action if the attorney’s conduct was the result or consequence of mental incompetency and if the mental condition responsible for such conduct has been cured so completely that there is little or no likelihood of a recurrence of the condition.\(^{45}\) The burden of proof as to all aspects of the defense is upon the attorney. From the rules mentioned above it is clear that there are not any well established or widely accepted guidelines to follow in determining what sanctions should be imposed on a mentally incompetent attorney.

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39. *Id.* at 282.
40. The Court in *Theard* apparently based its holding more on the fact that the misconduct had taken place eighteen years earlier than upon the fact that Mr. Theard had been mentally incapacitated and had since recovered.
41. 66 Wash. 2d 718, 404 P.2d 978 (1965).
42. *Id.*, 404 P.2d at 982.
43. 69 Wash. 2d 975, 420 P.2d 374 (1966).
44. *Id.*, 420 P.2d at 377.
45. *In re Creamer*, 201 Or. 343, 270 P.2d 159 (1954); *In re Durham*, 41 Wash. 2d 609, 251 P.2d 169 (1952).
Personality disorders, which are difficult to distinguish from mental illness in many instances are subject to a different approach by the courts. In cases where the attorney presents a personality disorder as a defense, the courts have been able to dispose of the matter much more summarily. In State v. Ledvina the attorney mailed letters relating to legal matters when the recipient was already represented by counsel, solicited legal employment, and represented parties whose interests were diametrically opposed. The court in imposing an indefinite suspension on the offending attorney recognized a distinction between a personality disorder and a "psychosis or other serious mental illness where an individual attorney is unable to perceive reality. . . ." A personality disorder is not an illness but a disorder of behavior. It does not render one helpless to control his actions in the sense that he cannot distinguish between right and wrong or "appreciate the impropriety of his conduct." Application of Ronwin involved a prospective attorney applying for admission to the practice of law. Ronwin's application was denied on the ground that his personality disorder rendered him mentally incompetent to engage in the practice of law. The sanction imposed on the active members of the bar in State v. Ledvina and in State v. Heilprin was indefinite suspension until the attorneys could show that they had recovered from their personality disorders. Likewise, Ronwin's application for admission would be granted upon a showing that he was mentally able to engage in the practice of law. Thus, with respect to personality disorders, it is quite clear that there is no difference in treatment between active members of the bar and applicants seeking admission to the bar.

Conclusion

It is clear that these three lines of cases have begun to develop similarly. The physical illness cases and the personality disorder
cases have been rather consistent in holding, although without lengthy discussions of the rationale, that an attorney with a disorder which causes acts requiring disciplinary proceedings should be suspended indefinitely until he is able to show the court that he is able to once again engage in the practice of law. The mental incompetence cases, on the other hand, began with the view that mental illness was not a bar to disbarment. This generated the healthy debate over what sanction should be imposed in cases of disorders or sicknesses which cause acts or problems requiring discipline. It is fairly easy to see that the same arguments apply to all three lines of cases, although arguably with less strength in the personality disorder cases. The modern trend in the mental illness cases is continuing, and the trend in all three types of cases is toward imposition of an indefinite suspension until the offending attorney can show the court that he is no longer suffering under a disorder and is able to engage in the competent practice of law once again.

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